Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02203/2018**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 1 March 2019	**On 27 March 2019**

Before

UPPER TRIBUNAL JUDGE HEMINGWAY

Between

R
(ANONYMITY DIRECTED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Mr J Greer	(Counsel)
For the Respondent:	Mrs R Pettersen	(Senior Home Office Presenting Officer)

DECISION AND REASONS

1. On 2 February 2018 the Secretary of State refused to grant the claimant international protection. The claimant appealed to the First-tier Tribunal (the tribunal) but in a decision which it wrote on 19 March 2018 and sent to the parties on 21 March 2018 and which followed a hearing which it held on 15 March 2018, it dismissed her appeal. She then obtained permission to appeal to the Upper Tribunal and, on 10 January 2019, I set aside the tribunal's decision and directed that the decision would be remade by the Upper Tribunal after a further hearing. That hearing took place on 1 March 2019 and what follows is my explanation as to how I have remade the decision and why I have done so in the terms that I have.

2. The claimant was born on 1 January 1983 and is a national of Iraq. Her husband, a man whom I shall simply refer to as A, was born in Iraq but is a naturalised British Citizen. The couple have two children. The eldest was born on 5 March 2013 and the youngest on 14 February 2015. Both of those children are, it is accepted, British citizens in consequence of the nationality of A.

3. A became a British citizen on 31 July 2008. The claimant and A married each other in Iraq on 28 December 2009. After the marriage, A tended to spend part of his time in Iraq and part of his time in the UK. The children, though, remained in Iraq with the claimant. On a date in 2016 an application for entry clearance was made on behalf of the two children. The applications were not decided and no explanation as to why not has ever been offered. But it seems quite likely that, in fact, the claimant and A had not appreciated at the time the applications were made that the children are British. It seems equally likely that the entry clearance officer who dealt with the applications had realised they are and so took the view, quite correctly it seems to me, that no decision on the entry clearance application was appropriate or required.

4. The claimant, whilst in Iraq, found herself unable to make an entry clearance application which would have a viable prospect of success. That was, so far as I can see, for at least two reasons. Firstly, she does not speak English. Secondly, A has not been in a position to earn sufficient to reach the minimum income threshold for a couple of £18,600. So, compliance with the requirements of the Immigration Rules concerning spouses was not possible. But the claimant left Iraq on 31 August 2017 and travelled through various European countries until entering the UK, in a clandestine manner, on 12 September 2017. I am told she brought the children with her though it seems surprising she would take them on such a potentially difficult and demanding journey when it might have been possible, depending upon the stance taken by airlines with respect to unaccompanied minors, to have them come to the UK legitimately by air. But, nevertheless, I accept that that is what she did. It is recorded that she formally claimed entitlement to international protection in the UK on 10 October 2017. In so doing, she asserted that she was at risk of being the victim of an honour killing at the hands of her family because "a strange male", who had attended her house to drop off some medication for her daughter had been spotted by those family members and they had drawn inaccurate conclusions as to her morality.

5. It is fair to say that both the Secretary of State and, on appeal, the tribunal found the claimant's account of events said to underpin her claim to be entitled to international protection to be untruthful. The tribunal explained why it did not believe her in a passage running from paragraph 33 to paragraph 43 of its written reasons. The tribunal's findings as to that were not subsequently challenged. So, despite setting aside its decision I decided to preserve the findings contained within those paragraphs. I need not set them out but it is fair to say the adverse credibility findings were utterly destructive of her claim to be entitled to international protection.

6. Moving on from the preserved part of the tribunal's decision, it then went on to ask itself whether the claimant might succeed on the basis of Article 8 of the European Convention on Human Rights (ECHR) either within or outside the Immigration Rules. As a part of that assessment it considered whether there would be "very significant obstacles" faced by the claimant or A in pursuing a life together in Iraq. It concluded that there would not be any such obstacles and it explained why it took that view in a passage from paragraph 44 to 47 of its written reasons. The tribunal then turned its attention to other Article 8 considerations and, in particular, those concerning the situation of the two British Citizen children. It concluded that in all the circumstances, and notwithstanding the fact that they are British, it would be reasonable to expect them to leave the UK. That had the consequence of leading the tribunal to conclude that the claimant could not succeed on Article 8 grounds either within or outside the Immigration Rules. The tribunal did not, though, consider the possible relevance of a Home Office policy or internal instruction apparently known as "Immigration Directorate Instructions: Family Migration: Appendix FM, Section 1.0(B) Family Life as a Partner or Parent and Private Life, 10 year Routes". That is a policy or instrument of guidance which, it appears, seeks to ensure that the UK complies with the obligations which it has as a consequence of the decision of the European Court of Justice in the well-known case of *Zambrano* [2011] EUECJ C-34/09. Having heard argument as to that and in the face of what amounted to a concession on behalf of the Secretary of State I concluded that the tribunal had erred in failing to consider the policy, the detail of which had been set before it, on the basis that any possible compliance with the terms of such a policy might have been relevant to the global article 8 assessment outside the Immigration Rules and might have made a difference.

7. At the hearing of 1 March 2019 I had the paperwork which had been before the tribunal supplemented by a short additional witness statement of the claimant and a short additional witness statement from A. I heard oral evidence from each of them and then heard submissions from the representatives to whom I am grateful. I have taken all of that into account.

8. The claimant said that she had told the truth about events in Iraq which had led to her fleeing that country and claiming international protection. She suffers from asthma. She did not have that condition when she was living in Iraq. She thought if she were to leave her family behind and return to Iraq A would not be able to look after the children because "no one can replace a mother's position" and because the children are closer to her than they are to A. A said that he would be unable to look after the children in the way the claimant does.

9. In urging me to remake the decision Mr Greer simply relied upon section 117B(6) of the Nationality, Immigration and Asylum Act 2002 and asserted that the appeal must succeed under article 8 outside the Immigration Rules because the claimant has a genuine and subsisting parental relationship with the children, the children are "qualifying children" because they are British, and it would not be reasonable to expect them to leave the UK. That was a legitimate route for Mr Greer to take because although I had set aside the tribunal's decision on the basis of a different argument relating to article 8, I had not preserved the tribunal's conclusion that it would be reasonable to expect them to leave. Mrs Pettersen relied upon what she said was the dishonest conduct of the claimant and the fact that both the children were in the early stages of education such that a move to a different country would not be overly disruptive.

10. In deciding this appeal I have had followed, as I must, what was said in *KO (Nigeria) v SSHD* [2018] UKSC 53. I have also had regard to what was said and decided by the Upper Tribunal in *JG Turkey* [2019] UKUT 00072 (IAC).

11. It is made clear by the Supreme Court in *KO* that in considering whether it would be reasonable to expect a qualifying child to leave the UK, regard is not to be had to the misconduct of the parents. In my judgment there has, here, been misconduct which, but for *KO*, would have been relevant to the reasonableness question. The claimant has, on preserved findings, manufactured a claim to be entitled to international protection. She has done so because she wishes to circumvent the requirements of the Immigration Rules which she cannot meet. She has then persisted in that dishonesty in her evidence before me. Mr Greer, realistically, did not seek to persuade me that she had been honest when making her claim. He suggested, effectively, that she was an immigration offender but a routine one rather than a particularly or especially or unusually culpable one. I see the point in the sense that she is not the first person to come to the UK and seek to mislead to so as to be granted international protection. But she has done so, I find, as a cynical device in circumstances where others who similarly cannot meet the Rules have waited until they can before making a lawful and appropriate application. I expect that A had full knowledge of her dishonesty too. It would be surprising if she had hidden it from him. So, if it were not for the children, the claimant's article 8 arguments would be hopeless.

12. But *KO* as I say makes it clear that parental conduct is not relevant to a reasonableness assessment. It also makes it clear, if it were not so before, that satisfaction of the reasonableness test is determinative under article 8 outside the Immigration Rules even if that means Parliament has chosen to legislate in a way which makes the position more favourable to some claimants than article 8 itself strictly requires. *JG* makes it clear that the reasonableness test requires decision makers to hypothesise that a child will actually leave the UK even in circumstances where that would probably not happen.

13. Applying the above, if the claimant has to leave the UK she will, of course, go back to Iraq. I must assume, following *JG* that the two children will go with her. But I do not think that A will do so. I say that because he did not live in Iraq, though he clearly spent time there, when the claimant and the children were all in Iraq. It cannot benefit the children to be separated, even allowing for possibly lengthy visits, from their father. Nor, speaking generally, is it likely to benefit them to have to go to a country which has suffered

considerable instability and upheaval in the very recent past. or to leave one which is stable. As to that, it is clear that the claimant and A, who both by now have had experience of living in both countries, prefer the UK. So, I am able to comfortably conclude that it would not be reasonable to expect either child to leave the UK. It follows from the above that the claimant succeeds under article 8 outside the Immigration Rules.

Decision

The decision of the First-tier Tribunal involved the making of an error of law and has been set aside. In remaking the decision in the Upper Tribunal, I allow the claimant's appeal against the Secretary of State's decision of 2 February 2018 on human rights grounds under article 8 of the ECHR outside the Immigration Rules.

Signed: Date: 21 March 2019

Upper Tribunal Judge Hemingway

Anonymity

The First-tier Tribunal granted anonymity to the claimant. The Upper Tribunal continues that grant pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall name the claimant or any member of her family. Failure to comply might lead to contempt of court proceedings.

Signed: Date: 21 March 2019

Upper Tribunal Judge Hemingway

To the Respondent

Fee Award

I make no fee award.

Signed: Date: 21 March 2019

Upper Tribunal Judge Hemingway