Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/08375/2012

THE IMMIGRATION ACTS

Heard at Birmingham
on 16th September 2013

Determination Sent
on 4th October 2013

Before

UPPER TRIBUNAL JUDGE HANSON

Between

NEHARI MUHAMMED OMAR
(Anonymity order not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Saeed of Aman Solicitors Advocates
For the Respondent: Mr Hussain – Home Office Presenting Officer.

DETERMINATION AND REASONS

1. The Appellant, a citizen of Iraq, was born on 1 June 1988. Her immigration history shows that on 16th August 2010 she applied for a settlement visa in order to join her husband Mr Ali Mohammed Husein, a former Iraqi national but now a British citizen, in this country. The application was refused on 8th March 2011 and her appeal against that decision dismissed by First-tier Tribunal Judge

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Shanahan on 24th October 2011. Permission to appeal was granted to the Upper Tribunal and the matter heard by me on 14th March 2012 with appeal number OA/11803/2011. It was found that although Judge Shanahan had made errors they were not material to the decision to dismiss the appeal. Paragraph 73 of my determination is in the following terms:

> 73. I therefore find it has not been shown that Judge Shanahan made a material error of law in relation to her assessment of the appellant's ability to meet the requirements of the Rules or in relation to Article 8 on the basis of the evidence that she was asked to consider. This was a decision made on the basis of the evidence made available to Judge Shanahan at the date of that hearing. I have found that the finding in relation to 320 (3) and (7A) are not sustainable. It is therefore open to the appellant to make a fresh application. If such an application is made she must note the concerns of both the Judge and ECO relating to her ability to satisfy the rules and ensure that adequate evidence is provided from both her and the sponsor. It may then be that her application will succeed.

2. Instead of making a fresh application to secure a settlement visa lawfully the Appellant left Iraq on 10th July 2012 and entered the United Kingdom illegally on 6th August 2012 after which she claimed asylum.

3. Her appeal against the refusal of her asylum claim was heard by First-tier Tribunal Judge Chohan at Birmingham on the 22nd October 2012 who set out his findings from paragraph 6 of the determination which, in relation to the asylum, humanitarian protection, and Article 3 claims, can be summarised as follows:

i. The Appellants claim based upon a fear from her father was not credible. Her account simply does not make sense [6].

ii. It sounds incredible that the Appellant had a week to gather information about her husband and where he lived in the United Kingdom but failed to do so. It must be remembered that the Appellant had made an application for a settlement visa and had two appeals in the United Kingdom and for her to claim not even to know where her husband lived in the United Kingdom was not credible [7].

iii. Taking as a starting point, when applying the Devaseelan principles, the finding the Appellant was not in a genuine relationship with Mr Husein, [8], having heard the oral evidence of Mr Husein and having considered the evidence as a whole, the Judge was not satisfied the parties are in a genuine relationship. The Appellant is not credible and the credibility of her husband is damaged [9].

iv. It was submitted during the hearing that the Appellant was pregnant but there was no medical evidence to establish pregnancy although even if the

Appellant was pregnant there was no evidence to establish that Mr Husein is the father. The Appellant has failed to discharge the burden upon her to prove this fact [10].

v. Having had a settlement application refused and two appeals dismissed the Appellant, together with her family, devised a plan to enter the United Kingdom by other means. The Appellant faces no risk from her father or anyone else in Iraq and there is no reason why as a failed asylum seeker she could not return to Iraq and continue to reside with her family. No evidence was submitted to establish that returned failed asylum seekers are at particular risk. On return to Iraq the Appellant faces no real risk of persecution, serious harm or ill-treatment [11].

4. In relation to the Immigration Rules, Judge Chohan's findings can be summarised as follows:

   i. The Appellant cannot meet the requirements of EX.1.(b) of appendix FM [12].

   ii. In respect her private life paragraph 276ADE is relevant although in light of the fact the appellant is 24 years of age, has lived in the UK for less than 20 years and has ties to Iraq, she is unable to meet the specific requirements of 276ADE (vi) [13].

   iii. The Appellant is not able to meet the requirements of the Immigration Rules [14].

5. Judge Chohan also dismissed the claim under Article 8 ECHR in relation to both her family and private life against which permission to appeal was sought and granted by a Designated Judge of the First-tier Tribunal on 23rd November 2012.

6. On the 11th January 2013 the matter came before Upper Tribunal Judge O'Connor for directions. One such direction indicated he was minded to set the determination aside and so the parties were invited to make further submissions no later than 25th January 2013. There was no response and accordingly Judge O'Connor concluded that the First-tier Tribunal's determination contained an error of law in its consideration of the Immigration Rules and Article 8 grounds and that it was to be set aside. The decisions made in relation to the Refugee Convention, humanitarian protection and Article 3 ECHR have not been the subject of a challenge and those findings are to remain standing.

The law

7. There have been a number of cases both within the Tribunal and the Higher Courts which are relevant to this appeal.

8. The first in time is the decision in in R (on the application of Mahmood) v SSHD (2001) 1 WLR 840 in which Laws LJ said "that firm immigration control requires consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect - as it is - that a person seeking rights of residence here on the grounds of marriage (not being someone who already enjoys leave, albeit limited, to remain in the UK) must obtain an entry clearance in his country, then a waiver of that requirement for someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control because it would be manifestly unfair to other would be entrants who are content to take their place in the entry clearance queue in their own country".

9. The House of Lords in Chikwamba v SSHD [2008] UKHL 40 said that in deciding whether the general policy of requiring people such as the Appellant to return to apply for entry in accordance with the rules of this country was legitimate and proportionate in a particular case, it was necessary to consider what the benefits of the policy were. Whilst acknowledging the deterrent effect of the policy the House of Lords queried the underlying basis of the policy in other respects and made it clear that the policy should not be applied in a rigid, Kafka-esque manner. The House of Lords went on to say that it would be "comparatively rarely, certainly in family cases involving children" that an Article 8 case should be dismissed on the basis that it would be proportionate and more appropriate for the Appellant to apply for leave from abroad.

10. In LE (Turkey) v Secretary of State for the Home Department [2010] CSOH 153 it was held that the combination of a long term breach of immigration control, the recent establishment of a relationship in the full knowledge of such breach and the relative weakness of that relationship, militated strongly against the Claimant's Article 8 claim, distinguishing Chikwamba and MA (Pakistan) v Secretary of State for the Home Department [2009] EWCA Civ 953.

11. In MH (Pakistan), Petition for judicial review of a decision of the Secretary of State for the Home Department [2011] CSOH 143 a Pakistani visitor was arrested in connection with immigration offences after overstaying. He was granted temporary release and in April 2010 married a British citizen who had a daughter who, at that time, was approximately 17 years old. The Secretary of State refused an application as a spouse in December 2010 under Article 8 ECHR. It was held that the propriety of taking account of poor immigration history, the precariousness of the position when a relationship was entered into and the need to maintain immigration control were all confirmed by Lady Hale in ZH (Tanzania). Accordingly, the Secretary of State did not err by visiting on the child the behaviour of the Petitioner in the present case. In all the circumstances of the case, the omission of reference in the decision letter to

considering the best interests of the child first, was not of sufficient materiality to vitiate the decision reached (paras 56 – 58).

12. The Court of Appeal considered this issue further in Secretary of State for the Home Department v Hayat; Secretary of State for the Home Department v Treebhowan (Mauritius) [2012] EWCA Civ 1054 in which the Court outlined the following guidance as to the effect of Chikwamba and the subsequent decision of the Court of Appeal in TG (Central African Republic)[2008] EWCA Civ 997 and SZ (Zimbabwe) [2009] EWCA Civ 590 and MA (Pakistan) [2009] EWCA Civ 953 in which it had been considered:

(i) Where an applicant who did not have lawful entry clearance pursued a claim under Article 8, a dismissal of the claim on the procedural ground that the policy required that the applicant should have made the application from his home state might, but not necessarily would, constitute a disruption of family or private life sufficient to engage Article 8, particularly where children were adversely affected;

(ii) Where Article 8 was engaged, it would be a disproportionate interference with family or private life to enforce such a policy unless there was a sensible reason for doing so;

(iii) Whether it was sensible to enforce that policy would necessarily be fact sensitive, and potentially relevant factors included the prospective length and degree of disruption of family life and whether other members of the family were settled in the UK;

(iv) Where Article 8 was engaged and there was no sensible reason for enforcing the policy, the decision maker should determine the Article 8 claim on its substantive merits, having regard to all material factors, notwithstanding that the applicant had no lawful entry clearance;

(v) Nothing in Chikwamba was intended to alter the way the courts should approach substantive Article 8 issues as laid down in seminal cases as **Razgar and Huang**;

(vi) If the Secretary of State had no sensible reason for requiring the application to be made from the home state, the fact that he had failed to do so should not thereafter carry any weight in the substantive Article 8 balancing exercise (para 30).

Discussion

13. Mr Saeed accepted that the Appellant was unable to succeed under the Immigration Rules unless she is able to satisfy the 'insurmountable obstacles' requirement in paragraph EX. To establish whether this is the case it is necessary to analyze the evidence in some detail.

14. Paragraph EX contains exceptions which, if satisfied may entitle a party to succeed under the Rules even if unable to satisfy the individual criteria of the relevant section applicable to them. Paragraph EX states:

Section EX: Exception

EX.1. This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
(bb) is in the UK;
(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application ;and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

15. EX.1. (b) is the exception relied upon and to which reference shall be made further below.

16. When considering Article 8 issues it is necessary to considered the questions set out by Lord Bingham in paragraph 17 of the judgement in the case of Razgar [2004] UKHL 27 are which are:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well- being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate to the legitimate public end sought to be achieved?

17. During the course of discussions with the advocates it was ascertained that the issue is one of proportionality only in relation to Article 8 ECHR in relation to which no oral evidence was required.

The Appellant's case.

18. The Appellant and her husband both argue that it is not reasonable in all the circumstances for her to be expected to return to Iraq.

19. Her husband's witness statement dated 11th September 2013 alleges he cannot return to Iraq or relocate to Iraq for any period of time as he fears his father-in-law will kill him if he travels to Iraq as well as his wife and his daughter. This claim is repeated in the Appellant's own witness statement together with her claim that she was forced to flee from her father. A claim to be at risk from her father for a similar reason was the basis of her asylum claim which was rejected by Judge Chohan and which is a preserved finding. The claim was found to lack credibility and for there to be no evidence of a real risk on return from this or any other source in Iraq. The fact both the Appellant and her husband seek to rely upon a similar claim to that which has been found to have no merit damages their credibility. Their claim to face a risk on return sufficient to engage the Refugee Convention, Qualification Directive and Articles 2 and 3 has not been substantiated and permission to appeal was not granted on this basis.

20. The Appellant's husband states he is a British citizen employed in the United Kingdom, in part time employment. He claims he will lose his job if he had to travel to Iraq to help his wife make a further application for entry clearance. The evidence given to the Upper Tribunal in OA/11803/2011 stated that Mr Husein is employed as a shop assistant at a pizza shop earning a gross monthly income of £1092.00 per month [determination in OA/11803/2011, para 67]. There is no evidence before me today that he will loose his job if he returns with his wife.

He must be entitled to annual leave without the fear of loosing his job, in law. This element of the claim is unsubstantiated.

21. The Appellant herself speaks of her journey to the United Kingdom, claims her relationship is genuine, and that she does not wish to leave her husband. I accept this is an expression of genuinely held feelings.

22. There is also within the bundle provided a copy of a birth certificate of their daughter born on 30th May 2013 and which names the both the Appellant and her husband as the biological parents. I am satisfied on the basis of the new evidence that family life exists between the Appellant her husband and their newborn child, which was conceded in any event. I have also seen a copy of a letter dated 11th September 2013 claiming the Appellant is again pregnant and due to give birth around 17th April 2014. It is of course only the position of the daughter born recently I have to consider as a foetus is not an individual in a legal sense to whom the ECHR or the statutory provisions apply until born although I accept he or she will be part of her mother's private life, but not of her fathers until shortly before or at birth.

The Respondents case

23. The Secretary of State acknowledges that the Appellant's removal to Iraq may interfere with her protected rights under Article 8 ECHR but contends that this is proportionate having regard to the public interest in maintaining effective immigration control and deterring abuse of the system, especially in light of the deliberate actions taken by the Appellant .

The proportionality assessment

24. Mr Saeed was asked by me why the Appellant had chosen to come to the United Kingdom illegally rather than to re-apply for entry clearance as suggested in the earlier determination of the Upper Tribunal. He was unable to provide any explanation. He was then asked why the parties have chosen to have a family resulting in the initial conception and birth of their daughter and the second pregnancy knowing that the Appellant’s status was not secure as she has no permission to enter or remain in the United Kingdom. He could provide no explanation.

25. It is my primary finding of fact that notwithstanding the Appellant and her husband knowing that the previous application for entry clearance had been refused and dismissed by both the First-tier and Upper Tribunals, and having received a clear indication of the way in which they should have proceeded by making a further lawful application for leave to enter, it was decided that they would attempt to circumvent all immigration controls; as a result of which the

Appellant with the assistance of an agent entered the United Kingdom illegally which must have taken careful planning and considerable cost.

26. I find that having entered the United Kingdom the Appellant applied for asylum on grounds that have been found to be without merit and which resulted in adverse credibility findings being made against her by Judge Chohan. I find this was a deliberate attempt to secure a right to remain in the United Kingdom by the use of misinformation and dishonesty. The fact both the Appellant her husband appear to be attempting to rely yet again on similar unsubstantiated facts, alleging in inability to remain as a result of risk from family members, damages their credibility.

27. I find, in the absence of a plausible explanation to the contrary, that the conception and birth of their daughter and the further conception all with in a relatively short period after entering the United Kingdom, and whilst the Appellant's immigration status is uncertain, is also part of a deliberate attempt to try and secure the Appellant a right to remain in the United Kingdom, this time on the basis of the existence of a child within the family unit.

28. I accept the Appellant is an Iraqi national and that her husband is from Iraq but is now a British national, and that their daughter as a result of her father's status is also a British citizen. I accept that both the father and daughter by virtue of their British citizenship are also citizens of the European Union.

29. This case therefore raises an interesting point in relation to whether in such circumstances and with such deliberate disregard for the laws of the United Kingdom the existence of the child trumps any attempt by the Secretary of State to insist that the Appellant should return to Iraq and make an application to re-enter lawfully.

30. It is argued on behalf of the Appellant that it would be 'Kafkaesque' to require her to return to Iraq to re-apply in accordance with the laws of the United Kingdom in all the circumstances of this matter, based upon the case of Chikwamba. What Mr Saeed failed to address, however, is the text at paragraph 41 and paragraph 42 of that case in which Lord Brown of Eaton-under-Heywood commented on the policy of deterrence stated:

> "Now I would certainly not say that such an objective is in itself necessarily objectionable. Sometimes, I accept, it would be reasonable and proportionate to take that course. Indeed **Ekinci** still seems to me just such a case. The Appellant's immigration history was appalling and he was being required to travel no further than to Germany and to wait for no longer than a month for a decision on his application. Other obviously relevant considerations would be whether, for example, the applicant has arrived in this country illegally (say, concealed in the back of a lorry) for good reason or ill. To advance a genuine asylum claim would, of course, be a good reason. To enrol as a student would not. Also relevant would be for how long the Secretary of State has delayed in

> dealing with the case…In an Article 8 family case the prospective length and degree of family disruption involved in going abroad for an entry clearance certificate will always be highly relevant, and there may be good reason to apply the policy when the ECO abroad is better placed than the immigration authorities here to investigate the claim…"

31. In Ekinci [2003] EWCA Civ 765 the Appellant had entered the United Kingdom illegally and claimed asylum. He had untruthfully asserted that he had not previously sought asylum in another European country when in fact he had been in Germany for some eight years and had twice unsuccessfully claimed asylum there. Shortly after arrangements had been made for his removal back to Germany under the Dublin Convention he married a woman whom he had known in Turkey and who had since come to the UK and acquired British citizenship. He then claimed the right to remain here and later a child was born.

32. It was also a relevant consideration in Chikwamba that return to Zimbabwe was said to be to a harsh and unpalatable place.

> 8. In the case of *Beoku-Betts v Secretary of State for the Home Department* [2008] UKHL 39, the House has decided that the effect on other family members with a right to respect for their family life with the appellant must also be taken into account in an appeal to the AIT on human rights grounds. Even if it would not be disproportionate to expect a husband to endure a few months' separation from his wife, it must be disproportionate to expect a four year old girl, who was born and has lived all her life here, either to be separated from her mother for some months or to travel with her mother to endure the "harsh and unpalatable" conditions in Zimbabwe simply in order to enforce the entry clearance procedures

33. Although there are regular reports of ongoing sectarian violence in Iraq the current country guidance case of HM and others (Article 15(c)) Iraq CG [2012] UKUT 00409(IAC) shows there is no general risk and that failed asylum seekers can be returned with appropriate documents which the Respondent ensures are available before undertaking any returns to Baghdad. Any claim that the situation in the Appellant's home or home area is 'harsh and unpalatable 'has not been substantiated.

34. In relation to the submission the Appellant's husband cannot return to Iraq, I note he came to the United Kingdom and claimed asylum but was not recognised as refugee or granted such status. There is no judicial finding he is at risk on return and the fact he has a British passport does not prevent him returning with his wife per se. Although it is claimed the British Embassy in Iraq can only offer limited assistance there is very little evidence to show that the Appellant's husband, who lived in Iraq until he came to the United Kingdom in 2002, is specifically at risk at the point return or within that country.

35. In relation to the claim it is unreasonable to expect the Appellant to return alone and apply for entry clearance there is no evidence to show the fact she is

pregnant prevents her returning and her claim she is at risk from her family has been found not to be credible. There is no evidence to show that her daughter is unable to travel with her if the child is dependent upon her mother.

36. Notwithstanding the above, the issue of paramount importance in this case is the best interests of the chid. The Appellant's daughter is approximately four and half months old at the date of the hearing. She is an infant child fully dependent upon her parents and there is little evidence in the bundle regarding the day-to-day arrangements for caring for the child such as whether the child is breast or bottle-fed, the roles played by the parties in relation to the child's care and to show the role played by the parents in the child's life in general. Mr Saeed relied upon the decision of the Supreme Court in ZH (Tanzania) in support of his arguments that the child could not be returned to Iraq and that it will be unreasonable to expect her relocate to, and live in, Iraq.

37. In 2012 the Supreme Court published the judgment in the case of HH v Deputy Prosecutor for the Italian Republic, Genoa and others [2012] UKSC 25. Although an extradition case it was referred to by me in the determination of the Upper Tribunal which was upheld by the Court of Appeal in the case reported as SS (Nigeria) [2013] EWCA Civ 550. In HH Lady Hale gave the lead judgment and in relation to ZH (Tanzania) she stated at paragraphs 9 to 15 of the judgment:

> 9. I turn, therefore, to *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4, [2011] 2 AC 166. This was an expulsion case. The mother had been in the United Kingdom since 1995. She formed a relationship with a British citizen and had two children with him, born in 1998 and 2001, both of whom were British citizens and had lived here all their lives. They had a good relationship with their father, although the parents were now separated. Because of his health and other matters, their father would not be able to look after them if their mother were removed to Tanzania, so they would have to go with her. Their mother had an "appalling" immigration history. She had made three unsuccessful applications for asylum, one in her own name and two in false identities. Because of this she had twice been refused leave to remain under different policy concessions. An earlier human rights application had also been refused, as was the current claim, by the Secretary of State, the immigration appellate authorities, and the Court of Appeal. Before the case reached the Supreme Court, however, the Secretary of State had conceded that on the particular facts of the case removing the mother would be a disproportionate interference with the article 8 rights of the children.
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> 10. I gave the leading judgment, and all the other members of the court, including those who added short judgments of their own, agreed with it. The Strasbourg jurisprudence had adopted rather different approaches to the assessment of article 8 rights when considering the expulsion of, on the one hand, long-settled foreigners who had committed criminal offences and, on the other hand, foreigners who had no right to be or remain in the country. In the former type of case, the "best interests and well-being of the children" had been explicitly recognised as a factor by the Grand Chamber in *Üner v The Netherlands* (2006) 45 EHRR 421, at para 58. In the latter type of case, this was not explicitly listed as a factor in, for example, *Rodrigues da Silva, Hoogkamer v The Netherlands* (2006) 44 EHRR 729, at para 39. Nevertheless, the court had in fact taken into account that it was clearly in the best interests of the child that her mother remain in the Netherlands. Significantly, the child's interests prevailed, "despite the fact that the [mother] was residing illegally in the Netherlands at the time of [the child's] birth" (para 44). In

Neulinger v Switzerland (2010) 28 BHRC 706, the Grand Chamber had held that "the Convention cannot be interpreted in a vacuum but must be interpreted in harmony with the general principles of international law" (para 131). These of course included article 3.1 of the United Nations Convention on the Rights of the Child:

"In all actions concerning children, whether undertaken by public or private social welfare institutions, courts of law, administrative authorities or legislative bodies, the best interests of the child shall be a primary consideration."

11. I pointed out that "despite the looseness with which these terms are sometimes used, 'a primary consideration' is not the same as 'the primary consideration', still less as 'the paramount consideration'" (para 25). Where the decision directly affects the child's upbringing, such as the decision to separate a child from her parents, then the child's best interests are the paramount, or determinative, consideration. Where the decision affects the child more indirectly, such as the decision to separate one of the parents from the child, for example by detention or deportation, then the child's interests are a primary, but not the paramount, consideration (para 25). As the Federal Court of Australia had explained in *Wan v Minister for Immigration and Multicultural Affairs* (2001) 107 FCR 133, at para 32:

"[The tribunal] was required to identify what the best interests of Mr Wan's children required with respect to the exercise of its discretion and then to assess whether the strength of any other consideration, or the cumulative weight of other considerations, outweighed the consideration of the best interests of the children understood as a primary consideration."

12. Although nationality was not a "trump card" it was of particular importance in assessing the best interests of any child (para 30). As citizens the children had rights which they would not be able to exercise if they moved to another country (para 32). We now had a much greater understanding of the importance of such issues in assessing the overall well-being of the child:

"In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations".

The countervailing considerations were the need to maintain firm and fair immigrations control, the mother's immigration history and the precariousness of her position when family life was created. But the children were not to be blamed for that (para 33).

13. Lord Hope also stressed the importance of the children's citizenship as "a very significant and weighty factor" in the overall assessment of what was in the children's best interests (para 41) and, more fundamentally, that "it would be wrong in principle to devalue what was in their best interests by something for which they could in no way be held responsible", such as the suspicion that they might have been conceived as a way of strengthening the mother's case for being allowed to remain here (para 44).

14. Lord Kerr put it even more strongly. It is "a universal theme" of both international and domestic instruments:

"that, in reaching decisions that will affect a child, primacy of importance must be accorded to his or her best interests. This is not, it is agreed, a factor of limitless importance in the sense that it will prevail over all other considerations. It is a factor, however, that must rank higher than any other. It is not merely one

> consideration that weighs in the balance alongside other competing factors. Where the best interests of the child clearly favour a certain course, that course should be followed unless countervailing reasons of considerable force displace them" (para 46).
>
> 15. However the matter is put, therefore, *ZH (Tanzania)* made it clear that in considering article 8 in any case in which the rights of a child are involved, the best interests of the child must be a primary consideration. They may be outweighed by countervailing factors, but they are of primary importance. The importance of the child's best interests is not to be devalued by something for which she is in no way responsible, such as the suspicion that she may have been deliberately conceived in order to strengthen the parents' case.

38. Lady Hale clearly reinforces the importance of considering the child's best interests as a primary consideration which cannot be devalued by things for which the Appellant's daughter is in no way responsible such as the deliberate and deceitful actions of her parents. The fact British nationality is not a 'trump card' is also repeated which is applicable to both the child and her father.

39. This child is an infant and incapable of providing a view of what she wants but guidance in the assessment of 'best interests', which is a question of fact in all cases, has been provided in cases such as Azimi-Moayed and others (decisions affecting children; onward appeals)[2013] UKUT 197(IAC) (Blake J). In this case the Tribunal held that:

    (i) The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the appealed decisions:

        (a) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary;

    (ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong;

    (iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period;

    (iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to

a child that the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable;

(v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well-being of society amply justifies removal in such cases.

40. I also note that the Supreme Court in ZH (Tanzania) did not rule that the ability of a young child to readily adapt to life in a new country was an irrelevant factor, but rather that the adaptability of the child in each case must be assessed and is not a conclusive consideration on its own.

41. When one considers the witness statements of the Appellant and her husband it can be seen that there is little, if anything, addressing this specific issue based upon the needs of the child. It is accepted that an infant child needs a close bond with her parents to meet basic requirements of food, warmth, shelter, supervision, education, and to be loved to enable her to develop to maximise his or her potential. In his skeleton argument, at paragraph 17, Mr Saeed refers to the relevant statutory provisions and ZH (Tanzania) and submits that it is in the best interests of the child to remain with both her parents in the United Kingdom and that it is unreasonable to expect the appellant's daughter to relocate and live in Iraq, although the only reason given appears to be an implied reference to the fact she is a British citizen.

42. It may of course be that this is all that the Appellant is able to advance in support of this aspect of the appeal as recognised by the fact a child of this age is focused mainly on her parents rather than peers. The fact such a young child is also adaptable to change is a relevant factor and there is no evidence indicating any specific need for the child to remain in the United Kingdom for her needs to be met. As stated above there was no evidence relating to the role individuals play in the child's life and in SS Nigeria V SSHD [2013] EWCA Civ 550 Mr Justice Mann said "...the circumstances in which the Tribunal will require further inquiries to be made, or evidence to be obtained, (about the children's best interests) are likely to be extremely rare. In the vast majority of cases the Tribunal will expect the relevant interests of the child to be drawn to the attention of the decision-maker by the individual concerned. The decision-maker would then make such additional inquiries as might appear to him or her to be appropriate. The scope for the Tribunal to require, much less indulge in, further inquiries of its own seems to me to be extremely limited, almost to the extent that I find it hard to imagine when, or how, it could do so".

43. Provided the child remains with her parents or at least one of them who is capable of meeting her basic needs as an infant, the evidence suggests that the

child's best interests will be met. I accept it is not in the child's best interest to be separated from both parents but I do not find it proved that such separation needs to occur especially as the reasons it is alleged her father cannot return to Iraq are unsubstantiated.

44. As a result of being British citizens both the child and her father are also European citizens. I have therefore considered the decision in Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 00048 (IAC). In this case the Tribunal held that Case C-34/09 Ruiz Zambrano , BAILII: **[2011] EUECJ C-34/09** "now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so".

45. The difficulty with a finding expressed in such absolute terms is that if it is correct then in practice nearly all domestic case law in this jurisdiction regarding the reasonableness of return by one spouse to join another is now irrelevant where there is a European element. It appears the Tribunal also failed to adequately consider the doctrine of proportionality which is a key principle of European law.

46. In this case were not talking about an infant child to is able to exercise many rights as a European citizen as she is totally dependent upon her parents. Her father is also European citizen and the proposal at this stage is that they can return to Iraq with their mother/wife while she makes an application to re-enter the United Kingdom lawfully. In such a scenario it is not being proposed that the family relocate outside the European Union permanently and any period of absence must be proportionate. I do not find that this doctrine on the facts of this case makes the Secretary of State's proposal unlawful.

47. When considering proportionally generally it is necessary to consider the claim in the grounds that it was unreasonable to expect the family to return, even to make a lawful application, as there are no facilities in Iraq for such an application to be made although this was withdrawn before the Tribunal by Mr Saeed on the basis that entry clearance facilities have been set up in Iraq itself in addition to those in surrounding countries. The Appellant was able to make a previous application for entry clearance and it has not been shown that she is unable to do so in the future or that any delay in the application process will be lengthy such as to make the requirement disproportionate.

48. If the Appellant, her husband, and their daughter return together there will be no loss of family life. If it is decided that she returns alone to make the application leaving her daughter and husband in he United Kingdom or she travels with her daughter and her husband remains in this country, in the

absence of evidence that the process will be unnecessarily lengthy, any disruption will be proportionate.

49. It is also necessary to consider the issue of prospects of success, as submitted by Mr Saeed, when considering reasonableness of return. In Hayat at paragraph 17, Elias LJ states:

> 17. In *Chikwamba* the Article 8 claim was particularly strong. But in my view it is clear from paragraph 44 of his judgment that Lord Brown's objection to the routine enforcement of the policy was not limited to such cases. His observation that a one-stop appeal process should generally be adopted is equally valid where the claim might appear to be weak. It is true that the enforcement of the policy is likely to be particularly futile where entry clearance will ultimately be granted because it is requiring a temporary disruption of family life for no good purpose. To that extent, a preliminary assessment that the substantive merits are strong may be relevant to determining whether the policy should be enforced or not. But often the merits will not be clear until a careful assessment of the facts is made, and the dogmatic adherence to policy may in those cases too be a disproportionate interference with Article 8 rights.

50. Mr Saeed submitted that the Appellant will be unable to succeed if she made a fresh application. The relevant part of Appendix FM relating to entry clearance is the 'partner' section EC-P. It is accepted that the Appellant's husband satisfies the definition of a 'partner '. The Appellant will be outside the United Kingdom and would have made a valid application for entry clearance as a partner meeting the requirements of EC-P.1.1. Provided it is a truthful application there is no evidence that she will fall to be refused under the grounds in section S-EC and it will therefore be necessary for her to prove she meets all the requirements of section E-ECP.

51. The evidence clearly shows the Appellant is able to satisfy the requirements of E-ECP.2.1 to 2.10, described as the 'relationship requirements'.

52. The financial requirements require the Appellant to provide specific evidence from listed sources of a specified gross annual income of at least £18,600 for her and her husband together with an additional £3,800 for their daughter, totalling £22,400. I have not calculated any additional element for the child the Appellant is carrying for the reasons set out above. There is little evidence regarding the husbands financial position save for his claim that he works part time in a pizza takeaway. In OA/11803/2011 the Appellant's husband's evidence was that he received a gross income of just over £13,000 but insufficient evidence has been provided for this appeal to establish his true financial situation. I also note in relation to the financial requirements of the rules that in MM and Others v Secretary of State for the Home Department [2013] EWHC 1900 (Admin) it was held that the SSHD's June 2012 amendments to the Immigration Rules HC 395 (as amended) concerning the maintenance requirements for the admission of spouses to the UK, including raising the minimum income level to be provided by a UK sponsor to £18,600, had a legitimate aim in promoting measures that required spouses to be maintained at a somewhat higher level than the bare subsistence level set under previous interpretations of the Rules. The measures

were, however, so onerous in effect as to be an unjustified and disproportionate interference with the ability of spouses to live together contrary to their rights under Article 8 of the ECHR.

53. Even if the Appellant is unable to satisfy the specific requirements of the Rules due to this issue alone, the decision in MM indicates this will not be a bar to her succeeding in an application which will no doubt be made both under the Rules and Article 8 ECHR.

54. There are unlikely to be any concerns regarding the ability to meet E-ECP.3.4 as the parties are clearly adequately accommodated with the child.

55. Mr Saeed raised the issue of the ability of the Appellant to meet the English language requirement, E-ECP.4.1 as it is unlikely that she is going to be exempt from this requirement. There is no evidence that she currently has an English-language certificate and he submitted there may be delay in obtaining the same but this submission fails to have regard to the decision in R (on the application of Chapti) [2011] EWHC 3370 Admin in which Mr Justice Beatson considered the issue of English language test requirements for spouses. He found that the aims of the Rules - to promote integration and to protect public services - are legitimate aims within Article 8(2). He concluded "taking into account all the material before the court, in particular the exceptions to it (the rule), the new rule is not a disproportionate interference with family life and is justified...the fact that it may, in an individual case, be possible to argue that the operation of the exceptions in the way envisaged in the evidence adduced on behalf of the Home Secretary is a disproportionate infringement of that individual's rights does not render the rule itself disproportionate". At paragraph 115 of his decision he indicated that "absent the circumstances of a particular case it follows that in the generality of cases, and subject to particular circumstances which can only be identified on a case by case basis", interference arising from a delay in entering the UK whilst a certificate is obtained is unlikely to lead to a breach of Article 8. It is not been proved on the evidence that circumstances do exist which will mean any delay in obtaining the certificate will lead to a breach of article 8.

56. The facts as known therefore indicate there may be delay in obtaining a language certificate and there may be issues relating to the availability of funds, but the lack of evidence specifically addressing these issues means the claim the Appellant will be unable to meet the requirements of the Rules has not been substantiated. It has not been proved that there are no prospects of success.

57. I have taken into account for the decision of the House of Lords in EB (Kosovo) (FC) v SSHD [2008] UKHL 41 in which it was said the Tribunal should "recognise that it will rarely be proportionate to uphold an order for removal of a spouse if there is a close and genuine bond with the other spouse and that spouse cannot reasonably be expected to follow the removed spouse to the

country of removal or if the effect of the order is to sever a genuine and subsisting relationship between parent and child". The evidence does not support the claim the Appellant's husband cannot follow/accompany her to Iraq whilst an application is made or that the effect of such action would be to sever a genuine and subsisting relationship.

58. As the claim it will be unreasonable in all the circumstances for the husband returned to Iraq has not been substantiated the exception to the Immigration Rules is not satisfied. The appeal under the Immigration Rules is therefore dismissed.

59. It is necessary when conducting a properly balanced proportionality exercise to consider the position of both parties and the weight to be attached to the legitimate aim of immigration control. The onus lies upon the Respondent to show that the interference or lack of respect is "necessary in a democratic society" for one of the stated interests. As the Court of Appeal said at paragraph 12 of the determination in Chengjie Miao [2006] EWCA Civ 75. "To do this the State must show not only that the proposed step is lawful but that it is sufficiently important to justify limiting a basic right; that it is sensibly directed to that objective; and that it does not impair the right more than is necessary. The last of these criteria commonly requires an appraisal of the relative importance of the State's objective and the impact of the measure on the individual. When you have answered such questions you have struck the balance".

60. In Konstatinov v The Netherlands (Applic. 16351/03), reported in June 2007 and which post dated Huang and Kashmiri v SSHD [2007] UKHL 11, the European Court of Human rights said that the State enjoyed a margin of appreciation under Article 8.

61. In FK and OK Botswana [2013] EWCA Civ 238 Sir Stanley Burnton said that "The maintenance of immigration control is not an aim that is implied for the purposes of article 8.2. Its maintenance is necessary in order to preserve or to foster the economic well-being of the country, in order to protect health and morals, and for the protection of the rights and freedoms of others. If there were no immigration control, enormous numbers of persons would be able to enter this country, and would be entitled to claim social security benefits, the benefits of the National Health Service, to be housed (or to compete for housing with those in this country) and to compete for employment with those already here. Their children would be entitled to be educated at the taxpayers' expense...All such matters (and I do not suggest that they are the only matters) go to the economic well-being of the country. That the individuals concerned in the present case are law-abiding (other than in respect of immigration controls) does not detract from the fact that the maintenance of a generally applicable immigration policy is, albeit indirectly, a legitimate aim for the purposes of article 8".

62. The parties were aware of the precarious nature of the appellant's status when they acted as they did and created this family unit. In Hayat Elias LJ stated:

> 51. In my judgment, these were all proper considerations to weigh in the balance when considering the merits of the Article 8 claim. As the Secretary of State pointed out in her submissions, there is strong Strasbourg and domestic authority to the effect that only in exceptional circumstances will a couple who have formed a union in full knowledge of the precarious immigration status of either of them be entitled to remain pursuant to Article 8 rights: see *Y v Russia* [2010] 51 EHRR 21 paragraph 104.

63. Article 8 does not allow a person to choose the county in which they wish to live.

64. I do not dismiss this appeal on a purely procedural point but as a result of a proper consideration of the Article 8 proportionality issues. Having done so I find the Respondent has discharged the burden of proof upon her to show the decision is proportionate to the legitimate aim relied upon, especially on the facts of this case and the deliberate attempt by the Appellant and her family to circumvent the formal requirements for entry clearance and attempts to prevent her subsequent removal.

Decision

65. **The First-tier Tribunal Judge has been found to have materially erred in law and his determination set aside. I remake the decision as follows. This appeal is dismissed.**

Anonymity.

66. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such an order (pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008) as no such application was made and no basis for making such an order has been established.

Signed……………………………………………….
Upper Tribunal Judge Hanson

Dated the 3rd October 2013