Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21321/2014

THE IMMIGRATION ACTS

Heard at: Manchester	**Decision and Reasons Promulgated**
On: 6th May 2016	**On: 4th July 2016**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KAA
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: **Mr Markus, Counsel instructed by the Greater Manchester Immigration Aid Unit**
For the Respondent: **Ms Johnstone, Senior Home Office Presenting Officer**

DETERMINATION AND REASONS

1. The Appellant is a female national of Iraq born in 1989. She has permission[1] to appeal against the decision of the First-tier Tribunal (Designated Judge McClure)[2] to dismiss her appeal on human rights grounds[3].

[1] Permission was refused by Designated Judge of the First-tier Tribunal MacDonald on the 26th January 2015 but granted upon renewed application by Upper Tribunal Judge Finch on the 8th May 2015.

Background and Matters in Issue

2. The Appellant seeks leave to remain in the United Kingdom on the basis of her relationship with her husband, BA. BA is an Iranian national who has lived in the United Kingdom since 2008. He was recognised as a refugee in March 2010. Shortly after being granted that status he travelled to the Kurdish area of Iraq in order to visit his family. In Sulamaniyyah he was introduced to the Appellant. They became engaged and in 2011 he travelled to Syria where they were married. The Appellant applied for entry clearance as his spouse and on the 23rd November 2011 she was granted a visa under the terms of paragraph 319M of the Immigration Rules. That leave was valid until the 23rd February 2014.

3. On the 27th January 2014 the Appellant applied to vary that leave so as to extend it. The application was refused by way of letter dated 23rd April 2014. The Respondent noted that the Appellant had been given leave to enter under the 'old Rules' that is to say those rules in place prior to the 9th July 2012. The Appellant was therefore required to show that she met the requirements of paragraph 284 of the Rules. This she could not do because neither she or her husband were in employment, and as a refugee with limited leave to remain BA was not "settled".

4. The Appellant appealed to the First-tier Tribunal on human rights grounds.

The Decision of the First-tier Tribunal

5. The determination recognises that the Appellant cannot succeed under the old Immigration Rules for the reasons advanced by the Respondent. The determination then proceeds to consider *Razgar* Article 8.

6. By the time that the appeal was heard in September 2014 the Appellant had given birth to two children, the first born in December 2012 and the second in August 2014. The Tribunal accepted that there was a family life between the Appellant, her husband and child and that the Article is engaged by the decision. In its assessment of proportionality the Tribunal weighs the following factors in the balance:

    - The Appellant could meet neither the old rules nor the new provisions in Appendix FM/276ADE

    - She fails in part because her husband has "chosen" to give up his job in Birmingham. Although he claimed that he was not fit to work as a result

[2] Determination promulgated 28th November 2014

[3] Decision appealed was the decision to refuse to vary the Appellant's leave to remain and to remove her pursuant to s47 of the Immigration and Asylum Act 1999 dated 23rd April 2014

of illness there was no evidence of this and the family are now entirely dependent upon benefits

- The children are young and could "easily adapt to life in Iraq"
- Sulaymaniyyah is under the control of the Kurdish group and the family would therefore have no problem in relocating there
- The Appellant has family members still living in Sulamaniyyah
- The children have no medical issues

7. All of these factors lent weight to the Respondent's side of the scales. In the Appellant's favour was the fact that this is a genuine and happy family unit. The only other factor identified as potentially lending weight to the Appellant's case was the fact that when the original visa was issued the ECO granted the Appellant just over two years of leave to remain instead of the usual 63 months. There was no explanation as to why the grant was made as it was, but the First-tier Tribunal noted that there was no obligation, in law or policy, for the maximum available period of leave to be given. In any event it was an ongoing requirement that the maintenance and accommodation requirements were met, and in this case they were not.

8. The Tribunal considered all of those factors and having done so found the decision to be wholly proportionate. The appeal was dismissed.

The Appeal

9. The Appellant now has permission to appeal on the basis of the following grounds:

    a) The determination fails to adequately address the best interests of the children in this family. Although reference is made to that question, it goes unanswered;

    b) The determination fails to address material evidence adduced by the Appellant regarding the deteriorating security situation in Iraq generally and in Sulamaniyyah in particular;

    c) There is an error of fact in that the Tribunal found the Sponsor to have "chosen" to give up his job. In fact, there was evidence before the Tribunal that the Sponsor was in receipt of Employment Support Allowance (ESA) which is only available to jobseekers who are suffering from incapacity preventing their ability to work.

10. The Respondent opposes the appeal on all grounds. Ms Johnstone submitted that there was little more the Tribunal could say about the best interests of the two children because all it knew was that they were very young and that they lived with their parents. Although evidence had been produced about the ISIS-induced refugee flow into the Sulaymaniyyah area and the poor humanitarian conditions there, the Appellant still has family in the city and it was therefore very unlikely that she and her children would end up in an IDP camp. The evidence was not therefore material. The Appellant was a full time English teacher before she left Iraq and there was no reason why she could not resume that work. The security situation in Sulamaniyyah had not reached the Article 15(c) threshold. In respect of BA's claimed inability to work the Tribunal had been provided with a statement wherein he said that he wanted to return to work as soon as possible. It had not been explained why the Appellant herself had not been working to support the family in the UK. There was no evidence at all that there would be any technical obstacles to BA travelling to the Kurdish area of Iraq: he had done it before and there is an airport at Sulaymaniyyah that he could fly straight into.

Error of Law

11. I deal with grounds a) and b) together. It does not appear to have been contemplated that the Appellant should return to Iraq without her children. At the date of the decision of the First-tier Tribunal the children were aged just 23 and 3 months respectively. It was not in issue that she was their primary carer. Although there was evidence before it to the effect that the family would keep the children here[4] , the Tribunal appears to have progressed on the assumption that they would stay with their mother. In assessing their position upon return to Iraq the determination has regard to the following factors:

    - The children have no health issues;
    - They are at a young age and could easily adapt to life in Iraq
    - The Appellant has family members still in Sulamaniyyah
    - The city is under control of the "Kurdish Group"

12. In taking those matters into account the determination notes: "where an applicant ceases to meet the requirements of the rules but has young children in the UK, provided the children can live in the country of origin, their presence in the UK cannot be a complete answer or bar to the removal of the parent". Mr Markus accepted that this was a sustainable legal direction. His complaint was that this was not the only matter that the Tribunal had to take into account. What was required by s55 of the Borders, Citizenship and Immigration Act 2009 was a holistic assessment of the circumstances of the children both in the UK

[4] See for instance paragraph 21 witness statement of BA dated 29th September 2014

and in the country of proposed return. In respect of the latter he submitted that the analysis of First-tier Tribunal had been incomplete. He pointed to the evidence that had been before the Tribunal regarding the situation in Sulamaniyyah which has not been addressed in the determination. The Appellant herself had given the following unchallenged evidence:

> "My family are living in Sulamaniyah in Northern Iraq and the situation there is extremely insecure. Two weeks ago, a suicide bomb was detonated in the town of Sulamaniyah and ordinary people were killed. Things got so bad recently when NATO started airstrikes, my family were terrified and they made plans to leave…In the end they did not leave the city but they are still very, very frightened of ISIL and the terrorist attacks and the conflict that is happening in areas nearby…
>
> In addition to this, for more than three months there have been economic problems in the Kurdish region. There are lots of people moving into the city from elsewhere, people fleeing violence….My family does not have enough money to support us…My father lost his eyesight in both eyes during the war in Iraq and he is unable to work. My brothers are all married and have moved away and have their own families and they could not support us. I have only one brother living at home, who looks after my father and mother who is also ill".

13. In support of her own evidence the Appellant had produced a bundle of country background material. In June 2014 the UNHCR reported Iraqi government statistics that 434,000 civilians had fled their homes since the conflict with ISIL escalated; UNHCR's own estimate was that there were 480,000 displaced Iraqis. Sulamaniyyah is identified as having one of the highest concentrations of IDPs. By the 18th July 2014 the estimated numbers had increased to 650,000. The humanitarian challenge of providing for those numbers was exacerbated by the presence of some 225,000 Syrians who had fled across the border into Kurdish areas. Where possible IDPs were staying with relatives, but those who could not do so were being accommodated in emergency shelter in schools, tents and government buildings. The bundle contained travel advice issued by the FCO in September 2014 that "the security situation throughout Iraq remains uncertain and could deteriorate quickly". At that time the FCO advised against all but essential travel to Sulaymaniyyah.

14. I accept the Appellant's point, as I think did Ms Johnstone, that none of this evidence is expressly addressed in the determination. The submission made on behalf of the Respondent was that any omission in this regard was not relevant, since the Appellant would not be an IDP forced to live in a school or camp. She would be living with family members. Ms Johnstone pointed out that Sulaymaniyyah is not a "contested area" and that the security situation has not

yet reached the Article 15 (c) threshold. I have taken those submissions into account, but I am satisfied that the omission was material. The Appellant was not claiming that she was entitled to refugee status or humanitarian protection. She did not need to establish that Article 15(c) was engaged. Her case was simply that the security situation had substantially changed since she left Sulaymaniyyah, and indeed since her husband last visited. The rise of IS in Iraq and Syria meant that there had been an influx of tens of thousands of IDPs to the province. This had created not just a very difficult socio-economic environment, but increased instability and violence, including within the city itself. This was why her family had wanted to leave and why, in her words, they were "very, very frightened". She pointed to this evidence to explain why she did not believe it to be reasonable that she returns there at present, with or without two very young children in tow. I accept the Appellant's submission that the security and socio-economic challenges faced by her family in Sulaymaniyyah were plainly pertinent to the "best interests" assessment required by s55, as well as to any rounded assessment of proportionality.

15. Ground c) concerns the ability or otherwise of the Sponsor to work. The grounds suggest that the determination does not contain clear findings on whether BA gave up work through choice or illness. It appears to me to be tolerably clear [see for instance paragraphs 55 and 56] that the Tribunal found him to have made a *choice* to leave his paid employment, and that it found his claims as to illness unproven for lack of evidence. It is clear that this was a matter that weighed heavily against the Appellant in the proportionality balancing exercise. At pages 29 to 32 of the Appellant's bundle are documents issued by JobCentrePlus showing BA to be in receipt of Employment and Support Allowance (ESA) from February 2014. I accept the submission made by Mr Markus that these documents establish that as far as the DWP was concerned, BA was unfit for work. The document itself explains that in order to continue receiving it BA may be required to submit to a medical examination, and the benefit is defined on the government website as "a benefit for people who are unable to work due to illness or disability"[5].

16. The grounds are therefore made out. I find that the decision of the First-tier Tribunal does contains errors of law such that it must be set aside.

The Re-Made Decision

17. The legal framework that I apply in re-making this decision is as follows:

    i) Because the Appellant was given leave to enter under paragraph 281 of the 'old Rules' her application for further leave to remain falls to be decided with reference to paragraph 284;

[5] https://www.gov.uk/**employment-support-allowance**/overview

ii) It is for the Appellant to demonstrate that she meets the requirements of paragraph 284 and she must do so on a balance of probabilities;

iii) Insofar as paragraph 284 requires the Appellant to be "maintained adequately" this is to be gauged with reference to the applicable Income Support rate: KA and Others (Adequacy of Maintenance) Pakistan [2006] UKAIT 00065;

iv) If the Appellant does not discharge the burden of proof in respect of the Rules I must have regard to Article 8 ECHR and do so by applying the *Razgar* framework;

v) In any assessment of proportionality I must have regard to the best interests of the Appellant's children in accordance with s55 of the Borders, Citizenship and Immigration Act 2009;

vi) As this is an in-country appeal I must determine it with reference to the position and evidence at the date of appeal. To that end I gave permission to the Appellant to adduce further evidence at the hearing

The Rules

18. Paragraph 284 of the Immigration Rules reads:

> 284. The requirements for an extension of stay as the spouse or civil partner of a person present and settled in the United Kingdom are that:
>
> (i) the applicant has or was last granted limited leave to enter or remain in the United Kingdom which meets the following requirements:
>
> (a) The leave was given in accordance with any of the provisions of these Rules; and
>
> (b) The leave was granted for a period of 6 months or more, unless it was granted as a fiancé(e) or proposed civil partner; and
>
> (c) The leave was not as the spouse, civil partner, unmarried or same-sex partner of a Relevant Points-Based System Migrant; and
>
> (ii) the applicant is married to or the civil partner of a person present and settled in the United Kingdom; and
>
> (iii) the parties to the marriage or civil partnership have met; and
>
> (iv) the applicant has not remained in breach of the immigration laws, disregarding any period of overstaying for a period of 28 days or less; and

(v) the marriage or civil partnership has not taken place after a decision has been made to deport the applicant or he has been recommended for deportation or been given notice under Section 6(2) of the Immigration Act 1971 or been given directions for his removal under section 10 of the Immigration and Asylum Act 1999; and

(vi) each of the parties intends to live permanently with the other as his or her spouse or civil partner and the marriage or civil partnership is subsisting; and

(vii) there will be adequate accommodation for the parties and any dependants without recourse to public funds in accommodation which they own or occupy exclusively; and

(viii) the parties will be able to maintain themselves and any dependants adequately without recourse to public funds; and

(ix)(a) the applicant provides an original English language test certificate in speaking and listening from an English language test provider approved by the Secretary of State for these purposes, which clearly shows the applicant's name and the qualification obtained (which must meet or exceed level A1 of the Common European Framework of Reference) unless:

> (i) the applicant is aged 65 or over at the time he makes his application; or
> (ii) the applicant has a physical or mental condition that would prevent him from meeting the requirement; or;
> (iii) there are exceptional compassionate circumstances that would prevent the applicant from meeting the requirement; or

(ix)(b) the applicant is a national of one of the following countries: Antigua and Barbuda; Australia; the Bahamas; Barbados; Belize; Canada; Dominica; Grenada; Guyana; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and the Grenadines; Trinidad and Tobago; United States of America; or

(ix)(c) the applicant has obtained an academic qualification (not a professional or vocational qualification), which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, from an educational establishment in one of the following countries: Antigua and Barbuda; Australia; The Bahamas; Barbados; Belize; Dominica; Grenada; Guyana; Ireland; Jamaica; New Zealand; St Kitts and Nevis; St Lucia; St Vincent and The Grenadines; Trinidad and Tobago; the UK; the USA; and provides the specified documents; or

(ix)(d) the applicant has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and
(1) provides the specified evidence to show he has the qualification, and
(2) UK NARIC has confirmed that the qualification was taught or researched in English, or

(ix)(e) has obtained an academic qualification (not a professional or vocational qualification) which is deemed by UK NARIC to meet the recognised standard of a Bachelor's or Master's degree or PhD in the UK, and provides the specified evidence to show:
(1) he has the qualification, and

(2) that the qualification was taught or researched in English.

19. At the date of the application BA was not "settled" since he only had limited leave to remain as a refugee. It is not now in issue that he is settled today, because on the 8th June 2015 he was granted indefinite leave to remain and on the 8th January 2016 naturalised as a British citizen.

20. I find as fact that the Appellant was last given leave in accordance with Part 8 of the Immigration Rules for a period of more than six months. I am satisfied that she is married to BA, that they have met and that they intend to live together as man and wife. There is no issue as to her having overstayed. The marriage did not take place after the making of a deportation order. I am therefore satisfied that at the date of the re-making, the Appellant meets all of the requirements of paragraph 284(i)-(vi).

21. In respect of accommodation the family are living in a rented property in South Manchester. A joint tenancy agreement has been provided. The Secretary of State has not taken any issue with the adequacy of this property. A letter dated 5th March 2016 from Manchester City Council demonstrates that the rent is largely paid for by housing benefit. Since the primary recipient of that benefit is BA, to pay for a property where he can live with his British children, I am satisfied that there is no additional recourse to public funds in the Appellant living there with them. Paragraph 284 (vii) is satisfied.

22. The current position on maintenance is that BA is working as a barber. He is employed by Milano Barber Shop in Stockport. The proprietor Mr Dyari Hamakarem has written to confirm that he earns £7.20 per hour and works 16 hours per week. That amounts to £115.20 gross per week. This income is supplemented by benefits. His Barclays Bank statements show him to be in receipt of approximately £117 per week in Child Tax Credit. His TSB statements show receipt of a further £34.40 per week in child benefit. The total current family income is therefore £266.60 per week. The Appellant's bundle contains a schedule showing that a British family of the same size would receive £263.81 per week if in receipt of income support. I am satisfied on the balance of probabilities that the Appellant meets the KA threshold. The family income exceeds the income support level and her presence results in no additional recourse to public funds. The requirements of paragraph 284(viii) are met.

23. The Secretary of State has not taken any issue with the ability of the Appellant to speak English to the requisite level. For the sake of completeness I am satisfied that she meets the requirements of paragraph 284 (ix), having had regard to the Edexcel certificates in the bundle.

24. I find on the balance of probabilities that the Appellant meets all of the requirements of paragraph 284 and her appeal is allowed with reference to the Immigration Rules.

Article 8

25. The appeal is allowed under the Rules and there is therefore no need to address Article 8. I do so only on the alternative basis that I am wrong in my conclusions on paragraph 284.

26. It is not in issue that this is a genuine and subsisting relationship, or that Article 8 is engaged. I am satisfied that there would be an interference with family life in the case of the Appellant's removal since I accept that there is, to adopt the phrase used by BA in his witness statement, "no way" that the family would risk the safety or health of the children by sending them to Iraq with their mother. That is a perfectly rational conclusion for the Appellant and BA to have reached. The situation in Iraq is very different today than it was in 2010 when he last visited Sulamaniyya and she left.

27. The question is then whether it would be proportionate to remove the Appellant in those circumstances. Ms Johnstone pointed out that the separation would not be forever, and that the Appellant could always make an application to come back to the UK and join her husband here. I have been given no evidence on how long such a separation would likely be. I do not believe I need to have that estimate. However long it is – even if it is only a matter of months – it is likely to have an unjustifiably harsh impact on the Appellant and her (now British) children. They are very young children who are dependent upon their mother for everyday care, love and support. Their father would no doubt do his best but I am satisfied that at such a young age it would be in their best interests to remain with their mother.

28. I am mindful of the fact that BA is a refugee who has found it difficult to work because of various health issues and that at the date of decision this prevented him from being able to provide for his wife to the standard required by the Rules. I bear in mind that the Appellant herself has always complied with the Immigration Rules, and she speaks a good level of English.

29. I find as fact that it would not be reasonable to expect the children to travel to Sulamaniyya with their mother. They are British children and entitled to remain here to enjoy the benefits of their citizenship, including safety and healthcare. It would be wholly contrary to their best interests and, I find, unreasonable to expect them to leave the UK and travel to Iraq, a country where the foreign office warns against all but essential travel. I need not embark on a forensic analysis of whether the situation in Sulamaniyya reaches the level required to engage Article 15(c) to make that finding. Section 117B(6) of the Nationality Immigration and Asylum Act 2002 provides that it will not be in the public interest to remove a person where that person enjoys a genuine and subsisting relationship with a qualifying child and it would not be reasonable for that

child to leave the UK. The test of "reasonable" is not the high test imposed by either Article 15(c) or even proportionality outside of the Rules.

30. If I am wrong in allowing the appeal under the Rules, I allow it on human rights grounds.

Decisions

31. The determination of the First-tier Tribunal contains errors of law and it is set aside.

32. I re-make the decision in the appeal as follows:

"The appeal is allowed under the Immigration Rules.

The appeal is allowed on human rights grounds".

33. Although the Appellant herself does not merit a direction for anonymity this case does turn on the involvement of two British children. For that reason I make the following Order:

> "Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Respondent (original appellant) in this determination identified as KAA. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings."

Upper Tribunal Judge Bruce
1st July 2016