



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/10883/2017

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 18th June 2018

Decision Promulgated
On: 22nd June 2018

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

PMH
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J. Holt, Counsel instructed by ADL Solicitors
For the Respondent: Mr A. McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Iraq born in 1985. She appeals with permission the decision of the First-tier Tribunal (Judge JJ Maxwell) dated 11th December 2017 to dismiss her appeal, which was brought on human rights and protection grounds.
2. The basis of the Appellant's claim for protection was as follows. She is a qualified lawyer who practised in family law in Ranya, in the Independent Kurdish Region (IKR) of Iraq. She lived there with her husband and two children, all of whom are British nationals. In early 2017 she received instructions from a woman who wanted to divorce her husband on the grounds that he was violent and abusive

towards her. The Appellant took the case and launched proceedings on her client's behalf. Soon after she was approached by representatives of the husband, who attempted to bribe her to desist. The husband did not want his wife to divorce him. He is a powerful and influential man who perceived that he would suffer shame and dishonour if the divorce went through. When the Appellant refused she was threatened. The Appellant discovered that her client's husband was a powerful figure in his tribe, and within the ruling PUK. The Appellant and her family understood that this meant that she was in real danger of physical attack or being killed; her father arranged for her to leave Iraq.

3. Her husband and children were in Europe at the time, visiting relatives in Germany and the UK. She travelled alone in the back of a lorry. The entire trip was arranged by an 'agent' who deposited her in the UK. Upon her arrival she was heavily pregnant. She was badly traumatised by the journey, and in a "terrible state". She could not even remember her husband's mobile phone number. She was assisted by an Immigration Officer who managed to telephone her husband after they got his contact details via Facebook.
4. The First-tier Tribunal noted that the Appellant had produced various items of documentary evidence to support her claim, including her degree transcripts from Konya University, and a number of judgments from Ranya Personal Status Court where she is named as the advocate. She gave a detailed explanation of the way that the law works in the IKR which the Tribunal found to be credible. Having considered all of that evidence in the round the Tribunal was satisfied that the Appellant is a lawyer who was working in the court in Ranya. Having made that positive finding, the Tribunal go on to reject the claim for protection for the following reasons:
 - i) The claim is not one which engages the Refugee Convention. If the Appellant faces a risk from her client's husband that is the same as any lawyer facing threats and intimidation by a litigation opponent anywhere in the world. He is not threatening her for any of the five Refugee Convention reasons;
 - ii) The Tribunal did not accept that the Appellant had in fact been threatened as claimed. The reasons given for rejecting this core element of the claim are:
 - a) The Appellant's colleagues at Ranya Court, who had written a letter in her support, had said that she had left the IKR "because she got a social problem". The Tribunal considered this to be inconsistent with the evidence presented, that the Appellant had to leave because of her client's husband;
 - b) Because the Appellant is a lawyer she would have been aware of the difficulties that she would face in trying to

gain entry to the UK as the spouse of a British national. Her husband was working in the IKR and so could not meet the minimum income requirement in Appendix FM;

- c) The fact that her husband and children were in the UK at the time indicates that the trip was pre-planned and beyond mere coincidence;
- d) It was unlikely that the Appellant would not have contacted her husband before she left the IKR to alert him to the fact that she was on her way. It was clear that he was easily contactable by Facebook but she had not attempted to do so prior to her arrival here;
- e) If the Appellant is at risk there is no background material to indicate that she would be unable to seek the effective protection of the IKR authorities.

5. The Tribunal thereby dismissed the appeal on protection grounds.

6. The determination then turns to consider Article 8 ECHR. It proceeds on the basis that the Appellant does not qualify for leave under any of the Immigration Rules. It also appears to proceed on the assumption that the first four *Razgar* questions are answered in the affirmative so that the only matter in issue is proportionality. The Tribunal (repeatedly) directs itself to the test in *Nagre v Secretary of State for the Home Department* [2013] UKUT 45 that the Appellant must demonstrate that the refusal to grant her leave would result in “unjustifiably harsh” consequences. It then turns to consider the position of the Appellant’s children. The Tribunal notes the terms of the Respondent’s (then) policy guidance on when it would be reasonable to expect British children to leave the UK. That published guidance was that decision-makers must give effect to the judgment in *Zambrano* (C34/09):

“Where a decision to refuse the application would require a parent or primary carer to return to a country outside the EU, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer...

...

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- Criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
 - A very poor immigration history such as where the person has repeatedly and deliberately breached the Immigration Rules.
7. The First-tier Tribunal recognises that this guidance creates a presumption that leave should be granted. It finds however that in this case the presumption is rebutted because the Appellant has a “very poor immigration history” because of her rejected asylum claim: it finds that she has made a “concerted and dishonest attempt” to circumvent the Rules. It further finds that the Appellant’s children can be cared for by their father if he wishes to remain in the UK. If he chooses to take them back to the IKR that is a matter for him. The decision to refuse her leave would not have the effect of forcing the children to leave the UK. It would be reasonable to expect the children to live in the IKR where they have their extended family and where their parents were both previously employed. The appeal is therefore dismissed on Article 8 grounds.
8. The Appellant has permission to appeal against the decision on Article 8, on the grounds that the Tribunal failed to give effect to the Respondent’s published policy on whether it would be ‘reasonable’ to expect British children to leave this country. There is no challenge to the protection decision.

Discussion and Findings

9. Before me Mr Holt relied squarely on the Respondent’s published policy, applicable at the date of appeal. He submitted that the First-tier Tribunal erred in its application of that policy guidance to the matter at the heart of the human rights appeal, whether it was reasonable to expect the Appellant’s two British sons to leave the UK.
10. The Appellant’s sons are, by the terms of s117D Nationality Immigration and Asylum Act 2002, “qualifying” children. As such the operative question for the Tribunal was not whether the Appellant’s removal would have “unjustifiably harsh” consequences for *her*, but whether, taking all relevant factors into account, it was *reasonable* to expect these *children* to leave the UK. That is the effect of s117B(6) of the 2002 Act:

Article 8: public interest considerations applicable in all cases:

- (1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English –

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

11. It was the Respondent's stated position that it is *unreasonable* to expect British children to leave the EU with a parent or primary carer: see the passages cited at [6] above from the IDI *Family Migration: Appendix FM* section 1.0b *Family Life (as a Partner or Parent)* and *Private Life: 10 Year Routes* (July 2014). The First-tier

Tribunal recognised that, but found reason to depart from that guidance on the grounds that the Appellant had a “very poor immigration history”, viz her failed asylum claim.

12. Before me Mr McVeety found some difficulty in defending that reasoning. Whilst he maintained that the Tribunal was obliged to consider the countervailing factors, he conceded that having had one asylum appeal dismissed was possibly not the sort of deliberate and conniving behaviour that the Secretary of State had in mind when the policy was formulated following Zambrano. That this is so is illustrated by the recent Presidential decision in MT and ET (child's best interests; ex tempore pilot) Nigeria [2018] UKUT 00088(IAC). MT sought to avoid removal on the basis that it was unreasonable to expect her qualifying child, ET, to leave the UK with her. The First-tier Tribunal had found that it would be reasonable, given MT's poor immigration history, which included long-term overstaying, the pursuit of various means of remaining here and the making of a fraudulent asylum claim. The Upper Tribunal set that decision aside. While it did not downplay or excuse MT's unlawful behaviour, but found that it did not amount to the kind of bad faith that would justify the separation of a mother from her young child. It is apparent from my brief recitation of the facts that MT's immigration history was considerably worse than the Appellant's.
13. The determination goes on from there to implicitly suggest that s117B(6) has no application at all in this case. At paragraph 58 the determination notes that the father and children have an “absolute right” to remain in this country and as such no one is “expecting” the children to go back to the IKR with their mother. At paragraph 59 the determination reads “I find the removal of the appellant would not have the effect of forcing the children to leave the United Kingdom and therefore the appellant cannot rely on the respondent's policy as grounds to remain”. Several points are to be made about that reasoning.
14. First, the Tribunal has erred in law in failing to conduct any assessment of whether it would be in the best interests of these very young children (one only a baby) to be separated from their mother in the manner that it envisages as an appropriate resolution of this claim.
15. Second, the logical consequence of the Tribunal's analysis is that the word ‘expecting’ in s117B(6) gives non-British qualifying children a significant legal advantage over their British counterparts. A child who has accrued her seven years long residence but has no lawful basis to stay any longer is ‘expected’ to leave the UK. Her parents would have the benefit of being able to rely on s117B(6) and the associated case-law to the effect that ‘powerful’ reasons would be required to justify the child's removal (see for instance MA (Pakistan) [2016] EWCA Civ 705, MT and ET, PD & Ors (Article 8 – conjoined family claims) [2016] UKUT 00108 (IAC)). Families in that position are able to rely on the presumption that absent strong countervailing factors, leave will be granted. The British child, by contrast, is not ‘expected’ to go anywhere and on the First-tier Tribunal's analysis, cannot therefore rely on any such presumption. The British child is left

with demonstrating that there would be “unjustifiably harsh” consequences for the parent facing removal. I can see no justification for the difference in treatment between the two classes of qualifying child.

16. Third, and for the sake of completeness, I note that the Appellant finds further support in the updated version of the Respondent’s guidance, the February 2018 version of the aforementioned IDI. The current version of the guidance reads [at page 76]:

“Where the child is a British citizen, it will not be reasonable to expect them to leave the UK with the applicant parent or primary carer facing removal. Accordingly, where this means that the child would have to leave the UK because, in practice, the child will not, or is not likely to, continue to live in the UK with another parent or primary carer, EX.1.(a) is likely to apply.

In particular circumstances, it may be appropriate to refuse to grant leave to a parent or primary carer where their conduct gives rise to public interest considerations of such weight as to justify their removal, where the British citizen child could remain in the UK with another parent or alternative primary carer, who is a British citizen or settled in the UK or who has or is being granted leave to remain.

The circumstances envisaged include those in which to grant leave could undermine our immigration controls, for example the applicant has committed significant or persistent criminal offences falling below the thresholds for deportation set out in paragraph 398 of the Immigration Rules or has a very poor immigration history, having repeatedly and deliberately breached the Immigration Rules.

If the decision maker is minded to refuse an application in circumstances in which the applicant would then be separated from a child in the UK, this decision should normally be discussed with a senior caseworker.

In every case, all the circumstances must be carefully considered in the round, with the best interests of the child constituting a primary (but not the only or paramount) consideration”.

This guidance very sensibly recognises reality: that if the Appellant were to be removed it is very likely that her young children would have to go with her.

17. I therefore set the decision of the First-tier Tribunal aside insofar as it relates to human rights.

18. I remake the decision as follows.

19. The first four *Razgar* questions are uncontentious:

- i) It is accepted that the Appellant enjoys a family life in the UK with her husband and children;
- ii) The consequences of the decision to refuse her are of such consequence as to engage Article 8;
- iii) Any interference arising from this decision would be 'in accordance with the law' in that the Secretary of State has the power invested in him to make such decisions;
- iv) The decision is taken in pursuit of the legitimate Article 8(2) aim of protecting the economy

20. I must therefore determine whether the decision to refuse to grant the Appellant leave to remain is proportionate. In my consideration of whether it is 'reasonable' to expect the Appellant's British children to leave the UK (the operative question at s117B(6)) I must have regard to all relevant factors, including the public interest as it is expressed at ss117B(1)-(5).

21. I recognise that the maintenance of immigration control is in the public interest, and that the Appellant entered this country illegally. I bear in mind that the Appellant cannot speak English to any degree of fluency, or at least I have no indication that she is able to. That persons who seek leave to remain speak English is in the public interest because it better facilitates their integration. I have been provided with no evidence to demonstrate that the Appellant is financially independent, and on that basis I assume that she isn't. It is in the public interest that persons who seek to remain in the UK are financially independent. All of these matters weigh against the Appellant. I note that s117B(4)(b) is of no application since the Appellant and her husband largely formed their relationship outside of this country. It is in any event not applicable to her relationship with the children.

22. In my assessment of whether it is 'reasonable' to expect the British children in this family to go to the IKR with their mother I bear in mind the clear terms of the Respondent's policy. I direct myself that although the Tribunal is not bound by statements of policy made by the Secretary of State, they are a weighty factor to be taken into account when assessing proportionality: SF and others (Guidance, post-2014 Act) Albania [2017] UKUT 00120(IAC). I find that there are no reasons why the Appellant and her children should not be given the benefit of that policy. She has not been convicted of any criminal offences, and I am not satisfied that one failed asylum claim renders her a serious or serial immigration offender such that a family split would be justified. Having considered all of those factors I am satisfied that it would not be reasonable to expect the Appellant's children to leave the UK. Applying the guidance in MA (Pakistan) about the effect of that finding, I allow the appeal.

Coda

23. The decision on protection was not challenged in the grounds of appeal, and so it was not appropriate for this Tribunal to interfere with those findings. I am however bound to say that had those findings been challenged I would have had little hesitation in setting them aside. The Tribunal accepted that this Appellant is a family court lawyer. It found her evidence to be detailed and credible. It then, for little apparent reason, rejected the core of her claim, namely that she was being threatened by her client's husband. The reasons given at paragraph 39 of the determination are not good ones. Properly analysed, they amount to rejecting her claim because it might not be true. Having read the Appellant's evidence myself I could find no sustainable reason to reject it, applying the lower standard of proof. The fact that her colleagues at court described her difficulties as "social problems" is not, to my mind, inconsistent with the account advanced. The fact that the Appellant *might* have climbed in the back of a lorry and made her way across Europe, whilst heavily pregnant, in order to avoid the restrictive entry clearance requirements is not logically a reason to reject the veracity of her claim. Were it so there would be little point in having these appeals, since everyone 'might' be lying. The remaining reason, that the Tribunal found it incredible that the Appellant was not in touch with her husband, is difficult to understand given its earlier acceptance [at 34] that there was absolutely nothing to be gained in her feigning ignorance on this point.
24. I am also bound to record that the Tribunal's finding that this case does not engage the Refugee Convention flies in the face of the jurisprudence as it has developed in the past thirty years. The Appellant is a woman taking legal action on behalf of other women. She acts against husbands in an extremely conservative patriarchal society, where the prevailing social norms have strong roots in Kurdish tribalism. The evidence was that this man perceived the attempted dissolution of his marriage to be an affront to his honour, and to those traditions. The Respondent had no difficulty in accepting that the 'convention reason' in this case was imputed political opinion, and nor do I. The claim had to be assessed in its context: this was not the equivalent of a British lawyer being harassed by a disgruntled litigation opponent. This was a woman seeking to defend other women in a way that was seen by the agent of persecution as being socially - that is to say politically - unacceptable.

Anonymity Order

25. This appeal concerns the human rights of minors. Having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify her or any member of her family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Decisions

26. The decision of the First-tier Tribunal contains an error of law such that the decision must be set aside to the extent identified above.
27. The decision in the appeal is remade as follows: the appeal is allowed on human rights grounds.
28. There is an order for anonymity.

Upper Tribunal Judge Bruce
18th June 2018