Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17912/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre
On 9th August 2019

Decision & Reasons Promulgated
On 11th September 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

FATIMA [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr N Ahmed (Counsel)
For the Respondent: Mr A McVeety (Senior HOPO)

DECISION AND REASONS

1. This is an appeal against a determination of First-tier Tribunal Judge Place, promulgated on 29th March 2019, following a hearing at Nottingham on 22nd March 2019. In the determination, the judge dismissed the appeal of the Appellant,

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whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellant

2. The Appellant is a citizen of Iraq, was born on 1st January 1979, and is a female. She appealed against the decision of the Respondent dated 9th August 2019, refusing to grant her leave to remain in the UK on the basis of her private and family life as a spouse of her husband, Mr [KH], who has British citizenship, and is presently settled in the UK.

The Appellant's Claim

3. The essence of the Appellant's claim was set out by the judge in the determination. Mr [H], the Appellant's husband, is a British citizen. He and the Appellant married in Iraq in 2012. She was initially refused entry clearance as a spouse. Eventually she entered the UK on a spouse's visa in January 2014 in a lawful manner. She and her husband have been trying for a child. They have undergone fertility treatment in the UK. They had one round of treatment on the NHS and are in the midst of private treatment which has cost them around £10,000, "a cost which family members have helped to meet" so that, "just three days before the hearing, the Appellant had had a positive pregnancy test and she is due to have a scan in about two weeks' time" (paragraph 9).

4. The concern that the Appellant and her husband have now is that they will not be able to access fertility treatment in Iraq, in addition to the stress of having to return to that country, which will make it harder for her to have a normal pregnancy thereafter. Mr [H] himself came to the UK about twenty years ago, as an asylum seeker, and he is now settled in the UK. He works as a painter and a decorator. His business depends on word of mouth and recommendations. He could not go and live in Iraq because "there will be pressure on their relationship if they were to return to Iraq due to a stigma associated with childlessness" (paragraph 13). In any event, the Appellant's husband did not have any close family members living in Iraq any longer (paragraph 14). The judge found it to be the case that "their evidence was consistent and I found them truthful witnesses" (paragraph 7).

5. In relation to the judge's findings, the judge made two observations. First, she concluded that "the Appellant could integrate into Iraqi society if she were to return" because she had lived there most of her life, and that moreover "it will be possible for Mr [H] to integrate into society" given that Mr [H] had made various visits over the last twenty years back to Iraq after his arrival in this country (paragraph 8). The judge's conclusion was that "there is no reason why they cannot continue their family life in Iraq" (paragraph 18).

6. The second observation that the judge made, was in relation to the conduct of the proportionality exercise. Here the judge stated that, "I accept that both the Appellant and Mr [H] have built up a private life in the UK through employment, study and community involvement". The judge then went on to say that, nevertheless, "in the

Appellant's case there was never any guarantee that she would be able to remain in the UK and I give her private life little weight". In particular, as far as Mr [H] was concerned, "when he chose to marry the Appellant he knew or should have known that she would only be able to remain in the UK if the requirements of the Immigration Rules were satisfied …".

7. In these circumstances one of the judge's conclusion was that, "I find the legitimate aim of maintaining proper immigration control weighs more strongly in the balance than Mr [H]'s private life". The judge then went on to consider the Section 117B considerations and concluded that the public interest in immigration control was important (paragraph 20).

8. The judge was not unsympathetic to the fact that the Appellant and Mr [H] were undergoing infertility treatment in the UK, but it did not appear to be the case that infertility treatment was not available in Iraq. The judge came to this conclusion, "although I fully acknowledge the emotional difficulties caused by childlessness", but that "it has not been shown that there will be any risk to the Appellant's or Mr [H]'s health in returning to Iraq, even if treatment were very hard to access there".

9. In these circumstances, the judge held that, "I find that the fact that the couple are undergoing fertility treatment in the UK raised very little in their favour in the proportionality exercise that I have to undertake" (paragraph 22).

10. The appeal was dismissed.

Grounds of Application

11. The grounds of application state that the judge did not adequately consider the consequences to the Appellant in respect of a pregnancy if she is removed to Iraq. It was not in dispute at the hearing that the Appellant's pregnancy could require close monitoring, and would be a pregnancy where the IVF team from Care would remain linked and where the Appellant would derive considerable benefit from the uninterrupted presence and care of her husband, who was a prospective father, who would remain in the United Kingdom. Accordingly, the judge even failed to have regard to the fact that State parties have a positive obligation to promote a real family life.

12. Permission to appeal was granted on 16th May 2019 on the basis that this could be one of those "very rare cases" contemplated by the Tribunal in **GS and EO (India)** where reliance on Article 8 of the Human Rights Convention might properly occur. This was endorsed by **Akhalu (health claim: ECHR Article 8) Nigeria [2013] UKUT 400**.

Submissions

13. At the hearing before me on 9th August 2018, Mr Ahmed, appearing as Counsel on behalf of the Appellant, relied on the grounds of application. He has submitted that the finding that there were no "insurmountable obstacles" by the judge, was not

determinative of the entire proportionality exercise that had to be undertaken, given that the matter had to be reconsidered in any event outside the Immigration Rules.

14. Therefore, although the judge could not really come to the conclusion that under the Rules, there were no "insurmountable obstacles", nevertheless, it was important to look at the position of the right to family life outside the Immigration Rules. In this regard, the judge had manifestly failed to do so.

15. This is because when undertaking the proportionality exercise, the judge simply focuses upon the private life of the Appellant and Mr [H] separately from each other. There is no consideration of their right to family life as a couple. This was clear from what the judge states at paragraph 19.

16. Second, the conclusion that the balance of considerations inevitably fell in favour of the Secretary of State's policy of maintaining immigration control did not follow. The judge's assessment in this regard had been unnecessarily one-sided when she observed that

> "Mr [H] does have a substantial private life in the UK but when he chose to marry the Appellant he knew or should have known that she would only be able to remain in the UK if the requirements of the Immigration Rules were satisfied …" (paragraph 19).

17. This is because the family life interest between the parties had been created prior to the Appellant's entry to the UK. Mr [H] had gone to Iraq in 2012 and married the Appellant there. He was a British citizen and he was entitled to do so. The Appellant had then entered the UK in a lawful manner. She would have had every expectation of being able to live with her husband as his wife, as any normal wife would do. She had not, after all, entered the UK illegally.

18. She had not developed her family life with him conscious of the fact that her status was "precarious", in the sense that the relationship had not been created in anything other than a normal and lawful manner following which entry to the UK had followed as Mr [H]'s lawful wife under the Immigration Rules. The judge's failure to consider the family life interest between them led to a particularly harsh conclusion in the observation that, "I find that the fact that the couple are undergoing fertility treatment in the UK weighs very little in their favour …" (paragraph 22).

19. For his part, Mr McVeety submitted that the leading Supreme Court judgment in **Agyarko [2017] UKSC 1**, involved a case where IVF fertility treatment was being undertaken by one of the parties (see paragraphs 30 to 32), but the court had held that this did not mean that there were "insurmountable obstacles" to return back to their home country". It was not the case that the judge's consideration was confined to the "private life" of the parties, because at paragraph 18, the judge is considering the family life of the parties. He had to accept that the Appellant was now seven months pregnant and could not presently fly to Iraq. Nevertheless, at the time of the making of the decision, the findings made by the judge were open to her.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of TCEA 2007) such that I should set aside the decision. My reasons are as follows. First, the judge has failed to take into account the fact that the Appellant entered as the lawful wife of Mr [H], following a marriage in Iraq in 2012, and did so in a lawful manner on a spouse's visa, such that family life had been created between the two of them prior to her entry to this country. The judge failed to consider this in her assessment exercise. Mr McVeety submits that there is consideration of the family life between the two of them at paragraph 18. This is not so. What is said there is that every time Mr [H] returned back to Iraq over the last twenty years "he found family or friends to stay with each time they returned to Iraq" (paragraph 18). There is no consideration there of the family life between this lawfully wedded couple, namely, the Appellant and Mr [H].

21. Secondly, and far more seriously, in terms of the actual proportionality exercise that is undertaken (at paragraph 19), the judge is categorically clear that she is focusing only upon the private life of these two individuals when she begins with the statement that, "I accept that both the Appellant and Mr [H] have built up a private life in the UK through employment, study and community involvement" (paragraph 19).

22. It is because the focus is simply upon the fact that they have each built up a private life, that the judge then continues in the next sentence on the basis that, "however, in the Appellant's case there was never any guarantee that she would be able in the UK and I give her private life little weight" (paragraph 19).

23. In the same way, when consideration is given to Mr [H], it was observed that

> "Mr [H] does have a substantial private life in the UK but when he chose to marry the Appellant he knew or should have known that she would only be able to remain in the UK if the requirements of the Immigration Rules were satisfied …" (paragraph 19).

24. There is quite simply no consideration of the family life between the two of them. Third, this is no less important because this is a case where the family life in question is that of a British citizen who is presently settled in the UK, namely, Mr [H]. In **MM [2013] EWHC 1900**, Mr Justice Blake, observed that,

> "I consider that British nationality is of importance in the present context, because if the spouse cannot obtain admission under the Rules, and the citizen Sponsor wants to enjoy family life and matrimonial cohabitation following marriage he or she will have to leave the country of nationality in order to do so. Even if there are no insurmountable obstacles to a British citizen doing so, this is a serious interference with the right of residence (see Pitchford LJ in **Quila** at [72])" (see **MM** at paragraph 104).

25. Accordingly, the judge's conclusion inevitably fell into error when she observes that, "I find that the legitimate aim of maintaining proper immigration control weighs more strongly in the balance than Mr [H]'s private life" (paragraph 19). This has in turn impacted upon the conclusions in the final paragraph (at paragraph 22), where the judge observes that, "I fully acknowledge the emotional difficulties caused by childlessness", but that, "even if treatment were very hard to access there". This would have a very little weight as far as the proportionality exercise was concerned (paragraph 22) if the proportionality exercise has only been undertaken in the context of each party's individual private life rights, but not with respect to their family life.

Notice of Decision

The decision of the First-tier Tribunal amounts to an error of law. I set aside the decision of the original judge. I remake the decision as follows. This appeal is remitted back to the First-tier Tribunal to be decided by a judge other than Judge Place, pursuant to Practice Statement 7.2(b) of the Practice Directions.

An anonymity order is not made.

Signed	Date
Deputy Upper Tribunal Judge Juss	10th September 2019