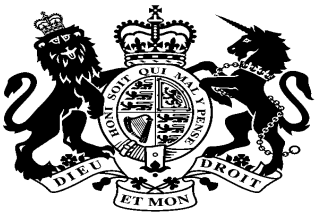

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/11669/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 April 2019 & 24 May 2019	**On 21 June 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

AMEANAH [S]
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Mutuambrudewa (For Immigration Advice Service)
For the Respondent: Mr I Jarvis (Senior Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Ameanah [S], a citizen of Iraq, born [~] 1984, against the decision of the First-tier Tribunal signed on 9 December 2018 dismissing her appeal, itself brought against the refusal of her human rights and asylum claims of 10 September 2018.

2. She arrived in the UK by air from Italy on 30 January 2017 and claimed asylum on arrival, that application being refused on 26 July 2017. She lodged

further submissions which were recognised as a fresh asylum claim and refused on 10 September 2018.

3. Her asylum claim can be summarised thus. She is a Sunni muslim who lived in Karada, Baghdad. In 2007 her husband and brother were killed by explosions. Her mother died similarly in December 2016. She lived opposite a member of the Badr organisation, who had significant security and protection arrangements in place; she felt that he attracted adverse attention which contributed to the local insecurity. She complained to the neighbours about the situation, which led to problems for her. She received a handwritten note on 4 January 2017 telling her to leave the area or be removed. She left Baghdad with her father and two children, and went to the Iraqi Kurdistan region, where they transited Sulaymaniyah before she left the rest of her family in a refugee camp in Dohuk.

4. At the hearing before the First-tier Tribunal, the Appellant explained that her sister had subsequently taken the children from the camp and they now lived with her. She felt unable herself to return to live with her sister given the threats she had received from the Badr group. She had begun her relationship with her husband in the UK, Mr [AS], via Facebook, on 28 March 2016.

5. Mr [AS] gave evidence, explaining that he could not return to Iraq as he had nobody there; he had previously been married, but was now divorced and had two children. He had not planned for her to join him in the UK.

6. The First-tier Tribunal did not believe the Appellant's account of her problems in Iraq because

   (a) She had referred to receiving threats from January 2017, which was after her mother's death in an explosion;

   (b) She was able to give no details regarding the Badr official who was the source of the neighbourhood's problems, had made comments to the neighbours that simply appeared to be general complaints about the risks of violence there, and in any event it was not plausible that the Badr group would target the area with bombs if a well known supporter lived in the area;

   (c) She had variously suggested the handwritten note had been delivered in January and November 2016;

   (d) It was supposition on her part to presume that the Badr were responsible for the note given it was not plausible that other groups could not enter the area, and it was also implausible that she would flee her home area having lived there safely for so long, or that she would abandon her children in an overcrowded refugee camp with her 85-year old father.

7. Overall the First-tier Tribunal concluded that it was likely that the account was an invention, designed to obscure the fact that she had travelled to the

UK with a view to joining her now husband here. The fact that the refusal letter apparently conceded that the Appellant could not be returned to Iraq did not make good an international protection. In reality there was no explanation as to why she lacked identity documents now; her statement that she had held them previously in Iraq but they had subsequently been lost was unexplained, and in reality the Judge believed her sister would be able to recover them for her.

8. The Judge accepted that the Appellant was married to Mr [AS]. It considered he had dissembled when he denied having visited Iraq: his passport showed a stamp for Irbil, in the North of Iraq, and he could not reasonably have understood himself not to have travelled to Iraq. Accordingly false representations had been made in support of the partner claim which rendered the Appellant unsuitable for the route in question.

9. As to whether or not there were insurmountable obstacles to the Sponsor's relocation to Iraq, it was not accepted that he had contact with his own two children in the UK, as no contact order or other objective information had been provided in relation to them. He was of Iraqi heritage, spoke Arabic, and had presumably not lost cultural ties with Iraq. His UK skills would help him to integrate and work on return. The child's best interests were to remain with his parents; whilst ideally he would have access to his British citizenship rights in the UK, the reality of the situation was that his mother was not entitled to reside here.

10. Outside the Immigration Rules, the statutory factors were against the couple: the Appellant did not speak English, had been a burden on public funds (exemplified by her use of the NHS to support her child's birth here), and had circumvented the entry clearance route via a false asylum claim, and thus formed a relationship in the UK in precarious circumstances. She should have applied for entry clearance as a partner from abroad.

11. Grounds of appeal contended the First-tier Tribunal decision was legally flawed because

    (a) The Judge was wrong to hold it against the Appellant that she had not written off the risks posed by daily explosions as a commonplace occurrence in Iraq, and furthermore to count it against her that she acted as a responsible mother in leaving her children in a refugee camp when she felt they were in danger in their home area;

    (b) The Sponsor had made an honest mistake to which his representatives may have contributed as to whether or not he had travelled to a part of Iraq, and the Judge had made a finding without evidential foundation in presuming the Sponsor would return to Iraq with the Appellant given he had expressly ruled out any possibility that he would do so, meaning that her case necessarily fell to be assessed on the basis that she would be a vulnerable female who might face suspicions of adultery on a return to Iraq;

(c) The Judge had failed to apply the appropriate test as to where the Appellant's child's best interests lie.

I have paraphrased those grounds somewhat in order to make sense of them; as drafted, they bore little correlation to a challenge predicated on identifying a material error of law.

12. The Upper Tribunal granted permission to appeal on 14 January 2019, on the basis that it appeared that material evidence regarding the use of night letters had been overlooked.

13. Before me Mr Jarvis for the Secretary of State took a pragmatic stance, explaining that there were clearly difficulties with the reasoning of the First-tier Tribunal. Whilst the approach to credibility was perfectly defensible, there was a real issue as to whether the proper approach had been taken to a British citizen child. Once it was recognised that a British citizen child was involved in the case, then it was essential to at least have regard to the Home Office policy that made it clear that a British citizen child should not be expected to leave the UK, a position that arguably extended beyond the *Zambrano* situation, particularly given the approach now struck by the Upper Tribunal regarding hypothetical removals. Mr Mutuambrudewa acknowledged that it would be difficult to demonstrate any error of law in the credibility findings, and agreed with Mr Jarvis's position as to the treatment of the British citizen child.

Findings and reasons - Error of law hearing

14. At the hearing listed to identify whether there was an error of law, I accepted that there was indeed a material error of law in the First Tier Tribunal's decision on this appeal.

15. As already noted, the grounds of appeal fell far short of what should be expected in measured pleadings aiming to identify a material error of law. The challenges to the fact-finding of the First-tier Tribunal were wholly discursive. I did not consider that any material error of law was established in the approach to the Appellant's credibility. The Judge's findings below were perfectly open to them, given that no material evidence was overlooked and adequate reasons were given. Indeed, given the sparse facts put forward and the overall chronology of the case, the conclusions were wholly unsurprising.

16. However, the First-tier Tribunal did err in its treatment of the British citizen child. To simply state that the child could be expected to move abroad (contrary to the Tribunal's finding as to its best interests) with its parents gave no attention whatsoever to the Home Office policy position on British citizen children nor to the special value of British citizenship as recognised on the highest authority.

17. Firstly, the Appellant's child's nationality is of particular importance because it brings into play considerations going beyond those present, for example,

in the case of a foreign national child who has established seven years of residence in the UK. As was noted by Baroness Hale in *ZH* [2011] UKSC 4 relevant considerations in removing a British citizen child include the potential deprivation of the practical benefits of that citizenship, "and of its protection and support, socially, culturally and medically, and in many other ways evoked by, but not confined to, the broad concept of lifestyle." However, these distinct benefits of British citizenship were simply not considered at all.

18. Secondly, there is the Home Office policy position. Tracing the progression of Home Office Guidance on British citizen children is not an easy task as it changes surprisingly often and historic versions are not readily accessible. The Immigration Directorate Instruction - *Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes"* in the course of 2018 posed the question:

> "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."

19. It will be seen that this represents a statement of public policy that appears wider in ambit than the *Zambrano* principle. Having had regard to a predecessor of this Guidance, in *SF Albania* [2017] UKUT 120 (IAC) the Upper Tribunal stated §13:

> "10. … it appears to us that the terms of the guidance are an important source of the Secretary of State's view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.
>
> 11. If the Secretary of State makes a decision in a person's favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.
>
> 12. On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal

> practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it."

20. However, the policy stance in force at the time that this appeal was heard by the First Tier Tribunal received no attention here.

21. I accordingly found that whilst the credibility findings of the First-tier Tribunal were not shown to be erroneous, there were material errors of law in the treatment of the reasonableness of the British citizen child's relocation abroad.

22. Given that this represented a discrete issue as to which only limited further factual findings were required, the appeal was retained for a continuation hearing in the Upper Tribunal.

Findings and reasons - Continuation hearing

23. At the adjourned hearing, further witness statements were provided. The Sponsor explained that his marriage to his ex-wife, a British citizen, lasted from 1989 until 10 May 2015, when they finalised their divorce. He had five children from that marriage, and continued to care for the younger two, Aidan and Ennis, who were also British citizens; he felt that he could not abandon them. He met the Appellant on Facebook in 2016 and first met her in person on 30 January 2017 after she arrived in the UK. Her ex-husband had been murdered on the street because he was a Sunni. He could not relocate to Iraq, having only been to Erbil. He denied having been dishonest in hiding information regarding the relationship's history to the Secretary of State. His daughter was now breast feeding.

24. The Appellant stated she had been married to her former husband in 2005, and had two daughters, [T] (born 22 January 2007) and [J] (born 10 January 2012). In Iraq she only had her sister, [E], who was looking after the two children from a former marriage. Her only other family member in Iraq was her father aged 85. Her mother and brothers were dead. She had lost her own passport. A lot had changed since her husband had last lived in Iraq. Her daughter was still young and breast-feeding. If she was forced to travel to Iraq she would be a single mother, of Sunni religion, an identity which could not be hidden, and her daughter would be seen to be born out of wedlock, the product of adultery.

25. For the Respondent, Mr Jarvis noted that the policy position of the Secretary of State had changed. The First-tier Tribunal had not accepted that there were insurmountable obstacles to relocation for the UK-based partner; and there was no corroboration of the matters said to point in the opposite direction. Parliament clearly countenanced, given the language of section 117B(6), that a British citizen child's relocation *might* be reasonable in certain circumstances. He observed that when the Supreme Court assessed the individual appeals in *KO and NS* it did not criticise the Judges for taking public policy considerations into account in so far as the parents'

immigration history formed part of the "real world" appraisal. Relevant circumstances were, acknowledging that the child's best interests must be to live in a two-parent family in the UK where both mother and father could participate in her upbringing:

(a) The untruthful asylum claim.

(b) The fact that for the *Chikwamba* principle to bite, the evidence would have to demonstrate an undeniable claim for re-entry by reference to the full criteria of the Rules, whereas here there was no specified evidence provided and not even an assertion of meeting the English language and financial requirements of the Rules.

(c) *Zambrano* as interpreted in *Dereci* and thereafter showed that the *Zambrano* principle was enlivened only where the parent with primary care responsibilities departure was compelled.

(d) The Appellant had her own elder children residing in Iraq whom she could rejoin.

(e) The child was very young and of an age where inevitably it would not have any connections outside the family unit.

(f) Whether looked at via the "insurmountable obstacles" test under the Rules, or the "unjustifiably harsh consequences" proviso within the GEN3.2 exceptionality criteria, the case was not viable: the background evidence did not establish general problems in Iraq, the implication of the First-tier Tribunal's findings being that the Appellant's sister was available to help her with childcare, and the Sponsor himself had visited Irbil.

26. For the Appellant it was submitted that the British citizen child would certainly be required to depart the country if the appeal was dismissed: she was compelled to follow her mother, who was breast-feeding. Powerful reasons were required to demand such a child's departure, and British citizenship was a particular status entitling the child to access free healthcare.

27. I mentioned at the hearing that I was inclined to have regard to the FCO advice on Iraq given that it would provide a general indication as to the possible conditions faced by British Citizens there. Mr Jarvis did not object to this, though noted that a British baby with its Iraqi mother would not present as a typical adult British citizen at whom that Guidance was primarily aimed.

28. As Mr Jarvis noted, the policy guidance for qualifying children has significantly changed and the relevant passages found variously in the guidance to the 10-year and 5-year routes now read:

> **Appendix FM 1.0b: family life (as a partner or parent) and private life: 10-year routes**
>
> "**Reasonable to expect a child to leave the UK?**

This section tells decision makers how to consider whether it is reasonable to expect a child to leave the UK.

The starting point is that we would not normally expect a qualifying child to leave the UK. It is normally in a child's best interest for the whole family to remain together, which means if the child is not expected to leave, then the parent or parents or primary carer of the child will also not be expected to leave the UK. In the caselaw of *KO and Others* 2018 UKSC53, with particular reference to the case of NS (Sri Lanka), the Supreme Court found that "reasonableness" is to be considered in the real-world context in which the child finds themselves. The parents' immigration status is a relevant fact to establish that context. The determination sets out that if a child's parents are both expected to leave the UK, the child is normally expected to leave with them, unless there is evidence that that it would not be reasonable. There may be some specific circumstances where it would be reasonable to either expect the qualifying child to leave the UK with the parent(s) or primary carer or for the parent(s) or primary carer to leave the UK and for the child to stay. In deciding such cases, the decision maker must consider the best interests of the child and the facts relating to the family as a whole. The decision maker should also consider any specific issues raised by the family or by, or on behalf of the child (or other children in the family).

It may be reasonable for a qualifying child to leave the UK with the parent or primary carer where for example:

- the parent or parents, or child, are a citizen of the country and so able to enjoy the full rights of being a citizen in that country
- there is nothing in any country specific information, including as contained in relevant country information which suggests that relocation would be unreasonable
- the parent or parents or child have existing family, social, or cultural ties with the country and if there are wider family or relationships with friends or community overseas that can provide support:
    - the decision maker must consider the extent to which the child is dependent on or requires support from wider family members in the UK in important areas of his or her life and how a transition to similar support overseas would affect them
    - a person who has extended family or a network of friends in the country should be able to rely on them for support to help (re)integrate there
    - parent or parents or a child who have lived in or visited the country before for periods of more than a few weeks should be

better able to adapt, or the parent or parents would be able to support the child in adapting, to life in the country

- the decision maker must consider any evidence of exposure to, and the level of understanding of, the cultural norms of the country
- for example, a period of time spent living amongst a diaspora from the country may give a child an awareness of the culture of the country
- the parents or child can speak, read and write in a language of that country, or are likely to achieve this within a reasonable time period
- fluency is not required – an ability to communicate competently with sympathetic interlocutors would normally suffice

- removal would not give rise to a significant risk to the child's health

- there are no other specific factors raised by or on behalf of the child"

Appendix FM 1.0a: Family Life (as a Partner or Parent): 5-year routes and exceptional circumstances for 10-year routes

"Factors relevant to the consideration of a child's best interests will include:

- whether their parent or parents is (are) expected to remain outside or to leave the UK
- the age of the child at the date of application
- the child's nationality, with particular importance to be accorded to British citizenship where the child has this
- the child's current country of residence and length of residence there
- the family circumstances in which the child is living
- the physical circumstances in which the child is living
- the child's relationships with their parent or parents overseas and in the UK
- how long the child has been in education and what stage their education has reached
- the child's health
- the child's connection with the country outside the UK in which their parents are, or one of their parents is, currently living or where the child is likely to live if their parents leave the UK

- the extent to which the decision will interfere with, or impact on the child's family or private life

- how renewable the child's connection is with the country outside the UK in which their parents are, or one of their parents is, currently living • whether (and, if so, to what extent) the child will have linguistic, medical or other difficulties in adapting to life in that country

- whether there are any factors affecting the child's well-being which can only be alleviated by the presence of the applicant in the UK

- what effective and material contribution the applicant's presence in the UK would make to safeguarding and promoting the child's well-being. Is this significant in nature? For example:

- support during or following a major medical procedure, especially if this is likely to lead to a permanent change in the child's life

- where there is no other family member in the UK able to care for the child and the applicant's presence in the UK will form part of achieving a durable solution for the child that is in their best interests"

29. *Every Child Matters: Change for Children* (Guidance issued in November 2009 under section 55(3) and 55(5) of the 2009 Act) specifies that safeguarding and promoting the welfare of children shall mean:

> "protecting children from maltreatment;
>
> preventing impairment of children's health or development (where health means 'physical or mental health' and development means 'physical, intellectual, emotional, social or behavioural development');
>
> ensuring that children are growing up in circumstances consistent with the provision of safe and effective care; and
>
> undertaking that role so as to enable those children to have optimum life chances and to enter adulthood successfully."

30. As stated by Elias LJ in *MA (Pakistan)* [2016] EWCA Civ 705 §49, Ex.1 "establishes as a starting point that leave should be granted unless there are powerful reasons to the contrary"; albeit that §73: "It may be reasonable to require the child to leave where there are good cogent reasons, even if they are not compelling." Those comments arose in the context of the pre-existing Home Office policy regime, from whence the "powerful reasons" rubric derives, but it nevertheless seems to me to accurately summarise the considerations in play for a British Citizen child, given the considerations deriving from a child's nationality identified in *ZH Tanzania* and the statutory guidance cited above.

31. I propose following the balance sheet approach encouraged by the higher courts in recent times. The factors counting in favour of departure being reasonable are essentially those identified by Mr Jarvis, which I now summarise and comment upon.

    (a) The Appellant entered the UK by subterfuge and pursued an unmeritorious asylum claim: this counts against departure being unreasonable, but only to a limited degree, in so far as it renders her presence precarious, given the principle that the sins of the parents should not be held against a child's best interests, and given the child's entitlement to remain in its country of nationality where its father is also a British citizen, the *KO (Nigeria)* "real world" assessment arises in a very different context to that where both parents are foreign nationals without leave in the UK;

    (b) On a return to Iraq, the Appellant would be able to join, or rejoin, family members, including her sister, meaning some family unit would be available to help support her in caring for the child, and of course the child is at an age where it has no UK ties beyond its parents;

    (c) It is unclear whether a watertight application could be made under the Rules to return: though this is not a consideration *within* the Rules and would only be relevant were the reasonableness test to be resolved against the Appellant; so too Mr Jarvis's reference to the "unjustifiably harsh" test is of course only to the benchmark *outside* the Rules;

    (d) This is not a case where the child is *compelled* to depart the UK in the *Zambrano* sense as it could remain with its father: this is again not strictly relevant to "reasonableness" as the Rules do not pose the same question as in *Zambrano*. I admit to finding it difficult to accept the proposition that the possible separation of a breastfeeding child from it mother would *not* represent circumstances coming very close to compulsion. As stated by the Court of Justice of the European Union in *Chavez-Vilchez* [2017] EUECJ C-133/15, the fact that the other parent is able and willing to assume sole responsibility for a child's primary care is a relevant factor but not a sufficient ground to conclude that the child would not be compelled to follow the parent who present holds that responsibility: the best interests of the child must be assessed having regard to all the specific circumstances, including their age, physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium. So it seems to me that this consideration, though I have addressed it for convenience in the debit column (from the Appellant's perspective), actually points towards departure being unreasonable.

32. Before looking at the other side of the coin, I should mention the FCO's Foreign travel advice for Iraq.

    "**Terrorism**

> Following Daesh's expansion into the country in 2014, there have been numerous and frequent terrorist attacks, and levels of violence remain high. The UN has reported that at least 3,298 civilians were killed by terrorism and violence during 2017.
>
> Attacks are more frequent in areas where Daesh had a strong presence and capability, such as Anbar, Baghdad, Ninewah, Salah-Al-Din, Diyala and Tam'mim (Kirkuk) provinces, but can and do occur throughout the entire country.
>
> **Safety and security**
>
> ...
>
> You should avoid political gatherings and large crowds, and minimise your movement around banks, restaurants and shopping malls. Observe instructions given by the local security authorities. ...
>
> Road travel within Iraq remains highly dangerous and there continue to be fatal roadside bombings and attacks on military and civilian vehicles. False vehicle checkpoints have been used to launch attacks. There is also a risk of carjacking and robbery. ...
>
> Road traffic accidents are frequent and often result in fatalities. ...
>
> **Consular assistance**
>
> Consular support is severely limited in Iraq. The British Embassy in Baghdad and the British Consulate-General in Erbil operate a limited consular service by appointment only. The Embassy and Consulate-General's ability to visit locations across Iraq is limited and travel to unsecure areas to deliver consular services may not be possible.
>
> **Health**
>
> Medical facilities are limited. In the event of serious accident or illness, an evacuation by air ambulance may be required. Make sure you have adequate travel health insurance and accessible funds to cover the cost of any medical treatment abroad and repatriation.
>
> The temperature in summer months can exceed 50 ^{o}C (122^{o}F), which can result in dehydration and serious health problems."

33. Then there are a number of factors suggesting that an expectation that the child depart would be unreasonable:

    (a) The child as a British citizen will be required to lose many of the benefits of that citizenship: as the FCO Guidance shows, consular support is "severely limited" and medical facilities are limited, and the climate is very different from that in which the child has so far been raised;

    (b) Beyond those practical concerns, life in Iraq is clearly dangerous due to the problems with indiscriminate acts of terrorism and the general dangers posed by everyday life there: I recognise of course that the

child would not be perceived as a British citizen if raised amongst an Iraqi family, but on the other hand, for the foreseeable future it would seem that it would be unable to proclaim that citizenship without risking some degree of adverse attention;

(c) The father cannot depart the UK on any prolonged basis without giving up his role in caring for his two youngest children (aged two and five), meaning that carrying through the immigration decision would represent a near permanent separation of the family unit at least for most of the Appellant's child's childhood, not simply a temporary one, meaning it would be raised without a father's regular support notwithstanding there might be other adults around. This would deprive the child of the society of part of its extended family.

34. It seems to me that the balance must be resolved in favour of finding the prospect of the child's departure to be unreasonable. I have discussed the factors above in the context of adumbrating them, and in general it seems to me that the points in favour of considering its relocation abroad to be reasonable are answered by the considerations I have already identified above. The real risks to its prospects of availing itself of the benefits of British citizenship in the context of living in a single-parent family abroad, without easy access to its father's society, and where the security situation is unstable, to my mind outweighs the public interest factors present here.

35. I accordingly allow the appeal.

Decision

There were material errors of law in the decision of the First-tier Tribunal which is set aside.

The appeal is allowed.

Signed Date 17 June 2019

Deputy Upper Tribunal Judge Symes