Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/02349/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 24 January 2020	**On 29 January 2020**

Before

Upper Tribunal Judge Pickup

Between

SA
[Anonymity direction made]

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the appellant: In person, not legally represented
For the respondent: Mr A McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. 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 appellant(s).

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Handler promulgated 1.10.19, dismissing on all grounds her appeal against the decision of the Secretary of State, dated 4.3.19, to refuse her protection claim made on 19.10.17.

2. First-tier Tribunal Judge Scott-Baker granted permission to appeal on 1.10.19.

3. There was no appeal against the judge's rejection of the protection claim on asylum and humanitarian protection grounds.

4. However, the grounds assert that the judge erred in law in:

   (a) Finding that it was reasonable to expect the appellant's British citizen L child to leave the UK;

   (b) Concluding that the appellant's British partner SM could travel to Iraq;

   (c) Finding that the appellant could apply for entry clearance from outside the UK.

5. In granting permission, Judge Scott-Baker considered it arguable that the First-tier Tribunal had erred in law in the assessment of the child's best interests as a British citizen pursuant to s117B(6) of the 2002 Act and the finding at [45] that the child could travel to Iraq.

6. The Upper Tribunal error of law hearing was heard at Manchester by Deputy Upper Tribunal Judge Harris. He found the First-tier Tribunal Judge's assessment of the child's best interests failed to consider whether it was in the long term best interests of the child to go to live in Iraq or to remain in the UK. At [16] of the Upper Tribunal decision, Judge Harris stated, "The effect on a British citizen and the prospective impact on the child of going to live in Iraq is one of the factors that needs to be taken into account. That is clear from the guidance of Lady Hale in *ZH (Tanzania)* at paragraph 41. The factors to be considered are weighty and significant and the judge has failed to properly apply them thus creating a material error of law."

7. Judge Harris preserved all the findings of fact. In the directions issued for the resumed hearing, he stated that the issue for determination by the Upper Tribunal "is whether it is in the public interest to remove the Appellant from the UK having concluded one way or the other whether it is reasonable to expect the child of the family L to leave the UK and for a full and detailed analysis of the issues pursuant to Section 117B(6) of the 2002 Act."

8. Judge Harris has now retired and thus on 16.12.19 the Principle Resident Judge made a transfer order for the appeal to be determined by a differently constituted Tribunal. Thus the matter came before me as a resumed hearing on 24.1.20.

9. There was no legal representation for the appellant, who attended with her husband and two young children. The eldest daughter is now 2 years of age and the youngest, born after the First-tier Tribunal decision, is just 2 months old. A letter received from Knightbridge Solicitors, dated 17.1.20, explained that their instructions had been withdrawn and thus they no longer represented the appellant. The appellant told me that they could

not afford the sum required for representation. Fortunately, the Upper Tribunal had arranged a Kurdish Sorani interpreter for the appellant so that the appeal was able to proceed.

10. The relevant background is that the appellant is an Iraqi Kurd from Sulaymaniyah in the IKR. Her factual claim to be at risk from her family on return to Iraq because she had had sex with her husband without going through a second marriage ceremony and because they regarded her first child as having been conceived out of lawful wedlock was found not credible. The First-tier Tribunal rejected the claim that the appellant had been mistreated by her family in Iraq and specifically found that she had travelled to the UK with the knowledge and support of her family and that she remains in contact with them, so that there was no need for her to relocate within Iraq. The judge found that, if necessary, they can assist her to re-document herself with a CSID from within the UK but found that the volume and page number of the Family Book were in fact shown in the English translation of her marriage certificate, so that she already had sufficient information to be able to obtain a CSID from the Iraqi Embassy in the UK. This findings have been preserved.

11. One of the arguments raised on the appellant's behalf at the First-tier Tribunal was that in the light of L's British citizenship and the Upper Tribunal's decision in JG (s 117B(6): "reasonable to leave" UK) Turkey [2019] UKUT 00072 (IAC), the appellant was "bound" to succeed on article 8 ECHR family life grounds.

12. Whilst Mr McVeety did not agree that the appeal was necessarily "bound" to succeed, he conceded that there were very strong grounds in relation to the appellant's (now) two young British citizen children and he was somewhat surprised that the appeal had not meet remade by allowing it at the same time Deputy Upper Tribunal Judge Harris set it aside. In the circumstances of this case, he did not resist the appeal.

13. Ms Patel's point had been that JG held that, "section 117B(6) of the Nationality, Immigration and Asylum Act 2002 requires a court or tribunal to hypothesise that the child in question would leave the United Kingdom, even if this is not likely to be the case, and ask whether it would be reasonable to expect the child to do so." Even if the children would have remained with their British citizen father in the UK whilst the appellant returned to Iraq to make an application for entry clearance as a spouse, the Tribunal has to proceed on the basis that the children would be leaving with her and thus had to assess whether it was reasonable to expect them to do so.

14. In KO (Nigeria) & Ors v Secretary of State for the Home Department [2018] UKSC 53 the Supreme Court's judgment was given by Lord Carnwath, who stated that "reasonableness" is to be considered in the context of the real world in which the children find themselves, including whether the parents have any right to remain. It would follow that the assessment on the facts of this case must take into account the rejection of the appellant's

protection claim so that she had no right to remain in the UK. Further, in my view, the assessment must be also made in the context of the assessment as to whether there would be insurmountable obstacles to the appellant's family life with SM continuing outside the UK. This is what the judge addressed at [44] of the First-tier Tribunal decision, noting that whilst a British citizen and he had been in the UK since the age of 17, SM's background was Iraqi. He spoke Sorani and had travelled to, lived in and visited Iraq on a number of occasions. Judge Handler saw no reason why SM could not accompany the appellant and L, if he chose to do so.

15. Returning to the best interests of the child L, and now a second child, it is clear from ZH (Tanzania) [2011] UKSC 4 that nationality is not a trump card but it is of particular importance in assessing the best interests of any child. In JG the Upper Tribunal cited ZH and pointed to the importance of the fact that as a British child by descent from a British parent, such a child has an unqualified right of abode in the UK. Given L's young age, and the second child being even younger, there are no existing educational, social or community links that are relevant in this case, and the child's present focus will be entirely within the nuclear family unit. However, it is important to point out that L may be deprived of the opportunity to be raised and educated in the UK, with all the obvious benefits that will entail. "It is not enough to say that a young child may readily adapt to life in another country. That may well be so, particularly if she moves with both her parents to a country which they know well and where they can easily re-integrate in their own community. But it is very different in the case of children who have lived here all their lives and are being expected to move to a county which they do not know and will be separated from a parent whom they also know well." Clearly, given the young age of the two children, only the first part of that statement from ZH applies to them. However, we have the following passage at [30] of ZH:

> "We now have a much greater understanding of the importance of these issues in assessing the overall well-being of the child. In making the proportionality assessment under article 8, the best interests of the child must be a primary consideration. This means that they must be considered first. They can, of course, be outweighed by the cumulative effect of other considerations. In this case, the countervailing considerations were the need to maintain firm and fair immigration control, coupled with the mother's appalling immigration history and the precariousness of her position when family life was created. But, as the Tribunal rightly pointed out, the children were not to be blamed for that. And the inevitable result of removing their primary carer would be that they had to leave with her. On the facts, it is as least as strong a case as Edore v Secretary of State for the Home Department [2003] 1 WLR 2979, where Simon Brown LJ held that "there really is only room for one view" (para 26). In those circumstances, the Secretary of State was clearly right to concede that there could be only one answer."

16. The Upper Tribunal in JG did not accept that the construction of s117B(6) could be affected by the respondent's submission that whether or not that provision had purchase, there would still need to be an article 8 ECHR proportionality assessment so that a parent who could not meet s117B(6)

might nevertheless succeed on article 8 grounds. The Upper Tribunal pointed out that because immigration history would need to be taken into account in such a proportionality assessment, the outcome could be very different from one conducted under s117B(6):

> "But, the real point is that this submission does not begin to affect the plain meaning of subsection (6). If, as we have found, Parliament has decreed a particular outcome by enacting section 117B(6), then that is the end of the matter. We accept that this interpretation may result in an underserving individual or family remaining in the United Kingdom. However, the fact that Parliament has mandated such an outcome merely means that, in such cases, Parliament has decided to be more generous than is strictly required by the Human Rights Act 1998."

17. Applying the 'real world' analysis required by KO, the assessment of reasonableness in relation to L leaving the UK must be on the basis that there are significant reasons why the appellant should be removed from the UK, given the failure of her protection claim, and that there is no reason why SM would not be able to accompany her to Iraq. I also bear in mind that, assuming that the appellant would make an application for entry clearance from Iraq, it is likely that her absence and thus the absence of the children accompanying her would be of short duration, during which time there would be no disruption to education, community or social life as there might be with an older child.

18. However, another factor that is important on the facts of this case is that because of L's very young age, still under two, and the second daughter being only two months of age, the appellant's role as her mother and carer is all the more significant. Whilst it might be possible for SM to care for the child on his own whilst the appellant makes entry clearance application from abroad, it is certainly not in the child's best interests to be deprived of her mother's nurturing care, even for a temporary period of months. It is obviously in the child's best interests to be raised by both parents and even more so where the child has all the greater need for parental care during her early years of life. Further, if the children do leave the UK, these two very young British citizen face life in Iraqi in difficult circumstances far inferior to those available to them in the UK; not only in terms of future educational advantages, but society and community life, and medical or social care and support. British nationality is intrinsic and fundament to the children's rights; affecting the manner of exercise of a child's family and private life, during childhood and well beyond.

19. If they do go to Iraq, these children would also face not insignificant risks to health and life arising from continuing unrest between factions, even if ISIS is no longer a significant player in events, and from the generally poor living conditions ordinary citizens face. It is no exaggeration to suggest that life in Iraq at the present time would inevitably be challenging. In all the circumstances, it is difficult to conceive how it can ever be regarded as reasonable to expect these two young children to leave the UK. As the Upper Tribunal pointed out in JG, the implications and consequences of an appellant meeting s117B(6) in respect of qualifying children are clear, the

public interest does not require her removal and that satisfies the other public interest elements of section 117B of the Nationality, Immigration and Asylum Act 2002, including the general public interest in enforcing immigration control.

20. In all the circumstances, I am satisfied that Mr McVeety was entirely right to present no further resistance to the appeal on article 8 ECHR family life grounds. Even without that concession, I am fully satisfied that on the facts of this case it would be unreasonable to expect the two children to leave the UK and conclude, for the reasons set out above, that the decision is therefore disproportionate to the family life rights of the appellant and her family members. It follows that the appeal must be allowed on human rights grounds under article 8 ECHR.

Decision

21. The appeal is allowed on human rights grounds only.

22. The decision of the First-tier Tribunal dismissing the appeal on asylum and humanitarian protection grounds stands.

Signed

Upper Tribunal Judge Pickup

Dated 24 January 2020