Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/04640/2018**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision and Reasons Promulgated**
On 21 February 2019	**On 19 March 2019**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

F B S
[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Ms Marian Cleghorn, Counsel instructed by Halliday Reeves Law Firm
For the respondent: Ms Rhoda Petterson, a Senior Home Office Presenting Officer

DECISION AND REASONS

Anonymity order
The First-tier Tribunal made an order pursuant to Rule 13 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014. I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008: unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the original appellant, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The appellant appeals with permission against the decision of the First-tier Tribunal refusing her international protection on asylum or humanitarian protection grounds, or leave to remain in the United Kingdom on human rights grounds. The appellant is a citizen of Iraq and is Kurdish.

Background

2. The appellant's husband has British citizenship which was acquired while he was a refugee in the United Kingdom, in fear of Saddam Hussein. In 2013, 7 years after Saddam Hussein's execution, he returned to live in Iraq, where he met and married the appellant who was then still living in Iraq. The parties married in July 2013 and their first child was born on 19 June 2014 in Iraq.

3. The appellant's account that her family were happy for her to marry a British citizen, on condition that he agreed to stay in Iraq after the marriage, but that when, at some time in 2013 (so when they were very newly married) he began working for a British company in order to provide a living for his wife and the coming child, the appellant's family was not happy and asked her to divorce her husband. The appellant refused.

4. After the marriage, and despite his promise to remain in Iraq, the appellant's husband returned to the United Kingdom three times, once for 15 days and twice for 3 months. The first return was in 2014 just after their son's birth, and the second in 2015, just after the child began walking. He needed to renew his British driving licence and taxi permit. The appellant said at her asylum interview that he probably also needed a break from the pressure exerted on him by her family because he was working for a British company. The pressure from the appellant's family on her to separate from her husband increased in his absence, including seclusion and physical violence, but she was not persuaded that she should end her marriage.

5. On 18 November 2016, the family attempted to enter the United Kingdom without obtaining an entry clearance visa for the appellant or her child (which as a British citizen should not have needed a visa). They were refused entry at the coach station at Coquelles, France, when the appellant showed an Iraqi passport with no United Kingdom visa.

6. The appellant then arranged to ente the United Kingdom clandestinely on 12 December 2016. By this time, the appellant was pregnant with the couple's second child, a daughter who was born in the United Kingdom on 4 July 2017. Both children are British citizens. The elder boy is 4 years old and his sister is 19 months old now: at the date of the First-tier Tribunal hearing, the baby girl was not yet a year old and the boy only 3.

7. The appellant claimed asylum on 12 January 2017 and had her screening interview on that date and her full asylum interview on 30 January 2018. She did not disclose the refusal of entry at Coquelles on 18 November 2016. The appellant claimed to fear an honour killing by her family in Sulaymaniyah, should she return to Iraq.

8. It is not suggested that the appellant's children have any physical or mental difficulties. They are very young, healthy, and not yet in education. There is no other evidence about their best interests, save that they are British citizens.

9. The respondent refused the appellant's protection and human rights claims and the appellant appealed to the First-tier Tribunal.

First-tier Tribunal decision

10. The First-tier Judge found the asylum claim to be fabricated. He noted that Sulaymaniyah, where the appellant came from, was in the IKR and that she either had valid documents or could obtain them by contacting her family. He expressly disbelieved her claim to be at risk of an honour killing or serious harm from her family in Iraq. The First-tier Judge found that there was no Article 15(c) risk to the appellant in her home area and that she would have the support of her family there.

11. He accepted that the appellant, her husband and the children had family life together in the United Kingdom but found her private life to be limited as the appellant had been in the United Kingdom for less than 2 years at the date of hearing before the First-tier Tribunal. In any event, applying section 117B(4)(a), as her private life was established while the appellant was in the United Kingdom unlawfully, little weight can be given to it.

12. The Judge found that the decision to refuse the appellant leave to remain would not compel her husband or children to return to Iraq with her but that they were likely to do so if she went. He did not find the appellant to be a witness of truth. He considered, applying section 117B(6) of the Nationality Immigration and Asylum Act 2002 (as amended), that it was not unreasonable to expect such young children to go and live in Iraq.

13. The First-tier Tribunal dismissed the appeal and the appellant appealed to the Upper Tribunal.

Permission to appeal

14. Permission to appeal was granted by Upper Tribunal Judge Martin, limited to considerations of family and private life. Judge Martin found the challenge to the First-tier Tribunal's findings on the protection appeal to be without merit and that challenge was not renewed before me today.

15. The material part of the grant of permission is at [4]:

> "4. However, it is arguable that the Judge has erred in his consideration of Article 8 [ECHR] in particular EX.1 of the Immigration Rules and section 117B(6), given that the appellant is the wife of a British citizen and the mother of British citizen children in the United Kingdom. It is arguable that the Judge has erred in his application of the Home Office policy and paragraph 49 of *MA (Pakistan)* [2016] EWCA Civ 705 as to the reasonableness of British children leaving the UK. "

Rule 24 Reply

16. The respondent filed no Rule 24 Reply.

17. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

18. When granting permission on 13 July 2018, Upper Tribunal Judge Martin did not have the benefit of the guidance of the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 in particular at [18]-[19] in the opinion of Lord Carnwath JSC, with whom Lord Kerr JSC, Lord Wilson JSC and Lord Briggs JSC agreed:

> "18. On the other hand, as the IDI guidance acknowledges, it seems to me inevitably relevant in both contexts to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here, and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain. The point was well-expressed by Lord Boyd in *SA (Bangladesh) v Secretary of State for the Home Department* 2017 SLT 1245, [2017] ScotCS CSOH_117:
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> > "22. In my opinion before one embarks on an assessment of whether it is reasonable to expect the child to leave the UK one has to address the question, 'Why would the child be expected to leave the United Kingdom?' In a case such as this there can only be one answer: 'because the parents have no right to remain in the UK'. To approach the question in any other way strips away the context in which the assessment of reasonableness is being made …"
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> 19. He noted (para 21) that Lewison LJ had made a similar point in considering the "best interests" of children in the context of section 55 of the Borders, Citizenship and Immigration Act 2009 in *EV (Philippines) v Secretary of State for the Home Department* [2014] EWCA Civ 874, para 58:
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> > "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"
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> *To the extent that Elias LJ may have suggested otherwise in MA (Pakistan) para 40, I would respectfully disagree.* There is nothing in the section to suggest that "reasonableness" is to be considered otherwise than in the real world in which the children find themselves."
> [*Emphasis added*]

19. The real world situation for these children, as Ms Cleghorn accepts, is that their mother has entered the United Kingdom unlawfully and has no right to be here. Their father is here lawfully and their mother's removal will not oblige the children to leave with her because they, like their father, are British citizens, but in practice, it is likely that the family will leave together and live in Iraq. The asylum claim not having been accepted, there is no risk in Iraq to the appellant, her husband or her children, from her family as non-State actors.

20. The judgment in *KO (Nigeria)* is fatal to the appellant's challenge to the decision of the First-tier Tribunal, and this appeal cannot succeed.

DECISION

21. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of no error on a point of law

    I do not set aside the decision but order that it shall stand.

Date: 21 February 2019 Signed Judith AJC Gleeson
Upper Tribunal Judge Gleeson