



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/01768/2017

**THE IMMIGRATION ACTS**

Heard at Birmingham  
On 9<sup>th</sup> March 2018

Decision & Reasons Promulgated  
On 21<sup>st</sup> March 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

RA  
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr M Mohzan instructed by Nottingham and Nottinghamshire  
Refugee Forum  
For the Respondent: Mrs H Aboni, Senior Home Office Presenting Officer

**DECISION AND REASONS**

**Introduction and Background**

1. The Appellant is a female citizen of Iraq born [ ] 1960 who arrived in the UK illegally on 8<sup>th</sup> August 2016 and claimed asylum. She claimed to have a well-founded fear of persecution in Iraq on the basis of her imputed political opinion, religion, and membership of a particular social group. She explained that she wished to come to the UK to look after her husband who had settled status in this country.

2. The asylum and human rights claim was refused on 6<sup>th</sup> February 2017 and the Appellant's subsequent appeal heard by the FtT on 20<sup>th</sup> March 2017 and dismissed. The FtT found that the Appellant had admitted in interview that she had no problems in Iraq. The FtT found that the Appellant's claim did not engage the Refugee Convention in any way at all. The Appellant has her daughters living in Iraq with their families to whom she could return. The FtT found that the Appellant would not be at risk if returned to Iraq, and then considered her appeal with reference to Article 8.
3. The FtT found that the Appellant could not succeed by relying upon Appendix FM in relation to her family life. Paragraph 276ADE(1) was considered with reference to her private life, the FtT finding that she could not satisfy any of the requirements contained within that paragraph.
4. The FtT considered Article 8 outside the Immigration Rules. The FtT found that the Appellant had not been able to show that she is validly married because she could not produce her marriage certificate but it was accepted that the Appellant and her husband FR, to whom I shall refer as the Sponsor, are in a genuine and subsisting relationship and that they have four children.
5. The FtT found that the Appellant's removal would be proportionate and would not breach Article 8, and the appeal was dismissed on all grounds.
6. The Appellant applied for permission to appeal to the Upper Tribunal. There was no challenge to the finding by the FtT that the Appellant was not entitled to asylum, and no challenge to the finding that the Appellant would not be at risk if returned to Iraq. It was contended that the FtT had materially erred in law at paragraph 34 by making a finding that the Appellant could not succeed under Appendix FM in relation to her family life with her husband, who it was accepted has indefinite leave to remain in the UK. It was also accepted that the Appellant had come to the UK in order to care for her sick husband.
7. The grounds seeking permission to appeal contend that the FtT erred by not making any examination of the Appellant's family life with her husband pursuant to Appendix FM, and no reasons had been given for concluding that the requirements of Appendix FM could not be satisfied. In particular section EX.1 of Appendix FM had not been considered. It was contended that the FtT had erred in law by failing to consider, in particular EX.1(b) and the FtT should have found that there were insurmountable obstacles to family life continuing outside the UK.
8. Permission to appeal was granted by Judge Lambert of the FtT.

### **Error of Law**

9. On 7<sup>th</sup> August 2017 I heard submissions from both parties in relation to error of law. Full details of the application for permission, the grant of permission, and the submissions made by both parties are contained in my error of law decision dated 8<sup>th</sup> August 2017. I concluded that the FtT decision must be set aside and set out below

paragraphs 15–28 of my decision, giving reasons for setting aside the decision of the FtT;

15. There has been no challenge to the FtT findings in relation to the asylum and humanitarian protection claim, and no challenge to the finding that the Appellant would not be at risk if returned to Iraq.
16. The complaint is that the FtT did not consider EX.1(b) of Appendix FM and did not explain why not.
17. The FtT in paragraph 34 concludes that the Appellant “cannot succeed under Appendix FM on the basis of her family life”. The FtT then goes on to consider private life under paragraph 276ADE, and Article 8 outside the Immigration Rules. There is no explanation in paragraph 34 as to why the Appellant cannot succeed under Appendix FM. In paragraph 33 the FtT finds that the Appellant is cohabiting with her husband, but “cannot show that she is validly married because she cannot produce her marriage certificate”. That finding was not challenged in the grounds seeking permission to appeal.
18. Other than that finding, I do not find any reason or explanation given as to why the Appellant could not succeed with reference to Appendix FM, and why Appendix FM, and in particular EX.1(b) was not considered.
19. In order for EX.1(b) to be considered the Appellant's husband must satisfy the definition of a partner, which is contained within GEN.1.2 which is set out below;

For the purposes of this appendix “partner” means –

- (i) the applicant’s spouse;
  - (ii) the applicant’s civil partner;
  - (iii) the applicant’s fiancé(e) or proposed civil partner; or
  - (iv) a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application.
20. Ms McCarthy suggested that if it was not accepted by the FtT that there was a valid marriage, the FtT should have found that the Appellant and her husband are fiancé(e)s. I do not see any basis for the FtT to make such a conclusion. I can ascertain no evidence placed before the FtT that the Appellant and her husband indicated that there was any intention to marry. Their case was that they were already married but they were unable to produce their marriage certificate.
  21. It is clear that the couple could not be regarded as civil partners or proposed civil partners.
  22. That leaves the question of whether they had been living together in a relationship akin to a marriage for at least two years prior to the date of application. No finding is made on this.
  23. It could be argued that there is no provision that a couple must live together continuously for a period of two years immediately prior to the date of application. In this case it is clear that the Appellant and her

husband were not living together continuously for a two year period immediately prior to the date of application. The evidence was that they had in fact been separated between 2007 and 2016. The Appellant arrived in the UK in August 2016, and they commenced living together in February 2017.

24. However the FtT made a finding that they have adult children and that they are in a genuine and subsisting relationship and that previously they had been in a genuine and subsisting relationship.
25. What is missing is any conclusion as to whether they satisfy the definition in GEN.1.2(iv). They could have been living together in a relationship akin to marriage prior to 2007.
26. I therefore conclude that the FtT erred in law, and did so materially, in failing to explain why the Appellant could not succeed under EX.1(b) of Appendix FM, and why it was not considered. I therefore must set aside the decision of the FtT. Some findings can be preserved as they have not been the subject of any challenge. Those findings are that the Appellant and her husband are in a genuine and subsisting relationship. There is DNA evidence that they have a son who was born in 1987, and he has an older and two younger sisters. The Appellant and her husband are currently cohabiting. The Appellant is looking after her husband who has suffered from cancer and depression. The Appellant and her husband have family life which engages Article 8.
27. It is not appropriate to remit this appeal back to the FtT. I find that it is not appropriate to decide this appeal without a further hearing. This is because findings need to be made as to whether the Appellant's husband satisfies the definition of a "partner" in GEN.1.2. If he does then it would appear that EX.1(b) of Appendix FM should be considered as part of an overall Article 8 assessment.
28. There will therefore be a further hearing before the Upper Tribunal. The purpose of the hearing will be to consider Article 8 of the 1950 European Convention on Human Rights, which may include consideration of EX.1(b) of Appendix FM."

10. The hearing was adjourned for further evidence to be given.

## **Re-making the Decision**

### **Preliminary Issue**

11. At the commencement of the hearing I made the representatives aware of the documentation held on the Tribunal file. The Tribunal had the Respondent's bundle that had been before the FtT which has Annexes A-C and a skeleton argument from Mr Mohzan. There was reference to the Tribunal having received a consolidated bundle on behalf of the Appellant comprising 350 pages, but unfortunately this bundle was not on the Tribunal file. Mrs Aboni confirmed that the Respondent had received that bundle.

12. It was agreed that the hearing could proceed as Mr Mohzan confirmed that the Tribunal could take his bundle at the conclusion of the hearing.
13. Mrs Aboni indicated that it was conceded that the definition of a “partner” is satisfied in this case in that the Respondent accepted that GEN.1.2(iv) was satisfied as the Appellant and Sponsor had been living together in a relationship akin to a marriage for at least two years prior to the date of application. The date of application was the date of the asylum claim, that being 8<sup>th</sup> August 2016.
14. The representatives indicated that they were ready to proceed and there was no application for an adjournment.

### **The Oral Evidence**

15. The Appellant gave oral evidence with the assistance of an interpreter in Kurdish Sorani. There was no difficulty in communication. The Appellant adopted as her evidence her witness statements dated 6<sup>th</sup> March 2017 and 19<sup>th</sup> September 2017.
16. The Sponsor then gave evidence with the assistance of the interpreter in Kurdish Sorani. There were no difficulties in communication. The Sponsor adopted as his evidence his witness statements dated 6<sup>th</sup> March 2017 and 19<sup>th</sup> September 2017.
17. The Appellant and Sponsor were cross-examined. I recorded all questions and answers in my Record of Proceedings and it is not necessary to reiterate them in full here. If relevant I will refer to the oral evidence when I set out my conclusions and reasons.

### **The Oral Submissions**

18. I heard oral submissions from both representatives which are set out in full in my Record of Proceedings and briefly summarised below.
19. On behalf of the Respondent reliance was placed upon the reasons for refusal decision dated 6<sup>th</sup> February 2017. It was accepted that EX.1(b) should be considered, but it was not accepted that there existed any insurmountable obstacles to family life between the Sponsor and Appellant continuing outside the UK. It was submitted that it had not been demonstrated that any medical or care needs of the Sponsor could not be met in Iraq.
20. I was asked to consider the public interest, in that the Appellant entered the UK illegally and made an asylum claim, her sole motive being to gain entry to the UK and join her husband. She had fabricated her asylum claim.
21. I was referred to section 117B of the Nationality, Immigration and Asylum Act 2002 and asked to note that the Appellant does not speak English, and is not financially independent. The evidence indicated that the Appellant and Sponsor had family in Iraq, and I was asked to find that there were no exceptional circumstances to outweigh the public interest in maintaining effective immigration control, and therefore the appeal should be dismissed.

22. On behalf of the Appellant Mr Mohzan relied upon his skeleton argument. I was asked to find that insurmountable obstacles existed to family life continuing outside the UK. The Sponsor has been in the UK since 2002 and has medical needs. He has previously suffered from cancer. The Appellant provides him with intimate care on a daily basis. The Sponsor would not be able to access the medical treatment that he requires in Iraq.
23. I was asked to find that there would be no public interest in the Appellant returning to Iraq to make an entry clearance application through the correct channels. It is accepted that the Appellant and Sponsor have a genuine and subsisting relationship. With reference to finance, if an entry clearance application needed to be made, the Sponsor would not have to show he had a specified gross annual income of at least £18,600 because he receives personal independence payments, and therefore all that need be shown is adequate maintenance. It was however accepted that the Appellant has not passed the required English language test. Notwithstanding this, Mr Mohzan submitted that there would be no public interest in the Appellant's removal and therefore the appeal should be allowed with reference to Article 8.
24. At the conclusion of oral submissions I reserved my decision.

### **My Conclusions and Reasons**

25. The only issue before the Upper Tribunal related to Article 8 on the basis of family life. There was no challenge to the FtT findings that the Appellant was not entitled to asylum or humanitarian protection, and her removal from the UK would not breach Articles 2 or 3 of the 1950 European Convention on Human Rights. As those findings were not challenged they are preserved.
26. There was also no challenge to the findings of the FtT that the Appellant could not succeed by relying upon paragraph 276ADE(1)(vi) as she had not proved that there would be very significant obstacles to her integration into Iraq. The FtT finding on this point is also preserved.
27. As it was conceded at the outset of the hearing, that the definition of a “partner” was satisfied, it was also conceded that section EX of Appendix FM should be considered and I set out below EX.1 and EX.2;
  - ‘EX.1. This paragraph applies if
    - (a) (i) the applicant has a genuine and subsisting parental relationship with a child who –
      - (aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;
      - (bb) is in the UK;

- (cc) is a British citizen or has lived in the UK continuously for at least the seven years immediately preceding the date of application; and
- (ii) it would not be reasonable to expect the child to leave the UK; or
- (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

EX.2. For the purposes of paragraph EX.1.(b) “insurmountable obstacles” means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.’

28. It is common ground that the Appellant and Sponsor have a genuine and subsisting relationship. They have an adult son who is an asylum seeker in the UK. They have three daughters who live in Sulaymaniyah in the Iraqi Kurdish Region (the IKR). Two of the daughters are married with their own families, and the youngest daughter was born on 5<sup>th</sup> February 2000.
29. The Appellant and Sponsor originate from Sulaymaniyah and moved with their family to Baghdad in 1989. The Sponsor left Baghdad and travelled to the UK arriving in July 2002. He claimed asylum, but was not granted asylum, but was granted exceptional leave to remain, and was granted indefinite leave to remain on 2<sup>nd</sup> March 2007.
30. In 2007 the Appellant and her children applied for entry clearance to join the Sponsor in the UK but the application was refused. Thereafter the Sponsor did not remain in contact with his family until in February 2016 his son arrived in the UK from Iraq. After that the Appellant made contact with the Sponsor again and made arrangements to enter the UK. The couple started living together in February 2017 and still cohabit.
31. It is contended that the Sponsor could not return to Iraq, and therefore the couple could not continue family life together outside the UK. The reason given for the Sponsor being unable to return to Iraq is his medical condition.
32. The most recent medical evidence on the Sponsor's condition is contained in letters from his general practitioners dated 20<sup>th</sup> April 2017 and 17<sup>th</sup> July 2017. The medical history shows that he has suffered from depression, and he had an operation for cancer of the bladder. He suffers with back pain and osteoarthritis of his knee. In late 2016 he was referred to a memory clinic, but the clinic felt that referral was not appropriate and he was referred to the mental health team. There was no record that he was seen, and it appears that he did not attend the initial appointment and so was

discharged. He takes medication for incontinence following the cancer operation on his bladder.

33. The Sponsor has also been seen by the spinal team for his back pain which causes numbness in his thigh and examination showed decreased sensation but good power. He received a spinal injection and there are plans to follow up. He receives painkillers for his osteoarthritis. His current medication is Fenbid 5% Gel, Fultium D3, Zapain 30/500, Tolterodine, as well as catheters and sheaths to aid continence.
34. I do not find that the medical evidence demonstrates that the Sponsor needs a carer. It does not demonstrate that he needs 24 hour care. While I accept that the Sponsor wishes the Appellant to act as his carer, the evidence does not indicate that there is a medical requirement for him to have a carer. Although there has in the past been a referral to the mental health team, the Sponsor did not keep the appointment and is not currently having any counselling or treatment in relation to depression.
35. There is a considerable amount of background evidence about medical treatment in Iraq contained within the Appellant's bundle. That evidence does not indicate the medication currently received by the Sponsor and listed above, would not be available in Iraq. The Appellant and Sponsor originate from Sulaymaniyah within the IKR, and therefore it would be open for them to return direct to the IKR. Alternatively they could return to Baghdad, where they resided together between 1989 and 2002. The Appellant has only been absent from Iraq since August 2016, and while I accept that because the Sponsor has been absent since 2002, there would be an upheaval for him, I do not find that the evidence demonstrates that there would be insurmountable obstacles to the couple living together in the country of which they are citizens.
36. I therefore conclude that there are no insurmountable obstacles to family life continuing outside the UK, and therefore the requirements of EX.1(b) are not satisfied.
37. I move on to consider Article 8 outside the Immigration Rules in relation to family and private life. I have taken into account the guidance in Agyarko [2017] UKSC 11 at paragraph 48, in which it is confirmed that if the test of insurmountable obstacles is not met, but refusal of the application would result in unjustifiably harsh consequences, such that refusal would not be proportionate, then leave will be granted outside the Immigration Rules on the basis that there are exceptional circumstances.
38. I do not find that it has been demonstrated that unjustifiably harsh consequences would follow from refusal of the Appellant's application under Article 8. The couple could return to Iraq and continue their family life, or alternatively the Appellant could return to Iraq and make an application for entry clearance through the proper channels. The Sponsor could remain in the UK and support the entry clearance application. I do not accept that it is essential for the Sponsor's wellbeing that the Appellant remain in the UK to look after him. As previously stated, there is no



medical evidence to indicate that the Sponsor requires a carer. The Sponsor had no contact with the Appellant from 2007 until 2016 and was able in that period to manage without her assistance. I do not accept that his health has deteriorated to such an extent that he requires a carer either full or part-time.

39. I also take into account the guidance in paragraph 51 of Agyarko which indicates that if an individual, even if residing in the UK unlawfully, was otherwise certain to be granted leave to enter if an application was made from outside the UK, then there might be no public interest in their removal, as was illustrated by the decision in Chikwamba v Secretary of State for the Home Department.
40. I do not find that the Chikwamba principle assists the Appellant in this case. I do not find that it can be said that she would be certain to be granted leave to enter the UK if she made an application from Iraq. She has not at present taken an English language test so would not be granted entry clearance on that basis. The financial circumstances of the Sponsor would need to be examined. It might well be that the Sponsor would be granted entry clearance, but in my view it cannot be said that she is certain to be granted entry clearance, and for that reason I do not find that the Chikwamba principle assists.
41. I have regard to the considerations of section 117B of the Nationality, Immigration and Asylum Act 2002. Subsection (1) confirms that the maintenance of effective immigration control is in the public interest. Subsection (2) confirms that it is in the public interest that a person seeking leave to remain can speak English to the required standard. The Appellant has not demonstrated that she can speak or understand English to the required standard. Subsection (3) confirms that it is in the public interest that a person seeking leave to remain is financially independent. The Appellant is not financially independent. She is dependent upon the Sponsor.
42. Subsections (4) and (5) confirm that little reliance should be placed upon a private life established by a person when in the UK with a precarious immigration status or unlawfully. This applies to the Appellant as she entered the UK illegally and she has remained here without leave. I therefore must attach little weight to the private life that she has established.
43. Therefore, with reference to Article 8, the Appellant cannot satisfy paragraph 276ADE(1) with reference to her private life, cannot satisfy Appendix FM in relation to her family life, and has not demonstrated that removal from the UK would result in unjustifiably harsh consequences so as to amount to exceptional circumstances. The Appellant entered the UK illegally in a deliberate attempt to circumvent the Immigration Rules, knowing that a previous application made for entry clearance in 2007 had been refused.
44. I have, when conducting the balancing exercise, taken into account the wishes of the Appellant and Sponsor that the Appellant be allowed to remain in the UK, and I have taken fully into account the Sponsor's medical condition. However, for the reasons given above, I must conclude that the weight that should be given to the

need to maintain effective immigration control, which is in the public interest, outweighs the weight to be given to the wishes of the Appellant and Sponsor to continue family life in the UK, and I conclude that the Respondent's decision is proportionate and does not breach Article 8 of the 1950 Convention.

### **Notice of Decision**

The decision of the First-tier Tribunal involved the making of an error of law and was set aside. I substitute a fresh decision as follows.

I dismiss the Appellant's appeal on asylum grounds.

I dismiss the Appellant's appeal on humanitarian protection grounds.

I dismiss the Appellant's appeal on human rights grounds.

### **Anonymity**

The First-tier Tribunal made an anonymity direction. This is continued pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. Failure to comply with this direction could lead to a contempt of court.

Signed

Date

14<sup>th</sup> March 2018

Deputy Upper Tribunal Judge M A Hall

### **TO THE RESPONDENT FEE AWARD**

The appeal is dismissed. There is no fee award.

Signed

Date

14<sup>th</sup> March 2018

Deputy Upper Tribunal Judge M A Hall