



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/03039/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 19 March 2019**

**Decision & Reasons Promulgated
On 11 April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

and

Appellant

Z N

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, HOPO

For the Respondent: Mr M Nadeem, Legal Representative

DECISION ON ERROR OF LAW

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge O'Hagan allowing the appeal of the respondent on human rights grounds.
2. The respondent is a national of Iraq born on [~] 1994. She is of Kurdish ethnicity and comes from Kirkuk.

3. She claimed that in April 2015 she met a man called [AH] whilst visiting her aunt. Mr [H] is an Iranian national. He was born on 23 September 1988. He lives in the UK and was granted indefinite leave to remain in 2013.
4. In June 2015, Mr [H] asked to marry her, but her brother refused him. They slept together in July 2015 and the respondent became pregnant as a result. She discovered that she was pregnant on 13 October 2015. Her family never discovered that she was pregnant. She left Iraq on 15 October 2015 with the help of Mr [H]'s brother. She believed that she would be at risk on return because her brothers would believe that she had brought shame on them.
5. After leaving Iraq, the respondent travelled to Turkey. She then travelled on to Greece by boat. She was fingerprinted in Greece on 18 March 2016. Her son, [AS], was born in Greece. She then travelled on to the UK via France where she stayed for about two and a half months. She entered the UK clandestinely on 6 September 2016. She claimed asylum on 14 September 2016. It is the refusal of that claim which gave rise to the appeal before the judge.
6. At paragraph 9(i) - (iv) the judge set out the respondent's asylum claim as set out in the grounds of appeal. The judge at paragraph 16 said the key issue in this case was whether the respondent would be at risk of honour based killing on return to Iraq on the basis of her relationship with Mr [H] and her brother's refusal to grant permission for her to marry him. At paragraph 17 the judge said it was not in dispute that the respondent had a genuine subjective fear of what might happen on return. The issue was whether that subjective fear was well-founded. The judge said the respondent had not, and could not, describe any specific threats from her family as she fled as soon as she realised she was pregnant. Although she feared the worst, she did not know how they would respond. There appeared to be some divergence between her brothers and her father. Her brothers were stricter, whereas her father had a more liberal approach. How that would play out should she return cannot be known.
7. At paragraph 18 the judge stated that the most recent guidance issued by the Secretary of State was in August 2013. Based on the paragraphs drawn to his attention by the respondent's legal representative, the judge accepted that the incidence of gender-based violence in the Kurdish community of Iraq was distressingly high. It was not however at a level where in the absence of any information (which the appellant could not give him) concerning her family's response to the fact that she now had a partner and child, could he find that there was a substantial risk to her that would be sufficient to engage the Refugee Convention, humanitarian protection or Articles 2 and 3.
8. The judge considered the guidance in **AA (Iraq) v SSHD [2017] EWCA Civ 944**. Based on that, the judge recognised that there might well be

practical barriers to returning the respondent to the IKR of Iraq. The judge however said that would not of itself be sufficient to engage international protection.

9. I accepted Mr Tufan's submission that it was evident from paragraphs 16 to 19 that the judge was dismissing the respondent's asylum appeal.
10. Mr Nadeem confirmed that the respondent has not lodged an appeal against those findings. Consequently, I find that the judge's decision dismissing the respondent's asylum appeal shall stand.
11. Mr Nadeem however said that the dismissal of the respondent's asylum appeal was not material and did not affect the judge's decision to allow the appeal on human rights grounds.
12. I was not persuaded that the judge's decision allowing the respondent's appeal on human rights grounds could stand as the errors identified by Mr. Tufan were material to the judge's decision.
13. I find that the respondent could not meet the definition of partner in the Immigration Rules as set out in Appendix FM GEN.1.2. The respondent is not married to the child's father and is therefore not a spouse. She met the child's father in April 2015 in Iraq; she left Iraq on 15 October 2015, entered the UK on 6 September 2016 and claimed asylum on 14 September. On these facts, she has not lived with the child's father in a relationship akin to a marriage for at least 2 years prior to the date of the application. I accept the Secretary of State's argument that the judge failed to acknowledge this. The judge's finding that the Rules could be met without reconciling this issue was a material error of law.
14. I find that the absence of employment and accommodation being on offer in Iraq or Iran cannot constitute an insurmountable obstacle to family life continuing in Iraq or Iran. Consequently, I accept Mr. Tufan's submission that the judge applied the wrong test of what constitutes an insurmountable obstacle. The test is whether the refusal of the respondent's claim would result in unjustifiably harsh consequences. It is a stringent test as laid down in **Agyarko**.
15. The judge held that there was no evidence that the respondent's partner was a British citizen even though at paragraph 11 of the Reasons for Refusal Letter it was stated that a copy of his British passport was produced in evidence to the Secretary of State. If that was the case, then the child of the respondent, who was born in Greece, could be registered as a British national and could be a qualifying child. EX.1 could have applied if the respondent's partner was British. This is a matter that needs to be considered further.
16. For the reasons that I have given I find that the judge's decision cannot stand. It is set aside in order to be remade.

17. The appeal is remitted to Sheldon Court Birmingham for rehearing by a judge other than First-tier Tribunal Judge O'Hagan.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date: 8 April 201

Deputy Upper Tribunal Judge Eshun