



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-002470
PA/04298/2020**

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On the 1st November 2022**

**Decision & Reasons Promulgated
On the 19th January 2023**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GOAH

(Anonymity direction made)

Respondent

Representation:

For the Appellant: Mr Williams, a Senior Home Office Presenting Officer.

For the Respondent: Mr Rashid, instructed by Taj Mughal Solicitors.

DECISION AND REASONS

- 1.** The Secretary of State appeals with permission a decision of First-tier Tribunal Judge O R Williams ('the Judge') promulgated on 15 January 2022 in which the Judge is said to have allowed GOAH's appeal

against the refusal her application to remain in the United Kingdom as a refugee and on human rights grounds.

2. GOAH is a citizen of Iraq born on 3 March 1995.
3. Following an analysis of the documentary and oral evidence the Judge sets out findings of fact from [31] of the decision under challenge.
4. The first issue that arose related to the question of whether the Judge did allow the appeal against the protection claim. It is important to read the determination as a whole in which the Judge in a number of headed paragraphs sets out a detailed analysis of the evidence that was presented in support of the claimed risk if GOAH is returned to Iraq. At [32] the Judge wrote "*the appellant does have a well-founded fear of persecution for a Refugee Convention reason in Iraq and will face a real risk of persecution if returned*". The basis of the Secretary of State's challenge is that that conclusion is contrary to the Judge's findings made in the preceding paragraphs.
5. I agree. The only logical conclusion that can be reached when reading the Judge's findings in relation to the protection claim, including the finding of lack of credibility in relation to the same, is that the Judge dismissed the appeal under the Refugee Convention. It appears that an error was made in [32] by the omission of the word "not" between "does" and "have" in the first line of that paragraph. Read that way the determination makes sense. I find there is no material error in the Secretary of State's grounds in relation to this discrete point.
6. I found at the hearing the Judge dismissed the appeal on asylum and Humanitarian Protection grounds. This conclusion was not challenged before me.
7. The Judge then went on to consider the human rights aspects. At [34] the Judge finds the Secretary of States decision was not unlawful under section 6 of the Human Rights Act 1998 for the reasons set out in the earlier part of the determination.
8. The Judge's conclusion that GOAH and her partner are in a genuine relationship is not challenged before me.
9. The Judge finds GOAH could return to the IKR but finds insurmountable obstacles to family life with her partner continuing outside the UK as her partner is a refugee who has been absent from the IKR since April 2003, bar one brief visit in 2021 to see his mother. He was granted refugee status in 2011 and is now a British citizen. The Judge accepts there is family life between GOAH and her partner.
10. At [39] the Judge finds, in the alternative, that if there were no insurmountable obstacles and/or unjustifiably harsh consequences to her husband being able to accommodate them in Iraq that did not answer the question of whether it was reasonable to expect him to do so.
11. In relation to the five questions posed by the House of Lords in Razgar [2004] 2 AC 368, the Judge identifies the issue being the proportionality of the decision and sets out the factors in favour of interference [47 - 48] and weighing against interference at [49 - 53]; resulting in the conclusion that it would not be a proportionate interference with GOAH's family life if she was removed from the

United Kingdom. On that basis the appeal was allowed, clearly only on human rights grounds.

12. Another ground of challenge relied upon by the Secretary of State is that since claiming asylum GOAH had entered into a relationship with her British partner and that consent was required for this new matter to be considered in accordance with section 85(5) of the Nationality, Immigration Asylum Act 2002. The grounds argue that as there was no representative for the Secretary of State at the hearing consent could not have been given.
13. I find no merit in this ground as documentary evidence provided in support of the appeal by GOAH's solicitors contains a copy of an email sent on 21 December 2021 by the Secretary of State's representative giving consent to this matter being considered as a new ground. On that basis I find no legal error made out.
14. The Secretary of State's remaining grounds assert the Judge did not give full and proper consideration to the Immigration Rules, which is a reference to Appendix FM, limiting consideration to the matters set out at [37 - 39]. It is claimed the reasons given are brief and insufficient and that it is unclear how the Judge's findings were reached.
15. As stated above, it is important to read the determination as a whole. The Judge was considering a specific issues when making reference to GEN.1.2 at [35] which was the definition of a 'partner'. Ascertaining whether the circumstances of the case satisfy the definition of a specific term which is relevant to the assessment under Appendix FM is a logical starting point, in relation to which the Judge gives clear reasons for why it was accepted GOAH met the definition in the Rules.
16. Whilst another judge may have set the matter out differently a reader of the determination is able to see what was in the Judge's mind.
17. GEN.3.2 of Appendix FM, which was also considered reads:

GEN.3.2.(1) Subject to sub-paragraph (4), where an application for entry clearance or leave to enter or remain made under this Appendix, or an application for leave to remain which has otherwise been considered under this Appendix, does not otherwise meet the requirements of this Appendix or Part 9 of the Rules, the decision-maker must consider whether the circumstances in sub-paragraph (2) apply.

(2) Where sub-paragraph (1) above applies, the decision-maker must consider, on the basis of the information provided by the applicant, whether there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

(3) Where the exceptional circumstances referred to in sub-paragraph (2) above apply, the applicant will be granted entry clearance or leave to enter or remain under, as appropriate, paragraph D-ECP.1.2., D-LTRP.1.2., D-ECC.1.1., D-LTRC.1.1., D-ECPT.1.2., D-LTRPT.1.2., D-ECDR.1.1. or D-ECDR.1.2.

(4) This paragraph does not apply in the context of applications made under section BPILR or DVILR.

18. EX 1/2, also referred to by the Judge, reads:

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 7 years immediately preceding the date of application ;and

(ii) taking into account their best interests as a primary consideration, 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, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), 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.

- 19.** A common point that arises from both these provisions is that they are exceptions applicable if a person cannot meet the requirements of the Immigration Rules. Although the Judge does not set out in detail why GOAH did not meet the Rules, and it is not suggested by way of a cross appeal that she did, the Judge considered the merits of the claim by reference to the sections which are applicable if GOAH did not.
- 20.** The issue of insurmountable obstacle is clearly relevant when one reads paragraph EX 1(b). The Judge finds that such obstacles exist especially in light of the fact GOAH’s partner has been recognised as a refugee from Iraq.
- 21.** Whilst the grounds criticise the Judge in relation to allegations of failure to properly consider Appendix FM, there is no challenge of merit to the Judge’s findings in relation to the existence of insurmountable obstacles to family life continuing outside the UK.
- 22.** The grounds challenge the Judge’s conclusions in relation to the merits of the case outside the Immigration Rules claiming the findings are “scattered” but that appears to be a further example of criticism of form rather than substance. The Judge is criticised for the weight placed upon the likelihood of GOAH being successful in applying for

leave outside the UK, claimed the rules had not been considered in their entirety and that it was not clear what evidence the Judge relied upon to find GOAH would not be a financial burden upon the state.

- 23.** There is merit in the submission of Mr Williams that the figures provided at [53], that the partner earns £1000 per month and has savings of between £2,000 and £8,000 the finding that the appellant would not in practice be a burden on the state, does not recognise that that income figure does not, per se, establish that the minimum requirements set out in the Immigration Rules can be met. The determination does not clarify whether £1000 per month is a gross or net figure and Mr Rashid was able to clarify the savings figures relate to different accounts.
- 24.** As noted above, even if the £1000 per month was not sufficient to satisfy the minimum income requirement, which would mean GOAH was unable to meet the requirements of the immigration rules and would therefore be unlikely to succeed if an application was made if she was returned to Iraq for such purpose, that is not fatal to the decision as a result of the exceptions. The Judge appears to have accepted the appellant could not meet the requirements of the immigration rules which resulted in consideration of paragraph EX 1.
- 25.** It is also a point that the minimum income requirement, although of great importance in protecting the public purse and services within the UK, to which proper weight must be given, is not a mandatory requirement to allow an appeal pursuant to article 8 ECHR, where it is one factor that needs to be taken into account.
- 26.** The fact the Secretary of State has provided in the Immigration Rules a route by which an individual can succeed on human rights grounds if they have a genuine subsisting relationship, even if they cannot meet the minimum income or other requirements, is also a relevant factor.
- 27.** The Court of Appeal have reminded appellant judges on many occasions that they must not interfere with the decision of the judge below unless there are very good reasons for finding that it has been established there is an error of law material to the decision under challenge.
- 28.** I find no merit in the reasons challenge as this is not an examination paper and the reasons given for the findings that have been made are adequate in enabling a reader to understand what the Judge's findings are and how they were arrived at.
- 29.** This is a decision that has been made on the specific facts of this appeal by reference to appropriate legal provisions. The weight to be given to the evidence was a matter for the Judge and it is not made out that the weight that was given was in any way irrational or outside the range of that the Judge could reasonably place upon the evidence.
- 30.** I find having considered this matter afresh, including a review of the evidence available to the Judge, the determination, the application for permission to appeal, the grant of permission to appeal, and submissions made before me, that the Secretary of State has failed to establish the Judge's conclusion that the Secretary of State had not established that the decision is proportionate (not helped by the fact

no Presenting Officer was sent to defend the appeal before the Judge) is outside the range of findings reasonably open to the Judge on the evidence. On that basis I dismiss the appeal.

Decision

- 31. There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

- 32.** The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. No-one shall publish or reveal any information, including the name or address of the respondent, likely to lead members of the public to identify the respondent. Failure to comply with this order could amount to a contempt of court.

Signed.....
Upper Tribunal Judge Hanson

Dated 14 November 2022