IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002168

First-tier Tribunal Nos: HU/58016/2021
IA/17612/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 1 September 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

Entry Clearance Officer

Appellant

and

Mustafa Mohammed Naeem Alshawi
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant/Secretary of State: Ms A Ahmed, Home Office Presenting Officer
For the Respondent: Mr D Balroop, Counsel, instructed by Duncan Ellis Solicitors

Heard at Field House on 27 July 2023

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Iraq. His date of birth is 28 February 1987.

3. On 19 June 2023 the First-tier Tribunal (Judge Mills) granted the SSHD permission to appeal against the decision of the First-tier Tribunal (Judge Wolfson) to allow the Appellant's appeal against the decision of the ECO on 29 November

2021 to refuse his application for entry clearance to join his wife (“the Sponsor”). They have two children (born on 3 March 2014 and 23 September 2019).

4. The Sponsor came to the UK in 2007 as a minor under the family reunion route. She was granted indefinite leave to remain (ILR) in 2011. She lived with the Appellant and their children in Iraq from March 2012 until 15 December 2020 when she returned to the United Kingdom. The Appellant and the children remain in Iraq. The judge had before him the Sponsor’s current UK travel document issued on 23 May 2022 which stated “CURRENTLY NO TIME LIMIT ON THE HOLDER’S STAY IN THE UK”.

5. The hearing before the First-tier Tribunal took place on 26th January 2023 by CVP. Both parties were represented. There were no witness statements before the judge. The judge heard evidence from the Sponsor through an interpreter.

6. After the hearing and before the judge promulgated the decision he received further submissions from the Home Office Presenting Officer. The thrust of these were that the Sponsor no longer had ILR because she had been in Iraq with her family from 2012 to 2020 and it had therefore elapsed. The judge considered SD (treatment of post-hearing evidence) Russia [2008] UKAIT 00037 and decided to reconvene the hearing with a direction that each party should prepare written submissions as to how the matter should proceed. A hearing was reconvened on 28 March 2023, however it came to light that directions had not been issued to the Appellant’s solicitors and the matter was adjourned. On 20 April 2023 the judge received written submissions from the Appellant’s representative and nothing further from the SSHD. The judge decided that he did not need to hear further evidence or submissions on the point. The judge found that the evidence before him supported that the Sponsor has ILR and that there is no time limit on her stay in the UK. The judge went on to consider the substantive appeal on this basis. The grounds do not challenge this aspect of the Judge’s decision. It appears to me that the presenting officer’s submissions were misconceived. Whether or not the Sponsor should have been granted ILR , was not a matter for the First-tier Tribunal. She clearly had ILR at the time of the decision.

7. At paragraph 20 the judge summarised the Home Office Presenting Officer’s submissions as follows: -

> “The applicant was not able to satisfy financial eligibility requirements at the date of the decision, there was no breach of Article 8 for the family to remain in Iraq, the sponsor can travel to Iraq because she has an Iraqi passport, the children are not British citizens.”

8. In respect of the financial requirements of Appendix FM of the IR, the Appellant’s representative submitted at the hearing that the documents provided at the date of the application were two months short only of the requirement to demonstrate six months’ employment history and the documents provided confirm the Sponsor’s employment up until December 2021. The Appellant submitted that the documentary evidence before the Tribunal demonstrated that the Sponsor met the substantive requirements of the IR.

9. The Appellant’s representative relied on MM (Lebanon) [2017] UKSC 10 and Agyarko [2017] UKSC 11, and the Respondent’s own guidance to support that the Tribunal should consider the Sponsor’s prospective earnings which would enable the minimum requirement to be met. It was further submitted that the Sponsor’s family ties were firmly in the UK as her parents and sister live here (see

paragraph 23). While the Sponsor had married an Iraqi national and lived in Iraq for some time, it was submitted that the situation there is "unpredictable" and her family ties are here. It was submitted that at the date of the appeal the Appellant met the requirements of the IR and that it would be "an academic exercise" to require her to make another application.

10. The judge referred to case law including SS (Congo) and Others [2015] EWCA Civ 387, SM and Others (Somalia) [2015] EWCA Civ 223 BLJ, MM (Lebanon), Hesham Ali (Iraq) v SSHD [2016] UKSC 60 and Jeunesse [2015] 60 EHRR 789. The judge went on to consider s.117 of the 2002 Act reminding himself that pursuant to s.117B(1) the maintenance of effective immigration control is in the public interest. The judge took into account that the Appellant speaks English and would be financially supported by the Sponsor and that there had been no breach of the IR.

11. At paragraph 32 the judge said that for the Appellant, "a refusal would represent a bar to the development of family and private life in the United Kingdom". At paragraph 33 the judge said that the only issue in relation to whether the Appellant meets the requirements of the IR is whether the financial eligibility requirement is met. The judge said that it was accepted by the Appellant that the requirements were not met at the date of the application but that evidential flexibility should have been applied and/or there are exceptional circumstances.

12. At paragraph 34, the judge found as follows: - "the evidence before me is that financial eligibility requirements were satisfied as at the date of the hearing, but I do not find that this is a situation in which evidential flexibility or exceptional circumstances applied. The Immigration Rules have been developed to protect the economic wellbeing of the country and the Respondent's decision is in accordance with those Rules". The judge said that when considering proportionality, "the ECO must justify the interference with family life and establish that the interference is proportionate".

13. The judge said that s.55 of the Borders, Citizenship and Immigration Act 2009 did not apply because the children are not in the United Kingdom. However, the children's best interests must be considered before the assessment of proportionality can be made. The judge took into account that the children were living with their father in Iraq. They had never been to the United Kingdom and that they have been separated from their mother for some time. The judge concluded that "the best interests of the children would be adversely affected by a refusal decision".

14. The judge at paragraph 35 considered the Sponsor's position with respect to the case of Beoku-Betts [2008] UKHL 390. The judge said that the Sponsor is settled and working in the UK and that she "would like to be reunited with her husband and children and live with them in the UK". The judge found that a decision would amount to a continued interference with her right to family life.

15. The judge at paragraph 37 said that he had considered all the factors in making an assessment of proportionality. He said that he considered TZ and PG v SSHD [2018] EWCA Civ 1109 and stated as follows:-

> "I place weight on my finding that the financial eligibility requirement was met at the date of the hearing, albeit not at the date of the application. It would not be proportionate to require a reapplication to be made. Moreover,

> the public interest considerations in s117B of the 2002 Act fall in favour of the appellant. In addition, I have considered the best interests of the children, noting that their best interests are to live together with both parents. I find that refusal of leave would be a disproportionate interference with the appellant's family life (as well as that of the sponsor and their children)."

The Grounds of Appeal

16. The grounds of appeal assert that the judge made a material misdirection of law on a material matter. The judge failed to assess whether there are insurmountable obstacles to family life continuing in Iraq. In the grounds, the case of TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 is relied upon.

17. The grounds assert that the Appellant did not satisfy the requirements of the IR at the date of the application and the judge failed to address the issue of whether there are insurmountable obstacles to family life continuing in Iraq which has resulted in a flawed assessment of proportionality.

The Respondent's case and the issues in this appeal

18. The thrust of the Appellant's Rule 24 response is that the insurmountable obstacles test with reference to paragraph EX.1.(b) of Appendix FM does not apply to entry clearance cases and therefore TZ (Pakistan) do not apply. The decision was open to the judge.

19. It is asserted that the Presenting Officer before the First-tier Tribunal "has been recklessly misleading the Tribunal and tried to influence the judge after closing submissions". The Appellant in the Rule 24 response states that there is concern that the Presenting Officer remarked at the hearing that "entry clearance will not be granted irrespective of the outcome of the appeal".

20. In the Reasons for Refusal Letter (RFRL), the decision maker was not satisfied that the Appellant was related to his wife and/or children as claimed or that he met the eligibility financial requirements of the IR. The Sponsor was required to earn £24,800, an application was made for entry clearance on 12th July 2021, less than three months after the Sponsor's employment at Saber Solutions Limited commenced and therefore she was not able to evidence six months' employment as required under the Rules. The ECO was satisfied that the Appellant met the English language requirements.

21. The decision maker went on to consider "exceptional circumstances" and the following was stated:

> "We have considered, under paragraphs GEN.3.1. and GEN.3.2. of Appendix FM as applicable, whether there are exceptional circumstances in your case which could or would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for you or your family. In so doing we have taken into account, under paragraph GEN.3.3. of Appendix FM, the best interests of any relevant child as a primary consideration.
>
> You have provided no information or evidence to establish that there are any exceptional circumstances in your case."

22. The Respondent set out their position is set out in their review. At this time the Appellant's relationship to the Sponsor and the children was still an issue. (By the time that the appeal came before the First-tier Tribunal, the Appellant had submitted DNA evidence). It was also asserted that the Appellant did not meet the minimum income threshold. The Respondent's case can be summarised:-

    a. The Appellant cannot meet the requirements of the IR.

    b. There are no exceptional circumstances which would amount to unjustifiably harsh consequences.

    c. Article 8 (1) is not engaged.

    d. Even if it were accepted that Article 8 (1) is engaged, the decision is proportionate. The maintenance of effective immigration control in the interest of the public and economic wellbeing of the country with reference to s.117B of the 2002 Act.

23. The Appellant replied to the Respondent's Review by stating that there was sufficient and reliable evidence showing that at the time of the application, the Sponsor had an income which meets met the income threshold. It was asserted that the Respondent should have exercised evidential flexibility. In the Appellant's skeleton argument (ASA) the Appellant identified the issues in the appeal as the relationships, the minimum income threshold and whether there are exceptional circumstances which would result in unjustifiably harsh consequences for the Appellant's family and render the refusal a breach of Article 8 ECHR.

Submissions

24. Ms Ahmed made submissions before me. She accepted that EX.1 does not apply to an entry clearance case but submitted that the judge found that the Appellant could not meet the IR and it was still incumbent on the judge to consider the circumstances on return to Iraq as part of the proportionality assessment. Ms Ahmed relied on SS, specifically paragraphs 34, 38 and 40. At the end of her submissions Ms Ahmed referred to the case of Lata [2023] UKUT 00164 which in her view helps the Appellant. However, she referred me to paragraph 20 of the decision of the judge to support that the issue of the family returning to Iraq was an issue raised and relied upon by the Respondent. She referred to the post-hearing submissions relating to the Sponsor having a longstanding family home in Iraq. She submitted that it was still incumbent on the judge to apply the relevant test under Article 8. According to her minute of the hearing, it was submitted by the Presenting Officer that the family could live in Iraq.

25. Mr Balroop made oral submissions. He relied on MM (Lebanon). The thrust of his submissions was that at the date of the hearing the Appellant was found by the judge to meet the requirements of the IR. It is not material whether there are insurmountable obstacles to family life continuing in Iraq. It is not the test to be applied in entry clearance applications. There would be no public interest in making the Appellant make a new application which would be granted.

SS (Congo) [2015] EWCA Civ 387

26. In SS (Congo) the Court of Appeal considered Appendix FM and Article 8 generally as they relate to applications for leave to enter the United Kingdom. The following paragraphs are relevant to this appeal.

> ”34. What, then, should be the position in relation to applications made by family members outside the United Kingdom for LTE to come here to take up or resume their family life? Mr Payne, for the Secretary of State, submitted that since a person actually in the United Kingdom who formed a family life knowing that they had no right to be here could readily be expelled (see the discussion of *Nagre*, above), so by parity of reasoning no claim for grant of LTE outside the Immigration Rules in Appendix FM could succeed under Article 8 save in truly exceptional circumstances. On the other hand, Mr Drabble, in submissions adopted on behalf of all the respondents, pointed to the fact that the part of Appendix FM which deals with LTR (unlike the part that deals with LTE) contains section EX.1 (exceptions to certain eligibility requirements for leave to remain as a partner or parent), which makes the LTR Rules more generous for applicants than the LTE Rules. Section EX.1 provides for grant of LTR in certain cases where the applicant has a genuine and subsisting parental relationship with a child whom it would not be reasonable to expect to leave the United Kingdom or if the applicant has a genuine and subsisting relationship with a partner in the United Kingdom who is a British citizen or otherwise settled in the United Kingdom and there are ‘insurmountable obstacles to family life with that partner continuing outside the UK’. Mr Drabble submitted that the omission of section EX.1 from the part of Appendix FM dealing with LTE showed that there was a substantial gap between what Article 8 required in an LTE context and the Immigration Rules themselves, so that a court or tribunal should not accord the LTE Rules significant weight in the Article 8 balancing exercise. Mr Drabble contended that, with respect to the LTE Rules, it was inevitable that in many cases there had to be recourse to the Secretary of State's residual discretion under the 1971 Act to grant LTE outside the Rules, and that therefore the tribunals in the present cases were justified in attaching little weight to the Rules themselves.
>
> 35. In our judgment, the correct legal approach lies between these extremes. This is because the position in relation to the LTE Rules is different from that in relation to the LTR Rules in two distinct ways.
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> 36. First, cases involving someone outside the United Kingdom who applies to come here to take up or resume family life may involve family life originally established in ordinary and legitimate circumstances at some time in the past, rather than in the knowledge of its precariousness in terms of United Kingdom immigration controls (as in the type of situation discussed in *Nagre*). Thus the ECtHR jurisprudence addressing the latter type of case, which was the foundation for the approach in *Nagre*, will not always be readily applicable as an analogy. A person who is a refugee in the United Kingdom may have had a family life overseas which they had to abandon when they fled. A British citizen may have lived abroad for years without thought of return, and established a family life there, but then circumstances change and they come back to the United Kingdom and wish to bring their spouse with them.
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> 37. On the other hand, if someone from the United Kingdom marries a foreign national or establishes a family life with them at a stage when they are contemplating trying to live together in the United Kingdom, but when they know that their partner does not have a right to come there (an extreme example of this would be the case of a so-called ‘mail-order bride’), the relationship will have been formed under conditions of known precariousness which will make the analogy with the Strasbourg case-law reviewed in *Nagre* a close one (see also *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471 at [68]). In that sort of case, it will be appropriate to apply

a similar test of exceptional circumstances before a violation of Article 8 will be found to arise in relation to a refusal to grant LTE outside the Rules.

38. Secondly, however, what is in issue in relation to an application for LTE is more in the nature of an appeal to the state's positive obligations under Article 8 referred to in *Huang* at para. [18] (a request that the state grant the applicant something that they do not currently have – entry to the United Kingdom and the ability to take up family life there), rather than enforcement of its negative duty, which is at the fore in LTR cases (where family life already exists and is currently being carried on in the United Kingdom, and family life or any private life established in the United Kingdom will be directly interfered with if the applicant is removed). This means that the requirements upon the state under Article 8 are less stringent in the LTE context than in the LTR context. It is not appropriate to refer to the LTR Rules and the position under Article 8 in relation to LTR, as Mr Drabble does, and seek to argue that Article 8 requires that the same position should apply in relation to applications for LTE.

39. In our judgment, the position under Article 8 in relation to an application for LTE on the basis of family life with a person already in the United Kingdom is as follows:

    i) A person outside the United Kingdom may have a good claim under Article 8 to be allowed to enter the United Kingdom to join family members already here so as to continue or develop existing family life: see e.g. *Gül v Switzerland* (1996) 22 EHRR 93 and *Sen v Netherlands* (2001) 36 EHRR 7. Article 8 does not confer an automatic right of entry, however. Article 8 imposes no general obligation on a state to facilitate the choice made by a married couple to reside in it: *R (Quila) v Secretary of State for the Home Department* [2011] UKSC 45; [2012] 1 AC 621, para. [42]; *Abdulaziz, Cabales and Balkandali v United Kingdom* (1985) 7 EHRR 471, [68]; *Gül v Switzerland*, [38]. The state is entitled to control immigration: *Huang*, para. [18].

    ii) The approach to identifying positive obligations under Article 8(1) draws on Article 8(2) by analogy, but is not identical with analysis under Article 8(2): see, in the immigration context, *Abdulaziz, Cabales and Balkandali v United Kingdom*, paras. [67]-[68]; *Gül v Switzerland*, [38]; and *Sen v Netherlands*, [31]-[32]. See also the general guidance on the applicable principles given by the Grand Chamber of the ECtHR in *Draon v France* (2006) 42 EHRR 40 at paras. [105]-[108], summarising the effect of the leading authorities as follows (omitting footnotes):

        > ‘105. While the essential object of Art.8 is to protect the individual against arbitrary interference by the public authorities, it does not merely require the State to abstain from such interference: there may in addition be positive obligations inherent in effective ‘respect’ for family life. The boundaries between the State's positive and negative obligations under this provision do not always lend themselves to precise definition; nonetheless, the applicable principles are similar. In both contexts regard must be had to the fair balance that has to be struck between the competing interests of the individual and the community as a whole, and in both contexts the State is recognised as enjoying a certain margin of appreciation. Furthermore, even in relation to the positive obligations flowing from the first paragraph, ‘in striking [the required] balance the aims mentioned in the second paragraph may be of a certain relevance’.

> 106. 'Respect' for family life … implies an obligation for the State to act in a manner calculated to allow ties between close relatives to develop normally. The Court has held that a state is under this type of obligation where it has found a direct and immediate link between the measures requested by an applicant, on the one hand, and his private and/or family life on the other.
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> 107. However, since the concept of respect is not precisely defined, states enjoy a wide margin of appreciation in determining the steps to be taken to ensure compliance with the Convention with due regard to the needs and resources of the community and of individuals.
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> 108. At the same time, the Court reiterates the fundamentally subsidiary role of the Convention. The national authorities have direct democratic legitimation and are, as the Court has held on many occasions, in principle better placed than an international court to evaluate local needs and conditions. In matters of general policy, on which opinions within a democratic society may reasonably differ widely, the role of the domestic policy-maker should be given special weight.'

iii) In deciding whether to grant LTE to a family member outside the United Kingdom, the state authorities may have regard to a range of factors, including the pressure which admission of an applicant may place upon public resources, the desirability of promoting social integration and harmony and so forth. Refusal of LTE in cases where these interests may be undermined may be fair and proportionate to the legitimate interests identified in Article 8(2) of 'the economic well-being of the country' and 'the protection of the rights and freedoms of others' (taxpayers and members of society generally). A court will be slow to find an implied positive obligation which would involve imposing on the state significant additional expenditure, which will necessarily involve a diversion of resources from other activities of the state in the public interest, a matter which usually calls for consideration under democratic procedures.

iv) On the other hand, the fact that the interests of a child are in issue will be a countervailing factor which tends to reduce to some degree the width of the margin of appreciation which the state authorities would otherwise enjoy. Article 8 has to be interpreted and applied in the light of the UN Convention on the Rights of the Child (1989): see *In re E (Children) (Abduction: Custody Appeal)* [2011] UKSC 27; [2012] AC 144, at [26]. However, the fact that the interests of a child are in issue does not simply provide a trump card so that a child applicant for positive action to be taken by the state in the field of Article 8(1) must always have their application acceded to; see *In re E (Children)* at [12] and *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4; [2011] 2 AC 166, at [25] (under Article 3(1) of the UN Convention on the Rights of the Child the interests of the child are *a* primary consideration – i.e. an important matter – not *the* primary consideration). It is a factor relevant to the fair balance between the individual and the general community which goes some way towards tempering the otherwise wide margin of appreciation available to the state authorities in deciding what to do. The age of the child, the closeness of their relationship with the other family member in the United Kingdom and whether the family could live together elsewhere are likely to be important factors which should be borne in mind.

v) If family life can be carried on elsewhere, it is unlikely that 'a direct and immediate link' will exist between the measures requested by an applicant and his family life (*Draon*, para. [106]; *Botta v Italy* (1998) 26 EHRR 241, para. [35]), such as to provide the basis for an implied obligation upon the state under Article 8(1) to grant LTE; see also *Gül v Switzerland*, [42].

40. In the light of these authorities, we consider that the state has a wider margin of appreciation in determining the conditions to be satisfied before LTE is granted, by contrast with the position in relation to decisions regarding LTR for persons with a (non-precarious) family life already established in the United Kingdom. The Secretary of State has already, in effect, made some use of this wider margin of appreciation by excluding section EX.1 as a basis for grant of LTE, although it is available as a basis for grant of LTR. The LTE Rules therefore maintain, in general terms, a reasonable relationship with the requirements of Article 8 in the ordinary run of cases. However, it remains possible to imagine cases where the individual interests at stake are of a particularly pressing nature so that a good claim for LTE can be established outside the Rules. In our view, the appropriate general formulation for this category is that such cases will arise where an applicant for LTE can show that compelling circumstances exist (which are not sufficiently recognised under the new Rules) to require the grant of such leave.

41. This formulation is aligned to that proposed in *Nagre* at [29] in relation to the general position in respect of the new Rules for LTR, which was adopted in this court in *Haleemudeen* at [44]. It is a fairly demanding test, reflecting the reasonable relationship between the Rules themselves and the proper outcome of application of Article 8 in the usual run of cases. But, contrary to the submission of Mr Payne, it is not as demanding as the exceptionality or 'very compelling circumstances' test applicable in the special contexts explained in *MF (Nigeria)* (precariousness of family relationship and deportation of foreigners convicted of serious crimes).

42. In our view, it is a formulation which has the benefit of simplicity. It avoids the need for any excessively fine-grained approach at the level of decision-making by officials and tribunals. It should thus help to avoid confusion when cases arise, as they sometimes do, where an application for LTE is made in parallel with an application for LTR: see, e.g., *PG (USA) v Secretary of State for the Home Department* [2015] EWCA Civ 118.

…

66. Mr Drabble said that there were insurmountable obstacles to SS's husband being able to travel to join her to resume their family life together in the DRC, as he is a refugee from the DRC and could not be expected to return there. Mr Drabble submitted that this meant that enforcement of the minimum income requirements in the Rules in SS's case would obviously be disproportionate, and that the appeal should therefore be dismissed. He also pointed to section EX.1 in the section of the Immigration Rules dealing with LTR, under which the existence of insurmountable obstacles to carrying on family life outside the United Kingdom is a basis for grant of LTR, and argued that Article 8 required that the same approach should be adopted in relation to an application for LTE.

67. We do not agree with these submissions. As explained above, there are important material differences for the purposes of Article 8 between applications for LTE and applications for LTR, and a state is not required to adopt as accommodating an approach in the former context as in the latter. Moreover, at a time before section EX.1 of the new Rules was promulgated,

> the House of Lords in Huang contemplated that both in the context of applications for LTR and in the context of applications for LTE, it might well be the case, depending on the circumstances, that the Secretary of State could lawfully refuse an application, without violation of Article 8, even though the family life relied upon 'cannot reasonably be expected to be enjoyed elsewhere": see para. [20], quoted above. This is another way of saying that this feature of a case does not, without more, create a right for a family member to enter or remain in the United Kingdom. In that paragraph, Lord Bingham also explained that, even on the Immigration Rules in the form they had prior to their amendment in July 2012, his expectation was that the number of claimants entitled to succeed under Article 8 in claiming LTE or LTR outside the Rules 'would be a very small minority'. Thus, contrary to Mr Drabble's contention, it is not at all clear that a proper approach under Article 8 must involve a decision to grant LTE to SS in this case."

Lata (FtT: principal controversial issues) [2023] UKUT 00163.

27. Ms Ahmed relied on the recently reported case of Lata. In the case of Lata the judge allowed the Appellant's appeal on protection grounds on the basis that she would be at risk in her home area and there was no internal relocation available to her. The grounds of appeal by the SSHD concerned the judge having failed to consider the immigration status of the Appellant's adult sons in the UK or their ability to return with her to India. The grounds to the Upper Tribunal expanded on the issue. The Upper Tribunal stated as follows about the grounds:

> "17. This was not the Secretary of State's case as expressly advanced at the hearing before the FtT. HL's elder son and his wife attended. They relied upon short witness statements, neither of which addressed their returning to India with HL. Whilst both witnesses gave oral evidence as to their contact with HL in the United Kingdom, neither were cross-examined about their relocating to Goa to provide HL with support. The Secretary of State's submissions before the FtT addressed the ability of HL to return to Goa, with its large Christian population, but no reference was made to one or other of the sons relocating with her. The only express reference to the sons was their ability to keep in touch with their mother from the United Kingdom and to visit her in India."

Error of Law

28. I do not find that Late is analogous to this case. Whether family life can continue in Iraq is an integral part of the Article 8 assessment. It was a matter inherent in the assessment of the level of interference to the Appellant's family life and in the assessment of whether that interference was proportionate. The issue in Late was relocation under the Refugee Convention. The issue raised at the appeal stage was a new matter namely whether family members could return with the Appellant. It was not a factor that the judge was bound to consider as part of whether relocation would be safe or reasonable in the context of the Refugee Convention. The Respondent's review in this case was not deficient. The Respondent's case was clearly stated (Article 8(1) is not engaged but if it is, the decision is proportionate). Moreover, the Presenting Officer specifically raised the issue of family life continuing in Iraq.

29. The Appellant's position, as I understand it, is that the assessment of insurmountable obstacles is not material to the appeal. I agree that EX.1 does not apply. However, SS (Congo) makes it clear (specifically at paragraph 39) that it is

incumbent on a judge to consider whether family life can be carried on elsewhere.

30. The judge found that the Appellant could not meet the requirements of the IR. The judge did not find that the decision maker had been wrong on this point. The judge found that at the date of the hearing he was satisfied that the Appellant met the substantive requirements of the IR. The Appellant's appeal could be allowed only if there were exceptional circumstances which would render refusal a breach of Article 8 of the ECHR because it could or would result in unjustifiably harsh consequences for the Appellant and his family. In making this assessment, the judge was entitled to attach weight to the Sponsor's earnings and his assessment that she would meet the substantive IR at the date of the hearing. This was a factor to weigh in favour of the Appellant.

31. However, the assessment of the interference with family life and proportionality of the Respondent's decision must as a matter of law involves an assessment of whether family life can continue in Iraq. The judge did not make findings about family life continuing in Iraq. It is a material consideration when assessing whether there are exceptional circumstances. If there are insurmountable obstacles (a term which is now part of the IR) or if there are obstacles which may not be insurmountable but make the continuation of family life very difficult in Iraq, this would be a matter in favour of the Appellant. The failure of the judge to consider whether family life could continue in Iraq is a material error of law. I set aside the decision to allow the appeal.

Re-making

32. The representatives were both of the view that the appeal can remade in the event that the decision is set aside without the need for a further hearing. There was no further evidence relied on by the parties. I remake the decision on the evidence that was before the First-tier Tribunal.

33. The submission that forcing the Appellant to make another application would amount to an academic exercise is misconceived. This is not LTR application where Chikwamba v SSHD [2005] EWCA Civ 1779 may apply. The application for entry clearance was made prematurely. The Appellant could have waited a few months before making an application for entry clearance and provided the required documents to satisfy the procedural and substantive requirements of the IR.

34. In MM (Lebanon), the decision of the respondent was an absolute interference with the appellant's family life which could not continue in Lebanon. In this Appellant's case he was found to meet the requirements of the IR at the date of hearing which is a factor that weighs in his favour, however, the decision does not interfere with his family life to anywhere near the same extent. The evidence was that the family wished to live in the United Kingdom and that the position in Iraq was unpredictable. The Sponsor also has family in the United Kingdom. However, the Appellant has not established insurmountable obstacles to family life continuing in Iraq or even very difficult obstacles. Family life had existed there for many years. In relation to the children who are not British citizens, their best interests are to remain with their parents. There is nothing preventing the Sponsor from returning to Iraq to join her family and continuing family life there. In these circumstances, the inevitable conclusion is that the interference with the Appellant's family life does not outweigh the public interest in the maintenance of immigration control. The interference with the Appellant's family

life is not very significant.[1] While there are factors that are in the Appellant's favour which were properly identified by the judge, in the light of the inevitable conclusion that family life can continue in Iraq, I find that the balance weighs in favour of the Respondent. The decision to refuse the Appellant entry clearance is proportionate.

35. The Appellant's appeal is dismissed under Article 8.

Notice of Decision

36. The Appellant's appeal is dismissed under Article 8 ECHR.

Joanna McWilliam
Judge of the Upper Tribunal
Immigration and Asylum Chamber

22 August 2023

[1] The First-tier Tribunal decision was on the basis that the first and second of the *Razgar* questions proposed by Bingham LJ (R (Razgar) v SSHD [2004] UKHL 27) were answered in the affirmative. There is no challenge to this in the grounds; however, the second minimum gravity question is not a specifically high one: AG (Eritrea) [2007] EWCA Civ 1384.