IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/18438/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 24 March 2015	**On 28th April 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE I A LEWIS

Between

SARAH FARIS HASAN AL-MAHDAWI
(ANONYMITY ORDER NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER,
AMMAN

Respondent

Representation:
For the Appellant: Mr F Gaskin of Counsel instructed by Roli Solicitors
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Prior promulgated on 10 December 2014 dismissing the appeal of Miss Sarah Faris Hasan Al-Mahdawi against a decision of an Entry Clearance Officer dated 1 May 2013 to refuse entry clearance to join her father in the United Kingdom.

Background

2. The Appellant is a national of Iraq born on 28 February 1986. She is the daughter of Mr Faris Hassan Shuker Al-Mahdawi, hereafter the Sponsor.

3. The Sponsor entered the United Kingdom in February 2012, claimed asylum and was recognised as a refugee in August 2012. Following recognition as a refugee the Sponsor supported his wife and two daughters in applications for entry clearance to join him in the United Kingdom, such applications being made on 27 December 2012. The other applicants were the Appellant's mother, Mrs Intisar Abdulrahman Majeed Al-Azzawi (date of birth 1 July 1956), and the Appellant's sister, Miss Mays Haris Hasan Al-Mahdawi (date of birth 19 May 1997). Each of the applications were refused for reasons set out in respective Notices of Immigration Decision.

4. The Appellant, her mother and sister appealed to the IAC.

5. The three separate appeals were linked, and the First-tier Tribunal Judge allowed the appeals of the Sponsor's wife and youngest daughter with reference to paragraphs 352A and 352D of the Immigration Rules, but dismissed the Appellant's appeal for reasons set out in his Decision. Essentially the First-tier Tribunal Judge was satisfied as to the marital relationship between the Sponsor and the Appellant's mother, and as to the paternal relationship between the Sponsor and the Appellant's sister; those Appellants thereby met the requirements of the Rules. The Appellant herein, however, was too old to meet the requirements of paragraph 352D, being over 18 at the date of application, and it was also conceded that she could not qualify under Section EC-DR of Appendix FM. Her case was considered therefore pursuant to Article 8 of the ECHR but dismissed essentially for the reasons set out at paragraph 22 of the First-tier Tribunal Judge's decision.

6. The Appellant sought permission to appeal, which was granted by First-tier Tribunal Judge Osborne on 5 February 2015.

7. The Respondent has filed a Rule 24 response dated 13 February 2015 resisting the challenge made by the Appellant. There has been no cross-appeal, however, in respect of the Appellant's mother and sister.

Consideration: Error of Law

8. Paragraphs 352A and 352D of the Immigration Rules give effect to what is sometimes termed the principle of family unity. This is identified and commented upon in the UNHCR Handbook on the Refugee Convention at Chapter VI, which is headed 'The Principle of Family Unity'.

9. The Handbook from paragraph 181 is, in part, in the following terms:

> *"181. Beginning with the Universal Declaration of Human Rights, which states that 'the family is the natural and fundamental*

group unit of society and is entitled to protection by society and the state', most international instruments dealing with human rights contain similar provisions for the protection of the unit of a family."

There is then a citation from the Final Act of the Conference that adopted the 1951 Convention and then it goes on:

"183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned recommendation in the Final Act of the Conference is, however, observed by the majority of states, whether or not parties to the 1951 Convention or to the 1967 Protocol.

184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.

185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household."

10. The Immigration Rules therefore attempt to give effect to a recognised international principle, albeit that there is no absolute right to family reunion of an adult child of a refugee, and indeed the Rules limit the children who are entitled to family reunion to those who are under 18.

11. The First-tier Tribunal Judge addressed the particular circumstances of the Appellant at paragraph 22. It was a feature of this case that the Appellant was suffering from mental retardation which was attributed to brain damage at the time of her birth presumed to be arising from the circumstances of a difficult birth. The supporting evidence in this regard lacks some degree of clarity. There were two reports before the First-tier Tribunal, one indicating a level of mental retardation described as 'severe' and another referring to 'moderate to severe' mental retardation. The fuller of those two reports suggested that the Appellant had a mental age of *"about 10 years"*. It does not seem to have been disputed before the First-tier Tribunal that the Appellant was a person who required considerable assistance. The Sponsor's evidence in this regard is set out at paragraph 11 of the decision of the First-tier Tribunal and includes this: *"My wife is required to provide full-time care to both of them"*, (that is to both daughters).

12. Paragraph 22 has a curious sentence in its middle which has been the subject of some discussion before me this morning. The sentence is in these terms:

> "My conclusion was that for years the marriage of the first Appellant and the Sponsor had been conducted at a distance and my strong inference was that it could very well have been the exercise of choice or the call of duty that resulted in the first Appellant conducting a close and ongoing family life with, in particular, the second Appellant."

The commencement of that sentence seems to suggest that the Judge is addressing the nature of the relationship between the husband and wife whereas the end of the sentence is focused upon the relationship between the wife and her daughter, that is the Appellant herein. It is unclear where the transition takes place within that sentence and the result is that the reader is left in some doubt as to exactly what the Judge meant by this sentence. In my view no clarity came through the discussion that I was afforded this morning with the assistance of the representatives.

13. Be that as it may, the First-tier Tribunal Judge proceeded to state the following:

> "There was no evidence whatsoever before me as to whether the first Appellant [that is the mother] would choose, despite succeeding in the present appeal, to remain in Iraq with the second Appellant [that is to say the Appellant before the Upper Tribunal] upon the failure of that Appellant's appeal. If that was her choice then the status quo would be maintained and the second Appellant would not lose the presence, comfort and support of the first Appellant despite the failure of her application outside the Rules. That application could not succeed under the Rules since the financial requirements of the Rules were not met. Those requirements and indeed Section [it says 177(B) but it should be 117B] of the Immigration Act 2014 [that is not wholly accurate either, it is actually the 2002 Act that is amended by the Immigration Act 2014] being designed to safeguard the important economic interests of the United Kingdom. According to the medical evidence relating to the second Appellant she requires educational facilities for a person with special needs and other special programmes. Clearly the second Appellant would make demands, in the United Kingdom, upon the resources of Social Services and the National Health Service. Having regard to all these considerations I am not satisfied that the refusal of the second Appellant's application would constitute a disproportionate interference with her private or indeed her family life."

14. In my judgment that passage is inadequately reasoned and fails to indicate that the Judge had duly conducted a **Razgar** analysis, notwithstanding setting out the **Razgar** questions at paragraph 4 of his determination, and in particular does not have regard either to the principle in **Beoku-Betts** or of the context of this case - being the principle of family unity for refugees.

15. Whilst the Judge recognises that the Appellant's potential loss of the care and attention and support of her mother could be avoided by the mother

electing not to join the Sponsor in the UK, in so doing, in my judgment, the Judge does not give any express recognition, or otherwise indicate that he has weighed into the balance, that such a circumstance would involve an interference with the family life of the Sponsor, the Appellant's mother and the Appellant's sibling in cases where they have established an entitlement to be together under the Rules and in accordance with internationally recognised principles. For those reasons I am satisfied that the reasoning is incomplete at paragraph 22 and is thereby in error of law. The decision in respect of this Appellant therefore requires to be set aside and remade.

Remaking the Decision

16. Both parties before me today agreed that the decision could be remade by the Upper Tribunal without the need for further evidence. Ms Holmes for the Entry Clearance Officer in helpful and realistic submissions acknowledged that whilst in other circumstances she might have wanted to explore the medical evidence in this case, the medical evidence appeared to have been accepted before the First-tier Tribunal and so she did not now seek to challenge it. Ms Holmes also emphasised that the approach to be taken in this case would likely be different if it were a non-refugee reunion case but in the particular circumstances she did not seek to articulate any specific or reasoned objection to the appeal succeeding.

17. In my judgment there plainly is family life as between the Appellant and her mother and her younger sibling. The effect of the decision puts the Appellant's mother to election either to lose the opportunity of family reunion for both herself and her younger daughter with the Sponsor in the United Kingdom, or to have to abandon the Appellant and thereby leave the Appellant without the love, care and direct support that she has received from her mother throughout her life. Bearing in mind that the Appellant has the mental retardation described and a mental age of 10 it seems to me that the level of the Appellant's dependency is necessarily greater than would ordinarily be the case for an adult offspring.

18. In those circumstances I find the effect of the decision of the Respondent to refuse entry clearance to the Appellant in circumstances where her mother and younger sibling are able to travel to the United Kingdom does indeed constitute an interference with family life of a severity to engage Article 8. It is not disputed that the decision is in accordance with the law and in pursuit of a legitimate aim. The issue is therefore one of proportionality. It is necessary to have regard to the factors in Part 5A of the 2002 Act and in particular the factors at Section 117B.

19. As regards the questions of economic wellbeing, the public purse, and indeed of integration identified at subsection (2) and subsection (3), it seems to me that in a refugee reunion case the weight to be accorded to the financial impact on the public purse is diminished bearing in mind that under the Rules there are no maintenance requirement for family reunion. It is nonetheless the case that this particular Appellant is likely to struggle

to integrate into society because of her mental health difficulties. That, however, in the overall scheme of things is not sufficient justification in my judgment to deny entry clearance.

20. Having given consideration to all of the factors under 117B, and bearing in mind the position adopted before me today by the Respondent through the Presenting Officer, I take the view that clearly the exclusion of the Appellant in circumstances where her mother and sister succeed in their appeals is disproportionate.

Notice of Decision

21. The decision of the First-tier Tribunal involved a material error of law and is set aside.

22. I remake the decision in the appeal. The appeal of Sarah Faris Hasan Al-Mahdawi (OA/184348/2013) is allowed.

23. The decisions in respect of the other Appellants in the linked appeals (OA/18437/2013 and OA/18439/2013) necessarily remain as they were.

24. No anonymity order is sought or made.

The above represents a corrected transcript of an ex tempore judgement given after the hearing on 24 March 2015.

Signed Date: **27 April 2015**

Deputy Upper Tribunal Judge I A Lewis

TO THE RESPONDENT
FEE AWARD

The First-tier Tribunal Judge declined to make a fee award in respect of the successful Appellants before him. In the circumstances, and in the absence of any specific submission to the contrary, I follow suit in respect of the instant Appellant for the same reason that matters might reasonably have been put differently in the initial application.

Signed Date: **27 April 2015**

Deputy Upper Tribunal Judge I A Lewis