



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

Appeal Number: PA/05879/2018

THE IMMIGRATION ACTS

**Heard at Cardiff Civil Justice Centre
On 9 May 2019**

**Decision & Reasons
Promulgated
On 3 June 2019**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

**SQAA
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Profumo instructed by Migrant Legal Project (Cardiff)

For the Respondent: Mr C Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal is subject to an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the appellant or his children. Failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Iraq who was born on 14 July 1976. He is a Kurd and comes from Sulaymaniyeh in the IKR.
3. He arrived in the United Kingdom on 19 January 2013 as a student with a visa to undertake a PhD at Nottingham University funded by a scholarship from the Baghdad government. His wife and three children joined him in the UK in April 2013. His visa was subsequently extended until 30 January 2018 in order to allow him to complete his studies.
4. On 1 November 2017, the appellant claimed asylum based upon his political opinion as a result, he said, of threats due to his political social media posting against the government in the IKR.
5. On 24 April 2018, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under the ECHR.
6. The appellant appealed to the First-tier Tribunal. In a determination sent on 23 August 2018, Judge Lever dismissed the appellant's appeal on all grounds including under Art 8.
7. The appellant sought permission to appeal solely against the dismissal of his appeal under Art 8. Permission was initially refused by the First-tier Tribunal on 28 September 2018 but on 4 December 2018 the Upper Tribunal (UTJ Chalkley) granted the appellant permission to appeal.
8. On 29 February 2019, the appeal was initially listed before me as an error of law hearing. At that hearing, the Secretary of State conceded that Judge Lever had failed adequately to consider the appellant's Art 8 claim, in particular the impact of the appellant's removal upon his children specifically his twin boys ('A' and 'M') aged 7 who have been diagnosed with Autistic Spectrum Disorder ("ASD") and have special educational needs.
9. In a determination sent on 13 March 2019, in agreement with the Secretary of State's concession, I set aside Judge Lever's decision in relation to Art 8 directing that the decision be remade by the Upper Tribunal at a further hearing at which further evidence could be submitted in respect of the children's circumstances.

The Resumed Hearing

10. The appeal was listed before me on 9 May 2019. At that hearing, the appellant was represented by Ms L Profumo and the Secretary of State by Mr C Howells.
11. The sole issue was whether the appellant could establish a breach of Art 8.

12. Both representatives sought to admit new evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698 as amended). Both applications were unopposed.
13. On behalf of the appellant, Ms Profumo relied upon a report from the special needs school at which the appellant's twins A and M were now placed.
14. In addition, Ms Profumo relied upon in translation a letter from the appellant's former employer, Sulaymaniyeh University - where he had been a lecturer before coming to the UK - which indicated that due to his unauthorised absence from work following the completion of his period of study vacation, if he did not return within 30 days from being abroad, he would be considered as "resigning" from his position. That letter is dated 5 May 2018.
15. Mr Howells relied upon the *CPIN*, Iraq: Medical and Healthcare Issues (May 2019); and two news reports printed from the internet concerned, inter alia, with the provision for those with autism in the IKR.
16. I heard brief oral evidence from the appellant himself.
17. I heard oral submissions from both Ms Profumo and Mr Howells. Ms Profumo handed up a detailed and helpful skeleton argument setting out the appellant's case.

The Issues

18. It was common ground between the parties that the appellant could not succeed under the Immigration Rules (HC 395 as amended) either under Appendix FM or on the basis of his private life and para 276ADE. It was also accepted that none of the appellant's children - in addition to the twins he also has a daughter ("S") aged 13 - nor his wife could succeed under the Rules.
19. A number of matters were common ground between the parties.
20. First, the appellant's claim was a claim under Art 8 outside the Rules. Secondly, the appellant's claim was based upon his (and his family's) private life in the UK, in particular the impact upon his twin sons if he were removed to the IKR. The reality in this appeal is that either all the family stay in the UK or all the family leave and return to the IKR. Mr Howells did not suggest otherwise in his submissions. Thirdly, the crucial issue was that of proportionality under Art 8.2. It was not suggested, nor could it be on the basis of the evidence, that Art.8.1 was not engaged based upon the impact upon the family if they returned to the IKR. Both representatives agreed that the crucial issue in determining whether any interference was proportionate was whether there were sufficiently compelling circumstances which would result in "unjustifiably harsh consequences" for the appellant or his family (see, R (Agyarko and Another) v SSHD [2017] UKSC 11 at [60]).

The Submissions

21. On behalf of the Secretary of State, Mr Howells submitted that s.117B(1) and (5) of the Nationality, Immigration and Asylum Act 2002 (the “NIA Act 2002”) was important. As the appellant and his family could not meet any of the requirements of the Rules, the maintenance of effective immigration control was in the public interest by virtue of s.117B(1). Further, the private life of the appellant and his family had been established whilst their immigration status was “precarious” and, therefore, should be given “little weight” by virtue of s.117B(5).
22. Mr Howells recognised that the principal aspect of the appellant’s claim related to the impact of removal of his twins, A and M who have a diagnosis of ASD. Mr Howells accepted that the background evidence showed that there was “limited” support for autism in the IKR but, he submitted, there was some provision. He referred me to a number of documents.
23. First, he referred me to the “Cara Report: A Study of Education Opportunities for Disabled Children and Youth and Early Childhood Development (ECD) in Iraq (April 2011)” at pages CB 40–82 of the appellant’s bundle. At CB 73 he referred to a section relating to the IKR under the heading “schools” identifying a higher percentage of special needs teachers with formal special needs training showing the “growing effectiveness of the Kurdistan Inclusion Education Programme (KIEP)”. Then at CB 50, the KIEP programme is discussed including referring to the provision of an “early learning programme” for children with disabilities. Then at CB 65–66 further reference is made to special needs teachers, albeit on an Iraq wide basis rather than specifically in the IKR, but also notes that the KIEP nevertheless had opposition from “some members of the Erbil Provincial Counsel, who view KIEP as pushing a western ‘construct’.”
24. Secondly, Mr Howells referred to the very recent May 2019 *CPIN* report at para 15.1.1 referring to the existence of “private institutions” for individuals with autism and Downs Syndrome charging \$250 monthly. When I enquired of Mr Howell whether this related to the IKR or the remainder of Iraq, he was unable to assist.
25. Thirdly, he referred me to the two newspaper reports arising out of ‘World Autism Awareness Day’ in 2019 and the provision of “twenty autism-designed centers in the Kurdistan region, seventeen of which are private.” He accepted however that provision did not meet demand. Mr Howells was unable to assist as to whether these “autism-designed centers” provided education or, as would appear from the text, some form of “treatment” for children with autism.
26. Mr Howells submitted that the appellant could generate income in order to allow his twins to attend one of these autism-designed centers. He had been a lecturer in Sulaymaniyeh University and now had a PhD.

27. Mr Howells submitted that, despite what the appellant said in his evidence, it was likely that the children had, at least initially, spoken Kurdish before and not just, as the appellant claimed, and the recent report stated, they now spoke English.
28. Mr Howells submitted that, having regard to all these circumstances, there were no compelling circumstances giving rise to unjustifiably harsh consequences to the family, in particular the twin boys, A and M so as to outweigh the public interest.
29. Ms Profumo relied upon her very detailed skeleton argument. She submitted that the twin had initially been in a mainstream school but had even there they had required 1:1 support. It had been recommended that they should have special educational provision and that in September 2018, they had been placed in a specialist school. She referred me to a letter from the head teacher dated 3 April 2019 which indicated that the ratio was six pupils: three adults. But, she submitted it was clear that they still required 1:1 support on specific occasions.
30. Ms Profumo placed considerable reliance upon the report from the specialist school which showed that both A and M were progressing and thriving relative to their progress whilst they were in a mainstream school. She submitted that they were both in a highly supportive environment which would simply not be available in the IKR. She submitted that the background material showed that there was a dearth of special educational provision, albeit that there was some within the mainstream context. There was no evidence that there were any specialist schools of the kind which both A and M required and at which they were placed in the UK. She submitted that the twins could not cope with mainstream school in the UK and they would not be able to do so in the IKR. The evidence about private institution was that they were essentially treatment or support centres. Nothing in the material suggested that they were educational institutions such as the one attended by the twins in the UK. She pointed out that the evidence showed that there were 2,800 cases of children diagnosed with autism in the IKR. The second letter made plain that there was “not enough support centres or funding to care for them”. She submitted that the private provision was not, in itself, adequate for the children but in any event the appellant would not be able to afford to place his children there. It was expensive and his evidence, which he invited me to accept, was that he was unlikely to be able to obtain a job.
31. She relied not only upon the impact upon A and M but also upon the appellant’s daughter, S and his wife. They had been in the UK for over six years, the twins were 1 year old when they came and S was 7. The evidence was, she submitted, that the children spoke English, in particular in the report of the school which the twins now attended.
32. She submitted, relying upon matters set out in paras 9–20 of her skeleton in relation to A and M and in para 21 in relation to S and para 22 in relation to the appellant and his wife, that the appellant’s removal would not be in

the best interests of the three children and, particularly having regard to the impact upon A and M, there were sufficiently compelling circumstances to outweigh the public interest as there would be an unjustifiably harsh consequence to them if returned to the IKR.

Discussion

33. I deal first with the appellant's oral evidence. I accept what he told me. I have no doubt that he was seeking to tell me the truth. He, like his wife, was employed at Sulaymaniyeh University before they came to the UK. I accept his oral evidence supported by the letter dated 7 May 2018, that he has now been sacked. He told me in his oral evidence that two further letters had confirmed that he had been sacked but he had not produced them. Mr Howells did not seek to cross-examine him on this matter to suggest that he was not telling the truth and, as I say, I accept that he has lost his job. I also accept his evidence that his wife has lost her job as well. I accept further that it will be very difficult for them to obtain employment, certainly employment permitting them to afford any private support for their twins A and M, on return to the IKR. I also accept the appellant's evidence that his family in the IKR would not be able to provide the required finance for private support for the twins. I accept his evidence that his three brothers are unemployed, his parents are very old and his two sisters are married living with their husbands and family. None are employed and they are uneducated.
34. Ms Profumo helpfully set out the evidence concerning M and A at paras 9-16 of her skeleton argument. Mr Howells acknowledged her summary of their circumstances is accurate. They have both been diagnosed with ASD and suffer from sensory and developmental needs. The appellant's own evidence, which I accept, was that:
- "everything is difficult for them, eating, changing clothes, going to the toilet...if they meet strangers who do not understand how to deal with autism, they cry, they shout, sometimes they run away".
35. Both children have, until September of last year, been in a mainstream school. They have been assessed as requiring special educational needs, including 1:1 teacher support. The needs of M are more acute than those of his brother A. As I have said, Mr Howells acknowledged as accurate Ms Profumo's summary of M and A's circumstances set out at paras 11-14 of her skeleton argument. There, she very carefully, and in detail by reference to the documents upon which she places reliance, sets out their circumstances. I accept what she sets out and I gratefully adopt it (with removal of her emphasis and identifying information, and with some typographical/citation corrections) as part of my decision. (The reference to the "EHCP" reviews in relation to both M and A is to their respective "Education, Health & Care Plan" review in the appellant's bundle ("AB").)

- “11, The EHCP review of [M], dated 30 March 2017 [AB/127-137], who suffers from the most acute needs, identifies the following concerns:
- i. He shows no awareness or interest in other children and reciprocal activities [AB/A129&130].
 - ii. His speech is unclear and easier to understand by adults ‘tuned into him’ [A129].
 - iii. He continues to require 1:1 support to facilitate access to all areas of curriculum, as well as for health and safety [AB/A135].
 - iv. He requires help to dress and undress [AB/A131].
 - v. Continues to require close supervision and clear explicit boundaries to remain safe at all times [AB/A131].
 - vi. “As the gap between [M] and his peers widens, his reliance on an adult to access the curriculum at [...] is unlikely to reduce which will impact on [M’s] ability to develop greater independence” [AB/135].
 - vii. His progress has been minimal despite the high level of sustained support he receives [AB/A135].
 - viii. The school does not have the capacity to meet [M’s] needs appropriately or to provide the level of support he requires to increase to his time to a full-time place [AB/A132].
 - ix. [M] requires a specialist school setting, with smaller class sizes, a higher ratio of staff support, and a peer group with similar needs with whom he is best placed to access learning [AB/A135].
 - x. The benefits of a move to specialist school would be “greater focus on communication, interaction, and life skills”, and in the long-term greater independence on reduced reliance on an adult [AB/A135].
12. The parallel EHCP review of [A] [AB/A146-154] identifies the following concerns:
- i. He does not initiate or respond to peers [AB/A148].
 - ii. Even with his 1:1 support, it is difficult for him to remain seated for more than 2-3 minutes [A149].
 - iii. He will take every opportunity to test the boundaries [A150].
 - iv. He continues to need 1:1 full time support to engage in curriculum activities and for health and safety [AB/A152].
 - v. “As the gap between [A] and his peers widens, his reliance on an adult to access the curriculum at [...] is unlikely to reduce which will impact on [M’s] ability to develop greater independence” [AB/A153]
 - vi. The school does not have the capacity to meet [A’s] needs appropriately or to provide the level of support he requires to increase his time to a full-time place [AB/A151].

- vii. [A] requires a specialist school setting as [...] unable to provide an environment and curriculum conducive to his progress; he would benefit from smaller, specialist classes with peers with similar needs [AB/A153].
13. The twins were thereafter admitted to [...] Primary School, a mainstream school in Bristol, on 11 September 2017, where they are similarly supported with SEN [see letter from SENDco, Ms Williams, at AB/A126]. When the family relocated to Cardiff in February 2018, the local authority re-investigated the children's education needs, with the following observations:
- “these two boys are very complex and would not do well in a local mainstream school even with full time 1:1 teaching assistant support. They are both very limited verbally (echolalic and key words), PECS (Picture Exchange Communication System) users, can be very challenging and have a very limited sense of danger”.
- They are definitely special Autistic Spectrum Disorder profile pupils. Being without a school placement and daily routine will also be having a significant impact on their wellbeing” [see letter from Mr Martin, SEN caseworker, AB/125].
14. In view of such needs, Cardiff SEN Casework Team advised [t]hat the twins required specialist educational provision for those on the autism spectrum [AB/125]. This was corroborated by the proposed amended statements of special education needs (date June 2018), which advised:
- (a) [M]:
- (i) Unable to independently access any aspect of the curriculum [AB/A190].
 - (ii) Only able to concentrate on activities with a high degree of structure and support [AB/A190].
 - (iii) His speech is unclear and best understood by those families with him [AB/A190].
 - (iv) He doesn't initiate interaction with other children [AB/A190].
 - (v) He suffers from ASD and certain sensory needs, his special educational needs likely due to his communication and language difficulties [AB/A190].
 - (vi) He will require specialist education provision that provides a high level of individual/small group teaching, with a high adult-pupil ratio, and staff experienced/trained in managing the needs of children with autism spectrum condition and with appropriate interventions [AB/A191].
 - (vii) He should also have access to a clinical-based Speech & language Therapist [AB/A191].
 - (viii) He will require close supervision for his own safety, and help with his independence skills such as dressing [AB/A192].

- (ix) There should be close liaison between the school, home and outside agencies to ensure a consistent approach and regularly review [M's] progress [AB/A192].
- (b) [A]:
 - (i) He has limited speech, requiring adults to model short phrases and develop his language [AB/A199].
 - (ii) He suffers from ASD and his certain sensory needs, his special education needs likely due to his difficulties with his social communication and language [AB/199].
 - (iii) He will require specialist educational provision that provides a high level of individual/small group teaching, with a high adult-pupil ratio, and staff experienced/trained in managing the needs of children with autism spectrum condition and with appropriate interventions [AB/A200].
 - (iv) He should also have access to a clinical-based Speech & Language Therapist [AB/A200].
 - (v) He will require close supervision for his own safety with the school needing to complete a risk assessment [AB/A200].
 - (vi) There should be close liaison between the school, home and outside agencies to ensure a consistent approach and regularly review [A's] progress [AB/A201]."

36. Since September 2018, they have attended a specialist school in Cardiff and the position there is summarised at paras 15 and 16 of Ms Profumo's skeleton argument as follows.

"15. The twins accordingly started at the [...] Special School in September 2018, a specialist school for pupils with Autistic Spectrum Condition [AB/A125; A186]. further evidence has been submitted...of the twins' most recent annual review at their new school [SB]. [...], the head teacher, confirms both pupils receive their education in a small class setting, with a high adult-pupil ratio (1:2). She observes both children:

"have social communication and social interaction challenges and require 1:1 support at specific times of the school day in order to access the curriculum and to develop life skills required within their development stage" [SB].

16. The recent school reviews of both children [SB] confirm they have thrived within their specialist education settings as relative to their progress in the former mainstream schools:

- (a) [M]
 - (i) He has made good progress in engaging with activities.
 - (ii) He benefits from the structured play in the classroom environment and engages well with the individual/class schedules [page 8].

- (iii) He has made good progress with self-help skills, able to put his coat on and toilet independently.
- (iv) His numeracy and literacy skills have improved.
- (b) [A]:
 - (i) He has improved his communication skills, showing a clear understanding of spoken language and using increasingly varied spontaneous language [internal page 7/8].
 - (ii) He has made good progress with his early literacy and numeracy skills [page 9].
 - (v) He is able to complete a variety of tasks, within a “highly structured environment” [page 7].
 - (vi) His concentration is developing when engaged in independent learning [page 7].
 - (vii) His social and play skill are developing [page 8].
 - (viii) He is independent with toileting, though still requires supervision [page 9].
 - (ix) Whilst aware of certain sensory aspects, he remains unaware of the danger so his actions [10].”

37. I accept Ms Profumo’s submission that the position of M and A has improved at a specialist school for those with a diagnosis of ASD where they obtain a high level of support including where necessary 1:1 support. The level of support is patently high and the improvement is over, an already significant level of special needs provision, which they previously received whilst they were in a mainstream school.

38. It is clear to me on the evidence that the level of support that is required and which they receive in the UK will simply not be available in the IKR. Added to which, I accept the appellant’s evidence that they only speak English. The confusion of being in a situation where a foreign language (to them) is being spoken can only, on any reading of the material concerned with their particular circumstances, have a deleterious effect upon them.

39. Although Mr Howells sought to identify from the background material support that would be available to the twins in the IKR, he candidly accepted it was “limited”. The special needs support in mainstream schools is very limited indeed. Ms Profumo referred, as para 18 of her skeleton argument, to a CBS news report, albeit dated 10 August 2008, where it was said that “the problem for autistic children in Iraq...is that nothing is known about this condition”. It may be that the more recent material shows some improvement. Nevertheless, the USSD 2007 Report states that:

“There were reports that persons with disabilities experienced discrimination due to social stigma...local NGO’s reported many children with disabilities dropped out of public school due to insufficient physical access to school buildings, a lack of appropriate learning

materials in schools, and a shortage of teachers qualified to work with children of developmental or intellectual disabilities.”

40. Whilst the Cara Report recognises that there is some provision within schools in the IKR under the KIEP, it also recognises that there is resistance. The report refers to the

“Average special-needs teacher to special-needs pupil ratio was 1:8, although 14% of the schools visited with special-needs pupils had no special-needs teacher. The remaining 86% had at least one special-education teacher, the majority of whom are female. Most of the special-needs pupils were not integrated within the standard school rooms. Special-needs classes observed were held away from the main classes, and are often located in unsuitable areas within the school building, e.g. in a store room without windows and under a school stairwell. The curriculum being taught was the standard curriculum.”

41. This report does not relate exclusively to the IKR although the enquiry included visiting five primary schools in the Erbil governorate (see para 10.9 at CB 65 - 66). It is plain that the provision contemplated would fall far short of that provided to the twins whilst they were being educated in the mainstream in the UK. The latter, however, was insufficient to meet their needs such that they have now been placed in a special needs school where they are provided even more intense and focussed education and support. It is the latter which has resulted in their improvement which Ms Profumo recognised had occurred. They remain, however, desperately in need of that support in order to fulfil their educational and wellbeing needs given their ASD diagnosis.

42. The evidence relied upon by Mr Howells in the two newspaper reports provides little support for any educational provision sufficient to meet the twins needs. Seventeen of the autism designed centers are private. Only three in the IKR are state supported. There is a very real danger that the twins will not be able to access the state provision. I accept the appellant’s evidence that he would not be able to afford to send them to the private autism-designed centers whether the cost is US\$250 monthly per child or, as the appellant said, he believed, US\$500 monthly. The second news report makes the prospect of the twins obtaining the support provided by these centres most unlikely. It states:

“Nearly 1,000 children with autism live in Erbil province, but there is only one center for treatment. It currently cares for 32 children...”

43. In any event, it is wholly unclear from these news reports what is the actual provision to children who attend one of the autism-designed centers. The reports speak of “treatment” received at the centers. It is far from clear that they are the educational equivalent of what was being received by the twins in mainstream education in the UK, let alone in the specialist school that they now attend and in which they are, on all the evidence I have seen, thriving and doing much better in their development and education.

44. Although I do take into account the impact upon the appellant, his wife and 13 year old daughter if they were removed to the IKR, at least as regards the appellant and his wife, I agree that s.117B(5) means that “little weight” should be given to their private life. It may well be also that although S is 13 and has lived in the UK since she was 7, her best interests would be to live with her parents in IKR if they return there in that it would be reasonable to expect her to return with them (see, KO (Nigeria) and Another v SSHD [2018] UKSC 53 at [18]). That, however, cannot be said of M and A. It is clearly, in my judgment, in their best interest to remain in the UK given the deleterious effect upon them as a result of the removal of their education and other support for the ASD which would, in my judgment, in all likelihood occur if they return to the IKR. A and M were 1-year old when they came to the UK and they are now 7 years of age. Whilst their private life was also formed whilst their immigration status was “precarious”, their circumstances (particularly bearing in mind their diagnosis of ASD) falls, in my judgment, for the flexible application of s.117B(5) read with s.117A(2)(a) recognised by the Supreme Court in Rhuppiah v SSHD [2018] UKSC 58 at [49]. There are in my judgment, “particularly strong features” relating to their private life and their circumstances which justify giving due weight to the impact upon their private life if removed.
45. I am satisfied that the impact upon A and M if removed to the IKR would be substantial, significant and highly deleterious to their education and developmental progress as a result of their ASD. Their current progress would, in all likelihood, be ‘stopped in its tracks’ resulting in behavioural and other detriments to them which would, necessarily, have a considerable impact upon their family, in particular their parents who would be caring for them. In my judgment, that impact amounts to sufficiently compelling circumstances because of the unjustifiably harsh consequences removal would have for the family, but in particular for A and M in the IKR. As a result, I am satisfied that the circumstances I have set out above outweigh the public interest such that A and M’s removal would be a disproportionate interference with their private life. Their removal would breach Art 8 of the ECHR. As it has never been suggested that the appellant, his wife and S should leave the UK if A and M’s removal would breach Art 8, the reality is that all of the family cannot lawfully be removed from the UK in accordance with Art 8 of the ECHR.
46. I accordingly remake the decision and allow the appeal under Art 8 of the ECHR.

Decision

47. The decision of the First-tier Tribunal to dismiss the appellant’s appeal on international protection and humanitarian protection grounds stands.
48. The First-tier Tribunal’s decision to dismiss the appellant’s appeal under Art 8 was set aside in the Upper Tribunal’s decision sent on 13 March 2019.

49. I remake the decision allowing the appellant's appeal under Art 8 of the ECHR.

Signed

A handwritten signature in black ink, appearing to read "Andrew Grubb", written over a horizontal line.

A Grubb
Judge of the Upper Tribunal

29 May 2019