Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/11018/2018**

THE IMMIGRATION ACTS

Heard at Cardiff	**Decision & Reasons Promulgated**
On 5 December 2019	**On 9 December 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

PAYMAN JALAL MUSTAFA MUSTAFA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Joseph, instructed by Crowley and Co
For the Respondent: Mr Howells, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant was born on 1 December 1974 and is a female citizen of Iraq. Her ethnicity is Kurdish. Her home city in Iraq is Erbil, the *de facto* capital of the Independent Kurdish Region (IKR). By a decision promulgated on 15 September 2019, Deputy Upper Tribunal Judge Davey found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. The judge directed that there be a resumed hearing in the Upper Tribunal which took place at Cardiff on 5 December 2019. The only issue remaining to be determined is that concerning the appeal on Article 8 ECHR grounds. The Deputy Upper Tribunal Judge did not disturb the First-tier Tribunal's findings and the appellant's appeal on asylum and Article 3 ECHR grounds. The proceedings were anonymised in the First-tier Tribunal but not at the initial hearing in the Upper Tribunal. No application was made to me for anonymity nor can I identify any reason to anonymise the appeal.

2. The appellant applied for a visa to enter the United Kingdom in January 2017. That application was refused. In December 2017, the appellant travelled to France and Spain before returning to Iraq. She left Iraq on 20 February 2018 travelling to Turkey by taxi. She then travelled by lorry to the United Kingdom and entered the country clandestinely on 5 March 2018. She claimed asylum the following day. The appellant claims that she met Kefi Omar (the sponsor) in 2014. She married the sponsor on 16 October 2016. The sponsor is a naturalised British citizen of Iraqi origin. The couple live together in Cardiff where the sponsor has a grocery business.

3. I heard evidence from both the appellant and the sponsor. Both gave their evidence with the assistance of a Kurdish Sorani interpreter. The oral evidence of the sponsor was interrupted by the appellant who was in court having given her own evidence. The appellant appeared to prompt the sponsor to give a particular answer to a question put in cross examination and which concerned the level of contact which the sponsor maintains with his family members in Iraq. The intervention of the appellant was unacceptable but, for reasons which I give below, I accept that the sponsor and appellant are currently in a subsisting relationship.

4. The standard proof in the Article 8 appeal is the balance of probabilities. In her evidence, the appellant explained that she did not have contact with her own family in Iraq. She did not know how many employees worked for her husband's business. She did know that the business was doing well and that the sponsor has savings. In his evidence, the sponsor explained that he has two brothers and two sisters living in the IKR. He claims to have limited contact with those relatives. The sponsor stated that he runs a grocery shop and has two part-time workers. He has savings of between £4000-£5000.

5. Both the appellant and sponsor were asked in cross-examination why they would be unable to live together in the IKR. The appellant said that her husband had established his life here and that he had a business. He would be unable to establish a business in Iraq. The sponsor gave similar evidence; he was reluctant to give up his business and start again elsewhere.

6. I accept that the sponsor and appellant are living together as husband and wife in a subsisting relationship. There is documentary evidence that they are jointly responsible for household utilities and no issue been taken with the validity of the marriage certificate produced. The evidence which each gave about their daily lives was broadly consistent. The fact that they are seeking treatment for infertility also strongly suggests the existence of a genuine relationship.

7. Subject that finding, I have considered whether the appellant is able to satisfy any of the requirements required under HC 395 (as amended). Mr Joseph, who appeared for the appellant, submitted that the appellant should be considered under Appendix FM for leave to remain as a partner. It is not disputed that the sponsor has an income which meets the financial requirements nor, in his submission, should the appellant be excluded by the provisions of E-LTRP 2.1 or 2.2:

E-LTRP.2.1. The applicant must not be in the UK-

(a) as a visitor; or

(b) with valid leave granted for a period of 6 months or less, unless that leave is as a

fiancé(e) or proposed civil partner, or was granted pending the outcome of family

court or divorce proceedings

E-LTRP.2.2. The applicant must not be in the UK –

(a) on temporary admission or temporary release, unless paragraph EX.1. applies; or

(b) in breach of immigration laws (disregarding any period of overstaying for a period of 28 days

or less), unless paragraph EX.1. applies.

8. Paragraph 6 of HC 395 (as amended) interprets 'in breach of immigration laws' as meaning 'without valid leave where such leave is required, or in breach of the conditions of leave.' It does not appear that the appellant falls within that provision given that she arrived as an asylum seeker and claimed asylum on the day following her arrival. Since that time, she has either been in the United Kingdom pursuing her claim or an appeal against the refusal to grant her international protection. However, the appellant must also satisfy Appendix FM as regards her suitability for leave to remain (Section S-LTR). Subsection 1.6 provides that, if the presence of the appellant in the UK is not conducive to the public good because of her conduct, character, associations or other reasons it shall be deemed undesirable to allow the appellant to remain. Mr Howells, who appeared for the Secretary of State, submitted that the appellant's arrival in the United Kingdom clandestinely would lead to her exclusion under that provision. I agree. The appellant has been shown by the failure of her appeal in the First-tier Tribunal to have invented a claim under Article 3 ECHR. She entered the United Kingdom, therefore, without bringing her entry to the attention of the authorities so that she might reside here with the husband. I find that it is clear that she has thereby sought to improve the prospects of her claim and appeal brought on Article 8 grounds as a consequence of living here with the sponsor rather than in Iraq. She did so because she had failed in her legitimate attempt to obtain entry clearance from abroad. I find that appellant immigration history is such that she does fall be refused on grounds of suitability within the comprehensive provisions relating to 'conduct' under S-lTR 1.6.

9. As a consequence of that finding, the appellant has to satisfy the provisions of EX1 and 2:

EX.1. This paragraph applies if

(a)

(i) …

…

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, 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.

10. Mr Joseph acknowledged that the decision of the Upper Tribunal in *AAH (Iraqi Kurds - internal relocation)* Iraq CG UKUT 00212 (IAC) indicates that cultural norms within the IKR would mean that family support would be forthcoming if the appellant and sponsor had to move back to Erbil. That would be the case notwithstanding the appellant and sponsor's evidence that their family members would be unlikely to assist. Mr Howells submitted that the sponsor has modest savings which would enable him to set up business in Iraq and that the sponsor had shown considerable entrepreneurial flair in establishing and maintaining a successful business in Cardiff. I agree. I have no doubt that the appellant and sponsor would wish to remain in Cardiff and to continue to build their business here. I am aware also that the couple are seeking treatment here for infertility. However, there is no obvious impediment to their return to the IKR; the sponsor did not argue that he had any reason to fear returning to that region whilst the appellant's claim that her family in the IKR might seek to harm her has been rejected by the First-tier Tribunal. Mere preference coupled with inconvenience cannot bring the couple within the requirements for there to exist insurmountable obstacles presenting very significant difficulties preventing them continuing their family life together in Iraq. There is simply no evidence to show that their return to Iraq would cause this couple very serious or, indeed, any significant hardship.

11. Having regard to all the evidence and my findings set out above, I find that the appellant is unable to satisfy the requirements of EX1. Moreover, I cannot identify any compelling circumstances in this case which fall outside the provisions of Appendix FM. I find that this is a case where the failure of the appellant to meet the requirements of the Immigration Rules must mean, absent any other compelling circumstances, that her appeal on human rights grounds should be dismissed.

Notice of Decision

The appellant's appeal against the decision of the Secretary of State dated 31 August 2018 is dismissed.

Signed Date: 5 December 2019

Upper Tribunal Judge Lane