Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/16856/2012
IA/16864/2012
IA/16867/2012
IA/16873/2012
IA/16875/2012
IA/16878/2012

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 10 June 2013	**On 3 July 2013**
	.....

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MOHAMMAD E J J ALBANNAI (FIRST RESPONDENT)
SARAH S M S ALHARBI (SECOND RESPONDENT)
ALI M E J ALBANNAI (THIRD RESPONDENT)
KHALID M E J ALBANNAI (FOURTH RESPONDENT)
HUSSAIN M E J ALBANNAI (FIFTH RESPONDENT)
NASSER M E J J ALBANNAI (SIXTH RESPONDENT)

Respondents

Representation:

For the Appellant: Mr K Hibbs, Home Office Presenting Officer
For the Respondents: Ms S Zorah of Law Clinic

DETERMINATION AND REASONS

1. The Secretary of State appeals against the decision of the First-tier Tribunal (Judge L Murray) which in a determination promulgated on 18 September 2012 dismissed the respondents' appeals under the Immigration Rules (HC 395 as amended) relating to Tier 1 (General) Migrants and their dependents but allowed their appeals under Art 8 of the ECHR.

2. For convenience, hereafter I will refer to the parties as they appeared before the First-tier Tribunal.

The Background

3. All the appellants are citizens of Kuwait. The first and second appellants are married and were born respectively on 6 January 1972 and 17 May 1972. The remaining four appellants are their children, Hussain, who was born on 29 July 1998, Khalid, who was born on 18 December 1999, Ali, who was born on 12 April 2002, and Nasser, who was born on 9 January 2005. All the appellants were born in Kuwait except for Nasser, who was born in the UK.

4. The first appellant (whom I shall refer to as the 'principal appellant') came to the United Kingdom in 1999 when he was stationed in Plymouth with the Kuwait Royal Navy. He undertook an undergraduate degree beginning in 2002 and was awarded a Bachelor of Engineering in Mechanical Engineering by the University of Bradford in July 2006. Although the principal appellant returned from time to time to Kuwait, he was based in the UK. His wife was based in Kuwait until 2002 when she came to the UK with their three oldest children. The principal appellant's evidence was that his wife and children remained in the UK with him between 2002 and 2005: their fourth son was born in the UK on 9 January 2005.

5. In 2005 the principal appellant and his family returned to Kuwait where, apart from visits to the UK, he and his family remained until 2009. The principal appellant then applied for entry clearance to come to the UK as a Tier 1 Migrant which he was granted and arrived on 14 April 2009. The remaining appellants were granted entry clearance as his dependants. That leave was valid until 10 March 2012. They came to the UK in August 2009 and, apart from a holiday in 2010 to Kuwait, they have remained in the UK since then. Between 2009 and 2011, the principal appellant studied for and obtained a Masters of Business Administration at Portsmouth University. The second appellant had a job with an oil company in Kuwait until December 2011 (when she lost because her passport is held by the UKBA) and she returned there – effectively 'commuted' – to work in Kuwait 3 days a week, spending the remaining time in the UK with her family. She lived in accommodation rented from her family whilst working in Kuwait.

6. On 24 February 2012, the principal appellant applied for further leave to remain as a Tier 1 (General) Migrant. The remaining appellants applied for further leave as his dependants. On 11 July 2012, the Secretary of State

refused to grant the principal appellant further leave on the basis that he did not meet the requirements of para 245CA of the Rules. In particular, the Secretary of State was not satisfied that he could meet the maintenance requirements in Appendix C or could establish the required income on the basis of his self-employment. The remaining appellants' applications were dismissed in line with that of the principal appellant. The Secretary of State also made decisions to remove the appellants by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006.

7. The appellants appealed to the First-tier Tribunal. Before Judge Murray, the principal appellant produced documents relating to his financial position which demonstrated that, in fact, he met the requirements of the Rules. However, applying s.85A of the Nationality, Immigration and Asylum Act 2002 Judge Murray found that those documents were not admissible at the appeal hearing as they had not been provided to the Secretary of State with the application. Consequently, she dismissed the appellants' appeal under the Immigration Rules.

8. Judge Murray went on to find that the Secretary of State's decision to remove the appellants was a disproportionate interference with their private life in the UK. Having cited a number of cases, at para 42 of her determination Judge Murray concluded as follows:

> "42. The Appellant has clearly built up a successful self-employed business in the UK and his children have already started to put down roots. The nature of the non-compliance with the Rules was slight in that he failed to submit all the required evidence at the point of the application. The evidence now produced shows that he met the Rules at the date of the application. He is clearly in a position to maintain himself and his family. In view of the minor nature of the non-compliance therefore and the severe disruption that would be caused to the Appellant's business and children's education if his family would be required to return to Kuwait I conclude that the decision to refuse further leave to remain in disproportionate."

9. The Secretary of State was granted permission to appeal against that decision by the First-tier Tribunal (DJ Barton) on 4 October 2012 because the judge had arguably wrongly approached the issue of proportionality on the basis that the principal appellant's failure to comply with the Immigration Rules was a "near miss"; an approach which had been disapproved by the Court of Appeal in Miah and Others v SSHD [2012] EWCA Civ 261. In a response to the notice of appeal under rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) the appellants sought to argue that Judge Murray's decision should stand on the basis that she had not applied the "near miss" as in these appeals, unlike in Miah, the appellants could show that they met the substantive requirements of the Immigration Rules at the date of decision.

10. Thus, the appeal came before me. I deal first with the issue of error of law.

Error of Law

11. On behalf of the Secretary of State, Mr Hibbs submitted that it was clear that in para 42 of her determination Judge Murray had allowed the appeal under Art 8 on the basis that the principal appellant had shown (on the evidence now placed before the Judge) that he met the requirements of the Rules at the date of application/decision and that the nature of his non-compliance with the Rules was "slight". Mr Hibbs relied upon the Court of Appeal decisions in Miah and Alam and Others v SSHD [2012] EWCA Civ 960 and, in particular, [24] and [47] of that latter decision. He submitted that Miah was not distinguishable as being a case where the individual had not shown by the evidence produced before the judge that he met the requirements of the Rules at the date of decision. It applied nevertheless and Mr Hibbs relied on Alam where, at [47], the Court of Appeal concluded that there was no difference between a "near miss" case and one which was a "no miss" case by the time of the appeal.

12. Ms Zorah on behalf of the appellants, although seeking to argue otherwise initially, accepted the effect of Alam. However, she submitted that Judge Murray had not based her decision that the removal of the appellants would be disproportionate simply on the basis that the principal appellant could now show that he met the Rules at the date of application/decision. She pointed out that the judge set out at some length at paras 34 *et seq* Razgar [2004] UKHL 27 and had not failed to look at the issue of proportionality independently on the basis of the interference with the private and family life of the appellants. The judge dealt with, she submitted, the position of the children at para 16 and of the principal appellant's business at para 33.

13. Before turning to these submissions, it was accepted by Mr Hibbs that the Secretary of State's decision under s.47 of the 2006 Act was unlawful. That decision could not be made contemporaneously with the decision to refuse to extend leave. That is undoubtedly correct as the Court of Appeal has recently made clear in SSHD v Ahmadi [2013] EWCA Civ 512. Consequently, the s.47 decision was not in accordance with the law and cannot stand.

14. Turning now to the issue of proportionality, in Miah, the Court of Appeal concluded at [26] that:

> "There is no Near Miss principle applicable to the Immigration Rules. The Secretary of State, and on appeal the Tribunal, must assess the strength of an Article 8 claim but the requirement of immigration control is not weakened by the degree of non-compliance with the Immigration Rules."

15. The "near miss" principle would, if permissible, permit a decision maker to take into account the degree of non-compliance with the Rules in assessing the proportionality of the decision. In Miah, the applicant had failed to establish, as required by the Rules, that he had been a work permit holder for five years. He fell some two months short of the required period. The Court of Appeal concluded that did not diminish the weight that had to be attached to the legitimate aim of effective immigration control as he had failed to meet the requirements of the Rules.

16. In Alam, the applicant had failed, on the evidence provided to the Secretary of State, to demonstrate that he had the necessary funds in his bank account to meet the maintenance requirements of the Rules as a Tier 4 Migrant. By the time of the Tribunal hearing however, the applicant provided the relevant bank statements which demonstrated that at the time of the application/decision he met the requirements of the Rules. His appeal was allowed on that basis under Art 8. On appeal the Upper Tribunal reversed that decision. The Court of Appeal agreed. The Court rejected the argument that Miah could be distinguished on the basis that it was a "near miss" case whilst the applicant in Alam was in fact a "no miss" case by the appeal stage. At [47] Sullivan LJ (with whom Moore-Bick LJJ and Maurice Kay LJJ agreed) rejected that argument. His Lordship stated that:

> "[The] submission that Mr Alam's was a "no miss" case ignores the fact that, under the PBS, one of the requirements of the Rules is that the specified documents must be submitted with the application. Prior to 23 May 2011 [that is the date on which s.85A of the 2002 Act came into force] a "miss" at the application stage because of a failure to submit the specified documents with the application could be converted into a "no miss" at the appeal stage, but as from 23 May 2011 this is no longer possible because the Tribunal is not entitled to consider the documents that were submitted with the application."

17. In this appeal, it is plain that in para 42 of her determination Judge Murray did fall into error in basing her decision on proportionality upon the "nature of the non-compliance with the Rules" which she described as "slight" as the evidence now showed that the principal applicant had, in fact, met the requirements of the Rules at the date of the application/decision. The reasoning in Alam applies here.

18. I do not accept Ms Zorah's submission that Judge Murray independently assessed the weight to be given to the appellants' private and family life in reaching her decision. There is only passing reference to the circumstances of the children at para 16 and little or no assessment of the impact upon the principal appellant and his family (particularly his children) if removed to Kuwait. There is no apparent consideration of the "best interests" of the children. Whilst it is undoubtedly the case that the judge correctly directed herself in terms of Razgar at para 34 and followed that through to the stage of proportionality, thereafter however, apart from para 42, the remaining paragraphs deal with "near miss" cases decided prior to Miah and which cannot stand in the light of Miah. The case of MB (Article 8 – near miss) Pakistan [2010] UKUT 282 (IAC) was specifically disapproved by the Court of Appeal in Miah at [20].

19. For these reasons, the judge erred in allowing the appellants' appeals under Art 8, in particular in her assessment that their removal would be disproportionate. For these reasons, the judge's decision to allow the appellants' appeals under Art 8 cannot stand and are set aside.

Remaking the Decision

1. *The Hearing*

20. At the conclusion of the submissions in relation to the error of law, I indicated that my decision was as I have set out above. At that point, Ms Zorah on behalf of the appellants indicated that she did not wish to call any of the appellants to give evidence and that I could proceed to determine the appeal on the basis of the submissions on the written material before me including witness statements. Not long into Ms Zorah's submissions it became clear that matters of the principal appellant's evidence were not necessarily contained in his witness statement or other documents and could only be properly before me if the principal appellant gave oral evidence. As a consequence, the principal appellant briefly gave oral evidence and was cross-examined by Mr Hibbs. In addition, Ms Zorah identified three bundles of documents (which we labelled 'A', 'B' and 'C') and Ms Zorah place reliance on some of the documents. Those bundles contain two witness statements from the principal appellant dated 23 August 2012 and 15 April 2013 together with a witness statement from his wife (the second appellant) dated 23 August 2012. In the course of cross-examination, the principal appellant withdrew his most recent statement dated 15 April 2013 because, he said, he had had no opportunity to review it following its preparation by his previous legal representatives and its content did not reflect his evidence. I was shown a complaint that has been made by the principal appellant in relation to the conduct of his previous representatives which, in part, deals with the preparation of the evidence. Mr Hibbs did not seek to make any submissions in relation to the principal appellant's evidence simply because of the withdrawal of his statement of 15 April 2013.

2. *The Submissions*

21. Ms Zorah accepted that the principal appellant and the remaining appellants could not satisfy the requirements of the new Art 8 rules in force since 9 July 2012, in particular para 276ADE and Appendix FM, section EX. As regards the latter, neither the principal appellant nor his wife could establish that any of their children were British citizens or that any of them had lived in the UK "continuously for at least seven years immediately preceding the date of application". Likewise, in relation to para 276ADE none of the children appellants could show that they had lived "continuously in the UK for at least seven years" and the principal appellant and his wife could not establish that they had "no ties (including social, cultural or family) with the country to which [they] would have to go if required to leave the UK".

22. Instead, Ms Zorah relied directly upon Art 8 of the ECHR. She submitted that the private life of the appellants was engaged. The principal appellant had established, on the documentary evidence, his self-employed business as a mechanical designer and also as an individual carrying out security or protection activities. She relied on the documentation showing that last year the principal appellant had a gross income of £47,234.82 made up of £33,526.57 (mechanical engineer) and £13,708.25 (close protection). She reminded me that the documents showed that the principal appellant paid income tax and his bank statements showed at all times a credit balance. The principal appellant (and his wife) also owned a house worth £265,000 upon which he had a

mortgage of £117,969. She submitted that the evidence was that if the principal appellant was removed to Kuwait, at least in respect of his close protection work, only one client was outside the UK. He would not be able to carry that work out abroad. She accepted that the principal appellant's evidence was that his mechanical design work, carried out through the internet, could be done from abroad. She submitted that the principal appellant had no property and no family in Kuwait although she acknowledged that his wife had both a mother and sister in Kuwait and was able to rent a property from her family when she stayed there. Ms Zorah relied not just on the principal appellant's residence in the UK since 2009 but also his previous residence between 1999 and 2005 when he had obtained his first a degree. She also relied upon the evidence concerning the second appellant (the principal appellant's wife) and her wish to improve her English and go on to university in the UK. The second appellant had previously worked for an oil company in Kuwait but she had lost that job in December 2011.

23. As regards the child appellants, Mr Zorah submitted that they were at a very significant age, particularly the oldest. He had lived in the UK between 2002 and 2005 and again from 2009 until the present. Collectively, Ms Zorah submitted that was seven years and that was half his lifetime. She reminded me that the youngest child had been born in the UK in 2005. The three oldest children (now aged 14, 13, and 11) have lived in the UK for a total of 7 years. The youngest child (now aged 8) has lived here for almost 4 years since 2009.

24. Ms Zorah referred me to the documents in bundle C concerning their activities in school. She submitted that the evidence was that when the eldest son returned to Kuwait in 2005 he had dropped to a lower class because of his level of Arabic. Ms Zorah reminded me of the principal appellant's evidence that although his two older children spoke Arabic it was not their first language, that was English. The younger two children did not speak Arabic. The evidence was that Arabic would be necessary for their education in Kuwait.

25. Ms Zorah relied upon s.55 of the Borders, Citizenship and Immigration Act 2009 and submitted that it was not in the best interests of the child appellants to return to Kuwait even if accompanied by their parents. She submitted that the removal of the appellants would amount to an interference with their private life in the UK and would be disproportionate.

26. Mr Hibbs, on behalf of the Secretary of State submitted that it was clear that none of the appellants could meet the requirements of the Immigration Rules. In particular, it could not be shown that any of the child appellants had been in the UK continuously for seven years. Mr Hibbs submitted that there was no expectation that a Tier 1 Migrant could remain in the UK unless he met the requirements of the Immigration Rules.

27. Further, Mr Hibbs submitted that the appellants' removals would be proportionate. The Rules were there to maintain a fair and effective immigration control. He submitted that the principal appellant's business could be run from anywhere in the world and he reminded me that the

principal appellant was registered as an international protection officer. He reminded me that the appellants would be removed as a family unit. As regards the education of the children, they had travelled to Kuwait and studied there for four years between 2005 and 2009. As regards any language issues, Mr Hibbs submitted that the children had previously attended an English school in Kuwait and there was no reason why they could not be taught in English. He submitted that given the history of the appellants' travel to and from Kuwait, they had retained links there. The principal appellant's wife had travelled there extensively. In those circumstances, he invited me to find that the appellants' removals would be proportionate and not a breach of Art 8.

3. *Discussion and Findings*

(a) The Rules

28. I can deal briefly with the Immigration Rules since it is accepted that none of the appellants can meet any of the relevant Rules. As regards para 276ADE which deals with the grant of leave on the basis of an individual's "private life in the UK", as each of the child appellants are under the age of 18, in order to succeed they must establish that they have: "lived continuously in the UK for at least seven years (discounting any period of imprisonment) ...". None of the appellants can demonstrate this. Although they have lived in the UK for a cumulative period in excess of seven years – between 2002 and 2005 (excluding the youngest child) and then again 2009 and 2013 – there is no "continuous" period of seven years.

29. The principal appellant and his wife are both over the age of 18 and are not under 25. As a consequence they must each show that they have:

> "lived continuously in the UK for less than twenty years (discounting any period of imprisonment) but has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK."

30. In relation to whether an individual can be said to have "ties" in his own country, the Upper Tribunal set out the correct approach in Ogundimu (Article 8 – new rules) Nigeria [2013] UKUT 00060 (IAC) at [123]-[125] as follows:

> "123. The natural and ordinary meaning of the word 'ties' imports, we think, a concept involving something more than merely remote and abstract links to the country of proposed deportation or removal. It involves there being a continued connection to life in that country; something that ties a claimant to his or her country of origin. If this were not the case then it would appear that a person's nationality of the country of proposed deportation could of itself lead to a failure to meet the requirements of the rule. This would render the application of the rule, given the context within which it operates, entirely meaningless.
>
> 124. We recognise that the text under the rules is an exacting one. Consideration of whether a person has 'no ties' to such country must

involve a rounded assessment of all the relevant circumstances and is not to be limited to 'social, cultural and family' circumstances. ...

125. Whilst each case turns on its own facts, circumstances relevant to the assessment of whether a person has ties to the country to which they would have to go if they were required to leave the United Kingdom must include, but are not limited to: the length of time a person has spent in the country to which he would have to go if he were required to leave the United Kingdom, the age that the person left that country, the exposure that person has had to the cultural norms of that country, whether that person speaks the language of the country, the extent of the family and friends that person has in the country to which he is being deported or removed and the quality of the relationships that person has with those friends and family members."

31. The evidence in these appeals, which I accept, of the principal appellant is that his wife has a mother and sister in Kuwait and that whilst his wife was working in Kuwait she lived in accommodation which she rented from her family. The principal appellant's evidence was that he had no family and no property in Kuwait. The whole family did, of course, live in Kuwait between 2005 and 2009. Both the principal appellant and his wife lived in Kuwait until 2002. His wife retained a job there and travelled back regularly – the evidence was for periods of three days a week – until she lost her job in December 2011. In other words, both the principal appellant and his wife lived in Kuwait for the first 30 years of their lives. Nothing in the evidence suggests that they are unable to speak Arabic.

32. Applying the approach in Ogundimu and taking a "rounded assessment of all the relevant circumstances", I am not satisfied that the principal appellant and his wife have "no ties (including social, cultural or family)" with their country of nationality Kuwait. That fact is, no doubt, the basis upon which Ms Zorah accepted that the principal appellant and his wife could not meet the requirements of para 276ADE.

(b) Article 8

33. As none of the appellants can succeed under the Immigration Rules, I turn now to consider the application of Art 8 of the ECHR in accordance with the approach set out in the leading decisions of the Upper Tribunal in MF (Article 8 – new rules) Nigeria [2012] UKUT 00393 (IAC); Izuazu (Article 8 – new rules) [2013] UKUT 00045 (IAC) and Green (Article 8 – new rules) [2013] UKUT 00254 (IAC).

34. In applying Art 8, I remind myself of the five stage approach set out by Lord Bingham of Cornhill in R (Razgar) v SSHD [2004] UKHL 27 at [17] as follows:

(1) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?

(2) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?

(3) If so, is such interference in accordance with the law?

(4) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?

(5) If so, is such interference proportionate for the legitimate public end sought to be achieved?"

35. It is for the appellants to establish on a balance of probabilities that Art 8.1 is engaged. Thereafter, it is for the Secretary of State to justify any interference with the appellants' Art 8 rights under Art 8.2.

36. The appellants clearly form a close-knit family. Nothing to the contrary was suggested before me. Family life exists between them. However, of course, it is intended that they should be removed together to Kuwait and so their family life can (and would) continue there.

37. As regards private life, I accept the evidence from the principal appellant concerning his self-employment in the UK as a mechanical designer and in the security and protection industry. I accept that he has maintained that work since his arrival in the UK in 2009. Prior to that, of course, he was stationed with the Kuwait Royal Navy and undertook an undergraduate degree at Bradford University. Between 2009 and 2011 he undertook a post-graduate degree at Portsmouth University. There is limited evidence before me concerning the wider private life of the appellants. I was not referred to any documents concerning the principal appellant's and his wife's private life. In her statement, the principal appellant's wife states that she and her husband have "settled into life in the UK" and that they have "built a life ... here". She also speaks of her hope to study English and to go on to the university and contribute to the British economy. By contrast, as regards the child appellants, there is an abundance of documentation in bundle C dealing with their schooling at pages 75-144. I have no doubt that, as with other children, they have formed a private life with their friends and others both in and out of school.

38. I accept that if the appellants are removed from the UK, the child appellants will lose those friendships and connections which they have formed since 2005 (at least in respect of the three older children) during their four years in the UK. The children are 14, 13, 11 and 8 respectively. The two oldest children were aged 11 and 10 when they arrived in the UK in August 2009 and have been in school thereafter, first in Portsmouth and latterly in Swindon. The oldest child is in year 10 and, therefore, he has begun his GCSE courses. The youngest child was only 4 at the time he came to the UK (he was of course born here in 2005 but moved back shortly thereafter to Kuwait) and he began attending reception classes in school year 2009/10. He is now in year 3 in the Swindon Academy School. The third oldest child is in year 6 also at the Swindon Academy School.

39. The principal appellant's education is, on the evidence before me, behind him. His own evidence was that he could carry on his mechanical engineering business from anywhere in the world but I accept that there would be some interference with his private life formed through his other business, namely the security and protection work.

40. I accept that it is established that the appellants' removal would interfere with their private life such as to engage Art 8.1. I did not understand Mr Hibbs to argue to the contrary.

41. Likewise, I accept that the Secretary of State's decisions were in accordance with the law. The crucial issue in this appeal, and the one that the submissions were wholly directed at, is that of proportionality.

42. In assessing proportionality, Lord Bingham in Razgar stated that (at [20]):

> "[It] involves the striking of a fair balance between the rights of the individual and the interests of the community, which is inherent in the whole of the Convention. The severity and consequences of the interference will call for careful assessment at this stage."

43. In assessing proportionality, a primary consideration is the "best interests" of the child appellants (see ZH (Tanzania) v SSHD [2011] UKSC 4 and s.55 of the Borders, Citizenship and Immigration Act 2009).

44. The principal appellant has lived in the UK for two periods of time. He first lived here between 1999 and 2005 having arrived as part of the Kuwait Royal Navy and undertook an undergraduate degree in mechanical engineering initially at the University of Portsmouth and subsequently at the University of Bradford. He returned to Kuwait in 2005 and again returned in 2009 as a Tier 1 Migrant. He also undertook between 2009 and 2011 a Masters of Business Administration at the University of Portsmouth. He has lived in the UK since 2009 where he has engaged meaningfully in self-employment as a mechanical engineer and in the security and protection industry. The most recent evidence of his income shows that he earned gross £47,234.82 in the tax year 2011 and 2012. The documents also show payments of tax to HMRCS in 2012 and 2013. His current bank account statements show that he is in credit. The evidence demonstrates that he and his family are self-sufficient. The family owns a house in Swindon which they bought for £265,000 with a current mortgage of around £118,000.

45. In Kuwait, the principal appellant has no property and no family. However, his wife has a mother and sister from whom she rented property when she stayed there in order to work.

46. The evidence is, and I accept it, that the principal appellant could carry out his mechanical engineering business anywhere in the world including, therefore, in Kuwait. He would, of course, lose his current clients in his protection and security business but he does have an international permit (so I was told and this was not disputed) and so there is a reasonable prospect that he could carry out some aspect of that work in Kuwait. It was not suggested before me that the principal appellant's wife would be unable to obtain work in Kuwait if she needed to. In any event, there is no reason to believe that the appellant could not continue to earn at least what he currently earns through his mechanical engineering business which was around £33,526 in the tax year 2011 and 2012.

47. Given this evidence, I am satisfied that the principal appellant would have adequate funds to support his family in Kuwait and that they would

have available accommodation either through the family of the principal appellant's wife or, and it was not suggested to me to the contrary, they would have available funds to obtain accommodation. I accept, of course, that the principal appellant sold his property in Kuwait in order to purchase the family home in Swindon. There is no reason to believe, however, that that process could not be reversed even if in the short-term other accommodation would have to be purchased.

48. The principal appellant and his wife would be returning to the country in which they spent the first 30 years of their lives. Although they have lived in the UK since 2009, they both lived in Kuwait between 2005 and 2009 most recently. Nothing in the evidence suggests that produced any hardship and that their choice to come to the UK was anything other than entirely economic. They both, of course, speak Arabic. If I were to look at the circumstances of the principal appellant and his wife alone it might well be difficult to conclude that their return to their home country would be disproportionate. Their circumstances must be taken into account but, in my judgment, the crucial issue in this appeal concerns the "best interests" of the child appellants and the proportionality of their removal to Kuwait even if accompanied by their parents.

49. The evidence before me supports a finding that all four children are flourishing in their educational environment in the UK. The material at pages 75-144 of bundle C is indicative of integrated children within the UK education system. No specific evidence was put before me concerning the impact upon any of the children if removed to Kuwait other than the principal appellant's evidence that when the eldest child returned to Kuwait in 2005, because of his poor or lack of Arabic, he was put in a class below that of his age. He is currently 14 and in year 11 which is the first year of the GCSE courses. The second child is 13 and is, so far as I can tell, two years below his elder brother. The third child is at the Swindon Academy School and is in the final year, namely year 6. The youngest child is in year 3 of the Swindon Academy School. Although the evidence was not entirely clear, it seems self-evident that both the two oldest children did attend school in the UK before 2005 and then attended school in Kuwait from 2005-2009. They have attended schools in the UK since 2009. The third brother spent two years in school in Kuwait between 2007 and 2009 and has for the last four years attended school in the UK. They are settled in education in the UK.

50. Although no background evidence was presented to me concerning the educational system in Kuwait, the principal appellant gave evidence on the impact upon the eldest child when he returned to Kuwait. That evidence was not challenged and I have no reason to doubt it. I accept the educational impact that faced the eldest child on return. In my view, it must also be the case that the two younger children will experience a similar "demotion" in school. They only speak English. It was also the principal appellant's evidence that the first language of the older children was English rather than Arabic. The fact that they have been educated in English and have lived in the UK for four years since August 2009 can only, as a matter of common sense, have affected adversely their ability to communicate and be taught through the medium of Arabic. Further, in the

case of the eldest child, his removal will come during the middle of his GCSE studies. He has currently undertaken almost all of the first year of those studies. It cannot, in my judgment, be in his best interests to interfere with his completion of his GCSE studies. Likewise, in relation to the two youngest children, their inability to speak Arabic will, at least for the time it takes them to acquire a facility in that language, seriously affect their education in Kuwait. Although Mr Hibbs submitted that they could be educated in English, the principal appellant's evidence was that even in the Kuwait English School, Arabic was necessary hence the "demotion" in classes of the eldest child when he returned in 2005.

51. In Azimi-Moayed and Others (decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC), the Chamber President (Blake J) summarised the case law of the Upper Tribunal in relation to the "best interest principle" as follows:

> "13. It is not the case that the best interests principle means that it is automatically in the interests of any child to be permitted to remain in the United Kingdom, irrespective of age, length of stay, family background or other circumstances. The case law of the Upper Tribunal has identified the following principles to assist in the determination of appeals where children are affected by the decisions:
>
> i) As a starting point it is in the best interests of children to be with both their parents and if both parents are being removed from the United Kingdom then the starting point suggests that so should dependent children who form part of their household unless there are reasons to the contrary.
>
> ii) It is generally in the interests of children to have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.
>
> iii) Lengthy residence in a country other than the state of origin can lead to development of social cultural and educational ties that it would be inappropriate to disrupt, in the absence of compelling reason to the contrary. What amounts to lengthy residence is not clear cut but past and present policies have identified seven years as a relevant period.
>
> iv) Apart from the terms of published policies and rules, the Tribunal notes that seven years from age four is likely to be more significant to a child than the first seven years of life. Very young children are focussed on their parents rather than their peers and are adaptable.
>
> v) Short periods of residence, particularly ones without leave or the reasonable expectation of leave to enter or remain, while claims are promptly considered, are unlikely to give rise to private life deserving of respect in the absence of exceptional factors. In any event, protection of the economic well being of society amply justifies removal in such cases."

52. I accept that the child appellants cannot show seven continuous years residence in the UK. They can only show four years continuous residence. However, apart from the youngest child, the appellants all previously lived in the UK between 2002 and 2005 when the principal appellant was stationed in the UK and studying. Each of the children has spent a substantial part of their lives in the UK. They have set down roots in the UK through their school and the community that it represents. All the

periods of residence of the appellants have been lawful. Of course, I accept that none of the appellants has an expectation of remaining in the UK. Nevertheless, it is the reality that with leave they have all set down roots in the UK, especially since 2005. I particularly bear in mind the ties that the four child appellants have formed in the UK through their education and the fact that the eldest child is half way through his GCSE courses. I remind myself that I find that it is not in the best interests of the child appellants, to the extent I have found above, to return to Kuwait because of the impact that will have upon their education.

53. In my judgment, to borrow the words used in Azimi-Moayed, the children have developed "social, cultural and educational ties" in the UK which it is not, in my view, appropriate to disrupt.

54. I remind myself that the children's best interests are a primary consideration but that those interests can be outweighed by the public interest if it is of sufficient strength (see, e.g. ZH at [26] *per* Lady Hale). I bear in the mind that the family's financial and personal circumstances in the UK and on return that I have set out above. I take into account the substantial time that the appellants (both adult and child) have spent in the UK both before 2005 and since 2009. The appellants' presence in the UK has always been lawful. Taking into account all the circumstances of all the appellants, and bearing in mind that the children's best interests are a primary consideration, balancing the impact upon the appellants (but particularly the child appellants) of their return to Kuwait against the legitimate aim of effective immigration control, I am satisfied that their Art 8 rights outweigh that legitimate aim and that the removal of the appellants (as a family) would not be proportionate.

55. For these reasons, I am satisfied that the respondent's decisions breach Art 8 of the ECHR.

Decision

56. The decision of the First-tier Tribunal to allow the appellants' appeals under Art 8 involved the making of an error of law. That decision is set aside.

57. The decision to dismiss the appeals under the Immigration Rules stands.

58. I remake the decision allowing the appellants' appeals against decisions refusing to vary their leave under Art 8 of the ECHR.

59. Further, the decisions to remove the appellants by way of directions under s.47 of the 2006 Act are not in accordance with the law.

Signed

A Grubb
Judge of the Upper Tribunal