Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/12401/2013
IA/12402/2013
IA/12403/2013
IA/12404/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Determination Promulgated**
On 2 January 2014	**On 21 January 2014**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

M S (FIRST RESPONDENT)
F F (SECOND RESPONDENT)
A S (THIRD RESPONDENT)
A H S (FOURTH RESPONDENT)
(ANONYMITY DIRECTION MADE)

Respondents

Representation:

For the Appellant: Mr I Richards, Home Office Presenting Officer
For the Respondents: Ms C Hulse, instructed by Albany Solicitors

DETERMINATION AND REASONS

1. These appeals are subject to an anonymity order made under Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 that no report or other publication of these

proceedings or any part or parts of them shall name or directly identify any of the respondents. This order is made as one of the respondents is a child. Reference to the respondents may be by use of their initials but not by name. Failure by any person, body or institution whether corporate or incorporate (for the avoidance of doubt to include either party to this appeal) to comply with this direction may lead to a contempt of court. This order shall continue in force until the Upper Tribunal (IAC) or an appropriate court lists or varies it.

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

Introduction

3. The appellants are all citizens of Iran. The first and second appellants are married and the third and fourth appellants are their daughter and son respectively. The first and second appellants were born in 1963. The third and fourth appellants were born respectively in 1993 and 1996 and are, therefore, now 20 and 17 respectively.

4. The first appellant entered the United Kingdom on 24 May 2008 with entry clearance until 16 April 2009 as a businessperson. He was accompanied by his wife and two children. On 14 December 2009, the first appellant was granted leave to remain until 14 December 2012 as a Tier 1 (Entrepreneur) under the Points-Based System in the Immigration Rules. On 10 December 2012, the first appellant applied for further leave as a Tier 1 (Entrepreneur) Migrant under para 245DD of the Immigration Rules. On 3 April 2013, the Secretary of State refused the appellant's application and made a decision to remove him by way of directions under s.47 of the Immigration, Asylum and Nationality Act 2006. At the same time, the Secretary of State refused the applications of the first appellant's family as his dependants under para 319H of the Rules. The latter applications necessarily failed as they were dependent upon the success of the application made by the first appellant.

5. The appellants appealed to the First-tier Tribunal. In a determination promulgated on 29 July 2013, Judge Archer allowed the first appellant's appeal and those of his family as his dependants. First, Judge Archer accepted that the first appellant met the maintenance requirements of Appendix C based upon the first appellant's overdraft facility. Secondly, Judge Archer found that the Secretary of State had unfairly failed to apply her "evidential flexibility policy" by not requesting from the first appellant further information in respect of documents which had been submitted without the required signature of the first appellant. Judge Archer allowed the first appellant's appeal (and that of his family) against the refusal to vary his leave to remain on the basis that the decision was not in accordance with the law. Finally, the judge allowed the appellant's appeal against the decision to remove him (and his family) under s.47 of the 2006 Act.

6. The Secretary of State sought, and was granted, permission to appeal by the First-tier Tribunal (Judge Landis) on 13 August 2013.

7. The appeal first came before me on 12 November 2013. In a decision dated 25 November 2013, I concluded that Judge Archer had erred in law in finding that the first appellant could succeed in establishing the maintenance requirement on the basis of his overdraft in the light of the Court of Appeal's decision in R (On the application of Adeyemi-Doro) v SSHD [2011] EWCA Civ 849. Further, I found that the Secretary of State's "evidential flexibility policy" in para 245AA did not apply. My full reasons are set out in my earlier decision which I do not repeat here. Consequently, I set aside the First-tier Tribunal's decision to allow the appellants' appeals as not being in accordance with the law. The decision to allow the appeal in respect of the decision under s.47 of the 2006 Act stood. However, as Judge Archer had not considered the appellants' claims under Art 8 of the ECHR, I adjourned the appeal in order for it to be relisted for a resumed hearing before me in order to remake the decisions in respect of Art 8 of the ECHR. The appeal was relisted for hearing on 2 January 2014.

The Hearing

8. Prior to the hearing, the appellants' legal representative sought an adjournment of the hearing in order that the first appellant's new Tier 1 (Entrepreneur) application, made on 23 December 2013, could be decided by the respondent. That application was, however, refused by a Judge of the Upper Tribunal on 30 December 2013 on the basis that the fresh application did not represent an obstacle to determining the appellants' Art 8 claims. Before me, Ms Hulse, who represented the appellants, did not renew the application for an adjournment.

9. Ms Hulse relied upon a statement by the first appellant (at pages 1-8 of the First-tier Tribunal bundle); a statement by the second appellant (at pages 314-318 of the FtT bundle) and a letter and personal statement made by the third appellant (at pages 323 and 324-5 of the FtT bundle). In addition, all four appellants briefly gave oral evidence before me.

10. Ms Hulse did not draw my attention, or seek to rely upon any other documents contained in the First-tier Tribunal bundle.

The Submissions

11. Ms Hulse relied only upon Art 8 of the ECHR. She submitted that the first appellant had not succeeded under the Immigration Rules through an error for which he was not responsible. He had not realised that his overdraft facility would not count to establish the necessary £2,700 to meet the maintenance requirements in Appendix C and the absence of his signature on the employee documents was not something that he had any reason to realise were crucial. She submitted that the first appellant and his family had made a "big decision" to leave Iran in 2008, selling their assets to invest in a business in the UK. Ms Hulse pointed out that it would be a negative moment, given the downturn in the world economy, for the first appellant to have to return to Iran. Ms Hulse relied upon the effect upon the third and fourth appellants if removed to Iran. She submitted that they had become integrated into the UK and

their private life was here. She invited me to allow the appeals on the basis that the family's removal would be a disproportionate interference with their private life.

12. Mr Richards, on behalf of the Secretary of State, accepted that there was little dispute as to the facts. The only possible exception to that, he submitted, related to the evidence from the first and second appellants about the difficulties the third and fourth appellant would face in accessing university education in Iran. He submitted that there was no objective evidence to support the claim of the first and second appellants that it would be difficult, perhaps impossible, for them to attend university in Iran.

13. Mr Richards submitted that the family would be returning together to Iran and that therefore there was no interference with their family life. However, he accepted that there clearly would be an interference with their private life if returned to Iran. He accepted that they had been in the UK for more than five years and that the first appellant had established a business in the UK and that all the appellants had formed friendships here and the third and fourth appellants had undergone, at least, part of their education in the UK. Mr Richards submitted that the appellants could not meet the requirements of the Immigration Rules which reflected the Secretary of State's view on the issue of proportionality under Art 8. Mr Richards submitted that in the light of this, and in the absence of exceptional matters, the respondent's decisions were proportionate balancing the appellants' interests against the public interest.

Discussion and Findings

14. It is not suggested on behalf of the appellants that they are able to meet the requirements of the Immigration Rules, in particular para 276ADE of the Immigration Rules, based upon their private life or Appendix FM, in particular EX.1 based upon there being a "genuine and subsisting parental relationship" with a child under 18 who had lived continuously in the UK for at least seven years.

15. Consequently, the appellants cannot succeed under the Immigration Rules. If they can succeed at all, it can only be on the basis of applying Art 8 outside or beyond the Rules.

16. In my judgment, the case law establishes that an individual may succeed in establishing a breach of Art 8, despite not succeeding under the so-called "new Article 8 Rules", where there are "sufficiently compelling" circumstances to outweigh the public interest (see, MF (Nigeria) v SSHD [2013] EWCA Civ 1192 at [41]-[46] and case law there cited).

17. I turn, therefore, to Art 8. In doing so, I apply the five-stage test set out in Razgar [2004] UKHL 27 at [17]:

> "(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 wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights or freedoms of others?

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

18. In applying Art 8, the burden of proof is upon the appellants to establish that Art 8.1 is engaged. It is for the respondent to justify any interference with the appellants' private and family life under Art 8.2.

19. As Mr Richards helpfully accepted, the facts in these appeals are (with one exception) not in dispute. Likewise, Mr Richards accepted that the appellants' removal would breach their private life in the UK but not their family life in the UK as they would be removed together. I did not understand Ms Hulse to rely on the appellants' family life in the UK and, in my judgment, she was correct not to do so. They would all be returned together to Iran and there would be no interference with their family life. However, there would be an interference with their private life such that Art 8.1 is engaged. Likewise, it is not in dispute that the appellants' removal would be for a legitimate aim, namely the economic well-being of the country, sometimes reflected in the public interest in effective immigration control. The crucial issue in this appeal is whether the appellants' removal would be proportionate.

20. The issue of proportionality involves striking a "fair balance" between the rights of the appellants and the public interest. In assessing proportionality, the "best interests" of any children (here only the fourth appellant) must be a "primary consideration" (see ZH (Tanzania) v SSHD [2011] UKSC 4 and s.55 of the Borders, Citizenship and Immigration Act 2009). Whilst the best interests of a child are not necessarily determinative, a child's best interests are a weighty consideration, albeit one that can be outweighed by sufficient weight of public interest concerns (see ZH (Tanzania) *per* Lady Hale at [33]).

21. The appellants came to the UK in May 2008. The first appellant (and his family as his dependants) have, throughout their time in the UK been here lawfully with leave on the basis of the first appellant's business activity. They have now been in the UK for five years and seven months. When they came to the UK, the third and fourth appellants were 15 and 12 years of age respectively.

22. I accept the evidence of each of the appellants concerning their integration in the UK. The first appellant has invested a significant amount of capital in the UK. In his witness statement he says that he has invested more than £200,000 in his business and more than £300,000 in property development. Further, he has bought a house in

the UK for which he paid a deposit of over £100,000. The first appellant says that he brought with him all of his 30 years' life savings to invest and that he and his family came to the UK with the intention eventually to settle here. The evidence shows that the first appellant has set up a business and initially created two jobs in the UK but, more recently, has employed a number of individuals.

23. The second appellant says that she studied English when she first came to the UK. I should say that she gave her evidence clearly in English before me. The evidence is that the second appellant helps her husband (the first appellant) with his business; she works part-time in a store in Cardiff and manages the family full-time.

24. In her oral evidence, the second appellant frankly accepted that they had come to the UK for a better future, particularly for their children. There were problems in Iran and they had left everything behind to take the opportunity to be in the UK. In her statement, the second appellant says that she has built up her life in the UK and now has all her close friends here. She also has a sister who lives in Cardiff with her husband and daughter.

25. The third appellant gave oral evidence. She explained that the hardest thing when they first came was the language. She did not speak any English when she went to school. It was quite clear from hearing the third appellant give her evidence that she now was fluent in English. She said that most of her friends were here and that she did not really have any friends in Iran. She explained to me that she had done some volunteering in Cardiff helping disabled children and older people. In her letter, the third appellant explains that soon after she arrived in the UK she began her GCSEs which she managed to pass. She then moved to a different school to study her A levels which she passed and was offered a place to study pharmacology at Bath University in September 2013. The third appellant, because of her immigration status, has not been able to take up that offer. She explained that she now wished to study dentistry and had been given an unconditional offer to study that at Plymouth University. She was also due to have an interview at Leeds University and was hoping for an offer but that Plymouth would be her first choice.

26. The fourth appellant gave oral evidence. He is currently studying for his A levels in PE, business and studying for the Welsh Baccalaureate. He has applied to a number of universities and is hoping to study business management at Essex University. He also has a number of other offers but he prefers the four year course at Essex which includes a year abroad. In his evidence, he explained that the family had returned to Iran for a couple of weeks two years ago and that he had visited family there, uncles and cousins, but he had no grandparents.

27. In their evidence, both the first and second appellant explained that they believed it would be difficult for their children to go to university in Iran. They would not be able to satisfy what both appellants described as, in effect, "behavioural" assessment because although they were Muslim they did not pray and, in relation to the third appellant, there were photographs on her Facebook page which, on enquiry, the

university would find and not like. In addition, the first appellant said that his son did not speak sufficient Farsi for university. That was a matter also referred to by the second appellant in her evidence.

28. The second appellant was asked about how easily her children could adapt to life in Iran. She said that her son knew nothing about Iran; he had only been there on holidays for two weeks. They were able to adapt very easily in the UK; learning English and coping with lessons and they were happy here. Although she accepted that the family spoke Farsi at home, she said that her son could not speak Farsi well enough. She said that she had to explain some words to him. She said that there was research carried out by universities about students' "behaviour" and this would be a problem for her children.

29. Taking all this evidence into account I make the following findings.

30. First, there is no doubt that the appellants have integrated into life in the UK; the first appellant in his business; the second appellant in her work and support for her family and friendships; and the third and fourth appellants in their education with the third appellant completing her GCSEs and A levels and the fourth appellant completing his GCSEs and currently undertaking A level courses. I accept that the four appellants have established a significant private life for the purposes of Art 8 of the ECHR in the UK which will be breached if removed.

31. Secondly, the first and second appellant gave evidence about the difficulties that would be faced by the third and fourth appellants if they were to seek to attend University in Iran. Whilst I have no doubt that there may be some difficulties, no supporting evidence was presented by the appellants to show, for example, that universities carried out systematic checks on potential students' behaviour and conformity to the required mores of Iranian society. It may be, however, that as a matter of common sense the fact that both the third and fourth appellant have received their secondary school education in the UK would not assist them in pursuing tertiary education in Iran. Although it was suggested in the evidence of the first and second appellants that their son (the fourth appellant) would not be sufficiently fluent in Farsi to undertake university education, I do not accept that that would present an insuperable difficulty. The second appellant accepted in her evidence that the family spoke Farsi at home although, she said, that she had to explain some words to the fourth appellant. There was no suggestion that the third appellant's Farsi was inadequate. It is clear that both the third and fourth appellants have acquired a high level of fluency in English during their time in the UK and I have no doubt that within a short time of being in Iran any lack of fluency in Farsi would disappear.

32. Thirdly, I accept that the first appellant (and indeed all the appellants), have been lawfully in the UK since 2008. Likewise, I accept that as a family they are self-sufficient because of the first appellant's business. There is no doubt, despite the fact that he could not meet the requirements of the Tier 1 (Entrepreneur) Rules, that he is

a genuine businessman and has invested considerable sums of his own money in the UK and now employs a number of people. There is no suggestion that the family has ever been reliant on any public funds or will be so in the foreseeable future.

33. Fourthly, nevertheless, the first appellant came to the UK on a temporary basis (with his family as dependants) and can have no expectation of remaining in the UK unless he could comply with the relevant Immigration Rules. I fully appreciate that the first appellant's failure to comply with the Immigration Rules might, to some extent, be described as a technical failure. Nevertheless even if it could be described as a "near-miss" that cannot assist the appellant in establishing that their removal would be disproportionate on the basis that the public interest is somehow diminished by the "near-miss". That was recently stated by the Supreme Court in Patel and Others v SSHD [2013] UKSC 72 (especially at [56] *per* Lord Carnwath; approving the Court of Appeal's decision in Miah v SSHD [2013] QB 35).

34. Fifthly, as I have already indicated, the "best interests" of children are a "primary" consideration. Only the fourth appellant is a child. He is currently 17 years of age. The third appellant is an adult. In approaching the best interests issue, the Upper Tribunal in Azimi-Moayed and Others (Decisions affecting children; onward appeals) [2013] UKUT 00197 (IAC) at [13] set out the general approach 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."

35. The starting point must, therefore, be that the best interests of the fourth appellant is to be with both his parents (and indeed his sister) who live as a family, whether that be in the UK or in Iran. The fourth appellant has lived in the UK since 2008, in other words for over five years, since he was 12. During that time he has undertaken secondary education, including taking and passing GCSEs. He is currently in the second year of his A level courses; he will take the examinations later this year. Although the fourth appellant has not lived in the UK for seven years, the five years that he has lived here have been significant ones in terms of his education and his social development. There is no doubt that he has strong educational ties and social and cultural ties in the UK. It would, undoubtedly, in my judgment, be very harsh indeed to disrupt his present education, namely his A level courses leading to examinations later this year. Even though I am satisfied that the fourth appellant could, in the fullness of time, live and develop in Iran, it would in my judgment be very harsh indeed to disrupt his education midway through his A level courses and uproot him and return him to Iran. He would lose the immediate benefit of his education so far and would fail to gain the benefits which (all being well) will follow when he completes and passes his A levels. It is not in his best interests to disrupt his secondary education at this stage.

36. Sixthly, were it not for the impact upon the fourth appellant's education, I would not be satisfied that the appellants' removal would be disproportionate. I do not accept that the impact upon the third appellant's future education, although not without difficulty, would in itself be sufficient to outweigh the public interest reflected in the fact that the appellants are unable to meet the requirements of the Immigration Rules, whether in respect of Tier 1 applicants or in respect of their private life under para 276ADE and Appendix FM (in particular EX.1).

37. However, the present circumstances of the appellants taken overall (and in particular those of the fourth appellant) takes these appeals outside of the norm dealt with by the Immigration Rules. In particular, the Rules do not deal specifically with the impact that a child (such as the fourth appellant) may experience as a result of a disruption to his secondary education when studying for qualifications such as GCSEs or A levels. Here, that disruption is in my judgment particularly damaging given that the fourth appellant is (just over) midway through his A level courses. Whilst there may not be any insurmountable obstacles to the appellants returning to Iran and, indeed, once the fourth appellant's school education is completed it may well be reasonable for them to do so, for the present the "best interests" of the fourth appellant point strongly in favour of him remaining in the UK to complete that education and that feature is, in my judgment, one which would make his removal "unjustifiably harsh" (see Gulshan (Article 8 – new Rules – correct approach) [2013] UKUT 00640 (IAC), particularly at [24] *per* Cranston J).

38. Consequently, for these reasons, I am satisfied that it would not be proportionate to remove the appellants from the UK. To give effect to my decision, it would be

appropriate to grant the appellants at least a period of leave enabling the fourth appellant to complete his secondary education in the UK. Thereafter, it will be for the Secretary of State to consider the appellants' circumstances and any future applications for leave to remain in the UK.

Decision

39. The First-tier Tribunal erred in law in allowing the appellants' appeals against the decisions refusing them further leave as being not in accordance with the law. Those decisions are set aside.

40. The First-tier Tribunal also erred in law in failing to consider the appellants' claims under Art 8 of the ECHR.

41. The First-tier Tribunal's decision to allow the appeals against the removal decision made under s.47 of the 2006 Act, as not being in accordance with the law, stands.

42. I remake the decision: (1) dismissing the appeals under the Immigration Rules; and (2) allowing the appellants' appeals under Art 8 on the limited basis set out in this determination.

Signed

A Grubb
Judge of the Upper Tribunal