

IAC-BFD- MD

**Upper Tribunal
(Immigration and Asylum
Chamber)**
AA/01591/2015



Appeal Number:

THE IMMIGRATION ACTS

**Heard at Bradford
On 6th October 2015**

**Decision & Reasons Promulgated
On 26th October 2015**

Before

UPPER TRIBUNAL JUDGE ROBERTS

Between

**MR HASHEM ESMAELZADH
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Karnik of Counsel, instructed by Ison Harrison Solicitors

For the Respondent: Mr M Diwnycz, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant a citizen of Iran born 20th March 1978, appeals, with permission, the decision of a First-tier Tribunal (Judge Caswell), which in a decision promulgated on 31st March 2015 dismissed his appeal against the Secretary of State's decision of 15th January 2015, to refuse to grant him asylum and leave to enter the UK.

Background

2. The Appellant first arrived in the UK in May 2001 and claimed asylum. His claim was refused and the subsequent appeal dismissed in 2002. The Appellant remained in the UK and on 14th December 2009 he was granted a certificate of approval to marry a British citizen, Ms Neal. They married on 20th March 2010. In 2010 and 2012, according to Mr Karnik in his permission grounds, the Appellant made further submissions under the Legacy and those further submissions have yet to be considered.
3. In 2013 the Appellant was told that his father in Iran had suffered a serious heart attack and was dangerously ill. He therefore decided to leave the UK to visit his father, but before leaving on 5th April 2013 he approached his MP and the Secretary of State for the Home Department, seeking permission to re-enter the UK. This was refused.
4. On 10th March 2014 the Appellant arrived at Heathrow and claimed asylum on arrival. On 15th January 2015 the Respondent refused the claim and made a removal decision. He appealed that decision to the First-tier Tribunal. The Appellant's case before the FtT can be summarised as follows. He remained living in the UK after his original asylum claim was refused. He became destitute and had to move in with a drug addict in order to have a roof over his head. He got involved with drugs himself and committed a number of offences. In 2002 he met his wife and they married in 2010.
5. The Appellant's wife is a British national. He made a family life with her in the UK and spent time with her adult children from her first marriage and with her grandchildren. After his most recent and most serious offence in 2010, the Appellant decided he wanted to get off drugs. He asked to be sent on a drug treatment programme, completed this and has been drug free for about the last five years.
6. After considering the Appellant's asylum claim, the FtT found it to be not a credible one. The Judge the Appellant was not a witness of truth and did not accept that he fled his country for the reasons, or in the circumstances, claimed. She also did not accept that he is of any adverse interest to the Iranian authorities on political grounds or otherwise.
7. Having found that the Appellant could not meet the requirements of the Refugee Convention, nor of Articles 2 and 3 of the ECHR, the Judge turned to Article 8 ECHR. She first considered whether the Appellant met the requirements of Appendix FM in terms of family/private life. At [48] she found, on the evidence before her, she could not be satisfied that the Appellant demonstrated he would meet all the eligibility criteria of Appendix FM. Nor was she satisfied that EX1 applied. She therefore dismissed the appeal on all grounds.
8. The grounds seeking permission, on a renewed application to the UT, submit in essence;
 - There were material errors in respect of the FtT's adverse credibility findings.

- There has been no clear finding at [48] of whether the Appellant meets the eligibility and suitability requirements of Appendix FM to the Rules.
- This impacts on whether EX.1 applies, which in turn impacts upon any Article 8 proportionality assessment.

UT Hearing

9. I heard submissions from both representatives. Mr Karnik kept very much to the lines of the grounds seeking permission and relied on paragraph 37 of the Respondent's Reasons for Refusal letter. He submitted that this showed that the Respondent had not properly included all relevant matters when considering whether the Appellant met Article 8 within the context of the Rules as she was obliged to do. The paragraph 37 consideration is a 'truncated' one and therefore defective.
10. This left the Judge, he said, in the position of being the primary decision maker, and led her in to error. The only way that EX.1 can properly be excluded, is if a fair and proper consideration of factors in Appendix FM has been carried out. This exercise has not been done here. The consequences flowing from that, impacted on the Article 8 ECHR assessment.
11. In support of this he referred to [48] of the Judge's decision which showed that she had not reached a 'settled' conclusion under the Rules. In the context of a removal decision such a conclusion was necessary. Neither the Secretary of State nor the Judge had reached a sustainable complete decision on that aspect of the case. The Judge gave no clear reasons why the Appellant is ineligible under the Rules and seemingly went on herself to accept at [52] that the Secretary of State had not given the matter full consideration either.
12. He concluded by submitting, that in the absence of clear decision making by the Respondent, the Judge was rightly reticent to trespass on the grounds of the primary decision maker. The only proper course and the one which the Judge should have undertaken, would be to return the matter to the Secretary of State for her to make a full and proper consideration of the Appellant's case.
13. Mr Diwnycz on behalf of the Respondent robustly defended the FtT's decision. He submitted that the Judge had extensively considered the Appellant's credibility, found that the Appellant had fabricated his asylum claim, considered the material changes in the Appellant's account of persecution in his second claim to asylum, but also found them devoid of credibility. The Judge had given proper and thorough reasons for finding as she did. She made a clear finding that the Appellant was able to return to Iran and reside there without any adverse interests from the authorities.
14. He said that in considering Article 8 pursuant to Appendix FM the Judge was not satisfied that the Appellant had demonstrated on balance that the

relationship between him and Ms Neal was genuine and subsisting and therefore she was not required to consider EX.1. In the alternative, the Judge had considered a freestanding Article 8 assessment and concluded that any interference with family or private life would be proportionate. The decision was well reasoned, bearing in mind the overall credibility findings.

15. In any event he said, the Judge had gone on to consider EX.1 but found that on the evidence before her the Appellant could not demonstrate there were insurmountable obstacles to family life, with Ms Neal, continuing in Iran.

Error of Law

16. I start my consideration by finding that so far as the Judge's decision relates to the Appellant's asylum claim, it is a well reasoned and careful one. In [44] the Judge sets out clearly her reasons for finding the Appellant not to be a witness of truth when analysing his reasons for leaving Iran. She found, further, that he is not of any adverse interest to the Iranian authorities, such as to bring him within Article 2 or 3 or the Refugee Convention. On a full reading of her decision, I find no reason to disturb those findings. Those reasons are properly evidenced and as the Judge granting permission neatly observed;

"The Judge's decision is clearly a detailed and thoughtful one the ground in respect of the adverse credibility findings seems doomed to failure in view of the careful and detailed conclusions reached on the evidence, including with reference to the previous determination ..."

17. Mr Karnik's main argument centres around a criticism of the Judge's fact finding (or more precisely it would seem a lack of fact finding) on whether the Appellant satisfies the eligibility criteria in Appendix FM. Only once that exercise happens can there be a proper and reasoned finding on whether EX.1 applies. If EX.1 applies then this can be factored into the Article 8 proportionality assessment.

18. The Respondent's reasons for refusal letter contains the following heading **Leave to Remain as a Partner under Immigration Rules**. Under that heading the Secretary of State acknowledges that the Appellant is married to Karen Neal a British citizen. The next two paragraphs then deal, as they say, with the Appellant's relationship with Karen Neal. It goes into detail about Karen Neal's children, who are adults in any event and then says;

"It is noted that you were out of the UK from ... a period of just over eleven months ... It is your account that you returned to the UK when you did because you were fleeing. You do not claim to have returned to the UK when you did so that you could be reunited with Karen.

It is therefore considered not unreasonable to refuse to grant you leave under E-LTRP 1.2 of appendix FM of the Immigration Rules. It is considered that you and your wife can continue your relationship in Iran or maintain it between the UK and Iran by means of modern communication, as you have shown yourself to be willing and able to do so."

19. It has always been the Appellant's case that he does fulfil the requirements of EX1 because he and Ms Neal have a genuine relationship and there are insurmountable obstacles to family life continuing outside the UK. It is that issue which is at the heart of this matter. However I see little or no merit in Mr Karnik's argument. I say this for the following reasons.
20. Mr Karnik made much of criticising the Judge for her analysis at [52] and [53]. What she said there when discussing the merits of appendix FM was the following;

"In any event, given my findings as to the Appellant's potential failures under the Suitability and Eligibility requirements, I am not satisfied that EX.1 applies. As indicated above, the appellant has not applied under Appendix FM and the matter has not received full consideration by the Respondent with all the evidence normally submitted on such an application.

I was not addressed by Mr Karnik on the 276ADE point and I accept the Respondent's submissions in this regard, that is he does not meet the private life provisions in the Rules. It follows that I find the Appellant ... cannot succeed on Article 8 grounds under the Rules."
21. I fail to see why Mr Karnik submits as he does that this shows the Judge is equivocating. It seems to me that what the Judge is saying, is that she is not satisfied that the evidence before her showed that the Appellant and Ms Neal are in a genuine and subsisting relationship. She has justified this conclusion by finding the Appellant did not submit the evidence which would normally be submitted on such an application. In other words the evidence falls short of that which the Respondent would expect to receive in any such application. It is a matter for the Appellant to produce the required evidence. The hearing before the FtT was his opportunity to put forward the best evidence he had. The Judge decided having considered all that evidence, there was a lacuna in the documentary evidence, and this meant she wasn't satisfied as to the genuineness of the relationship. There is nothing perverse in that finding. It was simply one which was open to her on the available evidence.
22. Having made that finding it is arguable that that was sufficient to dispose of the matter. The Judge decided for whatever reason to consider EX.1. Even so, she found that there were no insurmountable obstacles to family life between the Appellant and Ms Neal continuing in Iran. She considered the available evidence, which I am bound to say in my judgment, falls far short of what is required to establish insurmountable obstacles.
23. There is a second strand to Mr Karnik's criticism of the decision. He relies on 2 further factors. He argues that the Respondent's own evidence from FCO shows it would not be safe for Ms Neal to follow the Appellant to Iran and secondly the Judge made an unjustifiable finding at [51] where she says "*..... If she were joining him as his wife, presumably Ms Neal would be granted Iranian citizenship derived from her husband....*" Dealing with the second factor first, I agree with Mr Karnik that the presumption at [51] appears to be made without evidential foundation and is therefore an

error, but in the context of the Judge's other findings the error is immaterial. In addition a look at the COIR dated November 2014, and which was submitted in the Appellant's bundle paragraph 2.11 says under the heading MARRIAGE: "Foreign woman who marries an Iranian man is entitled to citizenship"

24. What the Judge says when discussing the FCO guidance at [51] (which it must be remembered is guidance to travellers) is the following;

"There is an absence of evidence before me as to the prevalence of British Iranians in Iran ... I was not addressed in any detail on the point and there was very little on it available to me. I did not find that the evidence of the conventional and limited help she (Ms Neal) gives her mother and daughter is so significant or necessary that it would form a good reason why she should remain in the UK, if her husband were to live elsewhere."

On that basis she found that she could not be satisfied that EX1 applied. I see no reason to disturb those findings.

25. I am satisfied therefore that the FtT's decision shows that proper consideration has been given, not only to the Appellant's asylum claim, but also to his article 8 claim through the prism of the Rules. The decision contains no error requiring it to be set aside.

Decision

26. For the foregoing reasons this appeal is dismissed.

No anonymity direction is made.

Signature

Mrs C Roberts

Judge of the Upper Tribunal

Dated

The appeal is dismissed, therefore there is no fee award made.

Signature

Mrs C Roberts

Judge of the Upper Tribunal

Dated