Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/10255/2014
IA/10256/2014
IA/10257/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 10 December 2014	**On 7 January 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MRS SINAVAR HASSANZADEH (1)
MS ATOUSADAT ALDAVOUD (2)
MASTER SAYED ALIREZA ALDAVOUD (3)
(ANONYMITY DIRECTION NOT MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr T D H Hodson, a legal representative from Elder Rahimi Solicitors
For the Respondent: Miss Everett, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I will refer to the appellants by their designation before the First-tier Tribunal notwithstanding that they are the respondents before the Upper Tribunal.

2. I will refer to the appellants collectively as "the appellants" but, insofar as it is relevant, individually, the first appellant as "Sinavar", the second appellant as "Atousadat" and the third appellant as "Sayed".

3. The appellants are all Iranian nationals. Their dates of birth are respectively 23 October 1969, 27 July 1995 and 12 November 2002.

4. The respondent appeals to the Upper Tribunal with permission from First-tier Tribunal Judge Foudy who found that an arguable error of law in that the reasons for finding the removal of the appellants would be unjustifiably harsh was inadequately reasoned and failed to address the issue of the appellants making further entry clearance applications. Those grounds are dated 29 September 2014. It does not appear that the appellant provided a Rule 24 response to those grounds. Notice of directions were sent out on 12 November 2014 for the parties to file an indexed and paginated bundle of documents for use at the hearing not later than 21 days before the hearing. Those directions also informed the parties that the Upper Tribunal would not consider evidence that was not before the First-tier Tribunal and unless notice was given in advance by the party wishing to rely on such evidence, indicating the nature of the evidence and explaining why it had not been produced before the lower Tribunal.

The Hearing

5. Miss Everett relied on the grounds of appeal and said that no adequate reason had been given by the Immigration Judge why the family could not return to Iran. It was not "fanciful" to suggest that they could do so, as the Immigration Judge appeared to suggest in paragraph 53 of his determination. On the contrary, the children had only been in the UK for three years and six months as at the date of the hearing before the First-tier Tribunal. The appellants are unable to meet the Immigration Rules and in view of that should go back to Iran and make a fresh application for settlement when and if they meet the requirements of the Immigration Rules.

6. It was then submitted on behalf of the appellant by reference to a substantial number of authorities contained in a bundle produced by him that "exceptional circumstances" was not the test for application of Article 8 outside the Immigration Rules. I was referred, in particular, to a case called **Oludoyi [2014] UKUT 00539 (IAC)**. He referred particularly to paragraph 41 of that decision. There, Deputy Upper Tribunal Judge Gill said that a decision maker has a considerable margin

within which to decide what weight to attach to any particular factor in the case before him. He ought not to be criticised on appeal unless the reasons he gave were "***Wednesbury*** unreasonable". The challenge to the decision of the First-tier Tribunal in this case amounted to a disagreement with the outcome rather than an allegation that it was ***Wednesbury*** unreasonable. Paragraph 38 of this determination made clear the factors that the Immigration Judge took into account, including the long residence in the UK. The main reason for finding in favour of the appellants was the undesirability of removing the children, the significance of the family life established here, and the fact that the appellants had been "model settlors". It seemed to Mr Hodson that the appellants had been caught out by the toughening of the Immigration Rules in 2012. He argued that the appellants had a legitimate expectation they would be allowed to stay. The "best interests" of the children were a primary consideration. In this connection I was referred to paragraph 44 of the case of **Hayat [2011] UKUT 00444 (IAC)** which reconsidered the **Chikwamba** principle. The issue there was whether it was necessary and proportionate to require the appellants to return to Iran and apply for entry clearance (see paragraph 44 of **Chikwamba**). The reason that the Immigration Judge found it inappropriate to require the appellant to return to Iran to apply for entry clearance was explained fully in his determination, for example, in paragraph 53. The Immigration Judge had looked at this issue adequately in his determination and it was unreasonable to expect the appellants to apply for entry clearance from abroad.

7. The respondent said by way of reply that **Chikwamba** was distinguished from the present case. In particular, the appellants do not meet the requirements of the Rules at all, whereas in **Chikwamba** they would have met the requirements of the Immigration Rules save that they were applying from the UK rather than abroad. Thus, the reasoning was inadequate. The sponsor had stayed in the UK voluntarily.

8. I allowed Mr Hodson to make an additional submission. He said that in the event of an error of law being found he would wish to make supplemental submissions whereas the respondent was content for the Tribunal to go on and re-decide the matter in the event that an error of law was found. I explained to Mr Hodson that this is an appeal and that the parties should make all their submissions at the hearing. I also stressed that it would be inappropriate to remit the matter to the First-tier Tribunal given that the Upper Tribunal was seized of the matter.

9. At the end of the hearing I reserved my decision as to whether or not there was a material error of law and if so what to do about it.

Discussion

10. The appellants are the wife and children of Mr Sayed Mojiaba Aldavoud (the sponsor). The appellants and the sponsor are Iranian nationals. The sponsor first came to the UK on 1 July 2003 and made an apparently spurious application for asylum. A subsequent appeal against the dismissal of that claim was also dismissed. He subsequently made a further claim for asylum which, according to him, was

never determined. I understand there are practical difficulties to the sponsor's return to Iran. However, it is not contended on behalf of the appellants that the sponsor would be persecuted if he now returned to Iran. In 2008 the sponsor's solicitors applied under the "legacy" scheme and after some delay the sponsor was given indefinite leave to remain (ILR) in the UK. He claims to run a business here selling Italian food products but at the date of the refusal (15 January 2014) it appears that the company in which the sponsor had an interest, was not showing any marked profit.

11. The first appellant, the sponsor's wife, came here in 2011 with their two children, Atousadat, born 27 July 1995, and Sayed, born 12 November 2002. They were given two years' leave to enter which expired on 24 June 2013. On 12 June 2013 the appellants applied for ILR.

12. Since the appellants entered the UK the Immigration Rules have been "toughened up" so that the maintenance requirements that must be met are more stringent. In order to qualify for ILR the appellants must satisfy the requirements of paragraph 287, in the case of the first appellant and, paragraph 300 with reference to paragraph 298(I) (a-d) of HC 395, as amended, in the case of the children.

13. At the date the applications were determined the first appellant and her children had only been in the UK for two years and seven months. At the date of the hearing before the Upper Tribunal it was three years eight months.

14. The family's financial means fell significantly below the minimum standard required by the Rules (£261.19 per week). This is only the equivalent of income support level for a British family of this size. The shortfall was a significant £111.18.

15. The respondent criticises the decision of the First-tier Tribunal to allow the appellants' appeal against the refusal of ILR because she says no adequate reasons were given why this family should not return to Iran. In particular, the sponsor was not a refugee and there were no insurmountable obstacles to the whole family returning there, alternatively, the appellants returning there and later applying for entry clearance if they met the requirements of the rules. Their relatively short period of residence in the UK did not justify the conclusion that insurmountable obstacles to their return there. In addition, their failure to meet the requirements of the Immigration Rules was an important consideration and before the Immigration Judge considered exceptionally granting them ILR outside the Rules he should have considered the possibility of their return to Iran from whence they could make a fresh application if and when the requirements of the Rules are met.

16. The appellants' answer to these points is to say that they are no more than a disagreement with the decision of the First-tier Tribunal. A margin of discretion is allowed to the Immigration Judge who is entitled to attach weight to those factors he perceives to be important. The respondent had the burden of showing that the decision was "***Wednesbury*** unreasonable" and provided the Immigration Judge did

not take into account irrelevant factors or ignore relevant factors his decision was uncontroversial and should be allowed to stand.

Conclusions

17. Helpfully, I have been provided with a bundle of recent Article 8 authorities by Mr Hodson, who appears for the appellants. Insofar as the case of **Oludoyi** suggests that the fact that an immigrant is entering the UK in a "shortage occupation" is a relevant factor in deciding whether they qualify for Article 8, I am not convinced that such conclusion is correct. If it is a relevant factor, it is a factor of minor significance. It is clear from all the recent authorities that the relevant starting position is to consider the Immigration Rules. Those considerations set out in the Rules are set out also in primary legislation as a result of the amendments to the Nationality, Immigration and Asylum Act 2002 introduced by Section 19 of the Immigration Act 2014. The public interest is now incorporated in primary legislation which includes considering the

> "interests of the economic wellbeing of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons –
>
> (a) are not a burden on the taxpayers …".

18. Unfortunately, the Immigration Judge failed to consider the significant shortfall in the maintenance requirement in this case and the fact that it was likely if this family settled in the UK that they would in fact become a burden on taxpayers. As the Immigration Judge acknowledged, in paragraph 52 of his determination, there was "no evidence" as to the performance of the company the sponsor had established. He attached excessive weight to the undesirability of the family relocating. He characterised this himself in paragraph 53 of his determination as "quite a serious matter". I do not read those words to be the same as "insurmountable obstacles". The Immigration Judge attached excessive weight to the fact that the children were "established in the English style of education". As he acknowledged in paragraph 51, they also spoke Farsi and had spent the bulk of their lives in Iran. The fact that the family "wished to remain" in the UK was an irrelevant matter. The fact that the family were integrated into English society, had taken steps to learn English and that the sponsor was doing his best to earn a living, were not factors to which such weight should be attached as to override the requirements of the Immigration Rules which were in place for a good reason. The family maintained close ties with Iran where the first appellant has her siblings living and with whom she maintains "some contact" (see paragraph 38 of the determination). As the respondent pointed out in her refusal, "British culture, society and way of life, does not automatically override or take precedence over Iran's culture or its society …" Indeed, it may well be that the appellants' knowledge of England and the English language may be an advantage to them on their return to Iran.

19. Therefore, whilst I accept that the Immigration Judge enjoyed a wide ambit of discretion within which reasonable disagreement was possible, the short period of residence in the UK by the appellants did not in any way justify the conclusion that it would "be unreasonable" to require the family to return to Iran. Their settlement has long term consequences for the wider interests of society with which the respondent is concerned. It is not simply a case of examining whether the parties are "model settlors", as the Immigration Judge appears to suggest in paragraph 53 of his determination. The respondent is entitled to have in place proper rules for controlling immigration which include meeting financial criteria. These plainly were not met by these appellants, indeed, by a significant margin. I am satisfied that the respondent fully took into account his international obligation incorporated into English law by Section 55 of the Borders, Citizenship and Immigration Act 2009 to treat the interests and welfare of the children as primary considerations. The children are not to be punished for the failure of their parents to regularise their immigration status. However, the appellants and the sponsor are foreign nationals who can safely return to Iran where all of them have spent the bulk of their lives.

20. I have considered the **Chikwamba** point but agree with the respondent that it is distinguished on its facts. The point that the House of Lords made in that case (that the degree of disruption to family life will be a highly material factor when the respondent insists the parties return to their home country to make a fresh application for entry clearance) was in the context of a case where one or more of the parties to return to Zimbabwe was unable to do so even if they were likely to meet the requirements of the Immigration Rules. Therefore, there was considerably more justification needed for that step to be required than in a case such as this in which the appellants fail to meet the requirements of the Immigration Rules at all, at least at the time of the refusal. There are good and substantial reasons for requiring these appellants to return to Iran and make a proper application for entry clearance supported by evidence of the ability of the sponsor to maintain and support them without recourse to public funds. I see nothing in the grant of a limited period of leave which gave rise to any "legitimate expectation" that the appellants would be allowed to remain in the UK permanently. I do not consider that it was enough merely to establish that the relationship between the first appellant and the sponsor was genuine and subsisting. The appellant and the sponsor have children together, including Atousadat, who is now an adult. The respondent was entitled to insist that they had the ability to maintain themselves to the minimum standards set by the Immigration Rules. Unfortunately, they did not meet those minimum requirements. It may well be that in future they do satisfy these requirements and a fresh application can be made.

Notice of Decision

The appeal by the respondent is allowed. The Upper Tribunal finds a material error of law in the decision of the First-tier Tribunal. Accordingly, that decision is set aside. The

decision of the respondent to refuse the appellants ILR was in accordance with the Immigration Rules and in accordance with the ECHR.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury