IAC-FH-AR-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/17984/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 3 June 2015	**On 19 June 2015**

Before

UPPER TRIBUNAL JUDGE ESHUN
UPPER TRIBUNAL JUDGE BLUM

Between

BARDIA VALI SHARIATPANAHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

ENTRY CLEARANCE OFFICER, ISTANBUL

Respondent

Representation:
For the Appellant: Mr A E D Ruano
For the Respondent: Mr P Duffy, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran born on 30 January 1997. He was 16 years of age at the date of the application on 14 June 2013 for entry clearance to settle in the UK as the child of a recognised refugee, his father, Mr Nader Vali Shariatpanahi. His father had arrived in the UK on 9 June 2009 and was recognised as a refugee and issued with an identity document on 25 November 2011.

2. The appellant appeals with permission against the determination of First-tier Tribunal Judge Nichols dismissing his appeal against the respondent's decision refusing him entry clearance on 30 August 2013 under paragraph 352D(iv) of the Immigration Rules and under Article 8 of the ECHR. The Entry Clearance Officer was not satisfied that the appellant had shown that he was part of the "family unit of the person granted asylum at the time the person granted asylum left the country of his habitual residence in order to seek asylum".

3. The judge took the appellant's case as set out in the letter sent on his behalf by his UK solicitors. It said that the appellant had been part of his father's family unit before his father left Iran. Since that time he had been living with his grandfather but due to age and infirmity his grandfather was no longer able to continue to look after him. Accompanying the application was a document dated 23 December 2012 and described in the translation as a "letter of confession", which stated that Mr Alimohammad Vali Shariatpanahi had deposed to a notary republic that he is the appellant's grandfather, that for fourteen years he had looked after the appellant but that due to age, financial problems and sickness he was not able to continue to do so. There was a further document dated 24 December 2012 which stated that Miss Sadaf Vasai had deposed to a notary public that she was the mother of the appellant. The appellant had gone to live with her but because of illness, she had had to give up her job and she requested that her son be returned to his grandfather's home as his grandfather continued to be his guardian.

4. The sponsor confirmed in oral evidence that he left Iran on 9 June 2009. He said that at the time he had been living with his son and also with his own father. He referred to his own flat that he had nearby, which he said was the one he had rented for the lady with whom he had formed a relationship and with whom he had left Iran. When he was asked about the finding by the First-tier Tribunal Judge in an appeal heard on 22 February 2010, where at paragraph 7.3 the judge recorded evidence that the sponsor had lived with the lady concerned in a flat that he had rented, the sponsor confirmed that this was true and accurate but he maintained that he was dividing his time between that flat and his father's property.

5. The sponsor had said in his statement dated 1 October 2014 that before his divorce in 2002, he and his ex-wife had lived in a flat above his father's flat. Although the formal divorce certificate gave custody of the appellant to his ex-wife, she had not taken the appellant to live with her, something the sponsor said he had not expected her to do. Now his father is 81 years of age, and suffering from Parkinson's disease and heart problems, it is difficult for him to look after the appellant. The sponsor was worried that the appellant's health would be at risk if he stayed in Iran, although he confirmed that the appellant does not suffer from any diseases or disabilities. The sponsor also confirmed that in addition to his father and the appellant, the property in Iran is also occupied by the sponsor's mother and his sister. His mother is 75 years old, although not in good health with back problems, thyroid problems and a nervous disorder like

epilepsy. His sister is a single woman without any children of her own and she does not have any responsibility for the appellant.

6. The judge correctly identified at paragraph 11 that the question before him was whether the appellant has shown that he was a part of his father's family unit at the time his father left Iran on 9 June 2009.

7. The judge at paragraph 13 said it was clear from the previous determination that the sponsor came to the UK in the company of a lady and her son, that they made a joint claim for asylum and that their appeal against an initial refusal was heard together. The judge assessed the case on the basis that they constituted a family unit together. The previous judge recorded evidence that the two adults had been living together in a flat rented by the sponsor prior to them leaving Iran. There was no mention in that determination nor in the evidence given by the sponsor in the appeal before him which showed that the appellant in this appeal had been a part of that arrangement.

8. The judge asked the sponsor where it was that the appellant kept his clothes and his personal possessions and the sponsor informed him that these were at the sponsor's father's property, as well as some kept in the rented flat. The document which was deposed out the notary public by the appellant's grandfather dated 23 December 2012, and referred to by the ECO, states that the appellant had been living with the grandfather for fourteen years up to that date, which would be from 1998. The sponsor said that he and his ex-wife had lived in the flat above his father's property. The judge found on the balance of probabilities that the evidence showed it was likely that the appellant's permanent base was at all times in his grandfather's property and that it could not be realistically said that he was a part of his father's family unit up to the point where his farther left Iran because that unit consisted of the father, the lady with whom he was having a relationship and her child.

9. The judge said as follows at paragraph 15:

> "The purpose of the family reunion provisions for refuges as set out in the Immigration Rules is to allow for the family that had lived together prior to the flight for asylum to be reunited. I find that in this appeal is it not shown to the required standard of probability that the appellant had formed part of his father's family unit up to the date his father left Iran. Accordingly, I agree with the ECO that the application does not show compliance with paragraph 352D(iv)."

10. This led Mr Ruano to submit in his grounds that a purposive interpretation of the Immigration Rules should be applied by the Tribunal, in view of the fact that the purpose of the Immigration Rules is to facilitate family unity, than otherwise rightly reflected by the Tribunal at paragraph 15. He submitted that an unduly restrictive interpretation of what amounts to being in the same family unit is inconsistent with the purpose of the Immigration Rules and therefore wrong and amounting to an error of law. There was no dispute as to the sponsor's and the appellant's living

arrangements where the Tribunal interpreted the fact that amounting to not living in the same family unit. He said that the sponsor and appellant had effectively two homes in which they both lived at the same time before the sponsor left Iran. Living in two homes, especially when they were so near to each other, was capable of being considered the same home, and was not inconsistent with being part of the same family unit.

11. In granting permission UTJ Lindsley said that the only issue in determining the appeal under paragraph 352D of the Immigration Rules was whether the appellant could show that he was part of his father's family unit at the time his father left for the UK. The FtT concluded that this was not the case at paragraphs 13 and 14 of the decision. She stated that this ground was the weaker of the two grounds. We agree.

12. We learned from Mr Ruano, who had represented the appellant below, that the leading case on this issue which is **BM and AL (352D(iv); meaning of "family unit") Colombia [2007] UKAIT 00055** was not put before the judge. The head note in BM and AL (Colombia) states:

> "What is a 'family unit' for the purposes of para 352D(iv) Immigration Rules is a question of fact. It is not limited to children who lived in the same household as the refugee. But if the child belonged to another family unit in the country of the refugee's habitual residence it will be hard to establish that that child was then part of two different 'family units' and should properly be separated from the 'family unit' that remains in the country of origin."

13. In light of **BM and AL** we find the judge's finding that the applicant and the sponsor needed to live in the same household in order to be part of a family unit was an error. The error however is not material. We find that Mr Ruano's argument that the sponsor had effectively two homes in which he and the appellant lived at the time before the sponsor left Iran was not supported by the evidence. The deposition by his grandfather, which was accepted by the judge, was that the appellant had lived with him for fourteen years, which the judge said would be from 1998. The evidence was that the grandfather's household included the appellant's grandmother and his paternal aunt. The sponsor's statement contained no information about his relationship with his son prior to his departure from Iran in June 2009 and since his departure. It does not appear from the determination that the sponsor was asked by his legal representative, in the absence of a Home Office Presenting Officer, about his relationship with his son before he left Iran and since. In his statement he said that he picked up his son from school because his mother was looking after his son after he divorced in 2002. There was no evidence of the appellant's relationship with his father's new family and whether he became part of that family unit. In the light of the evidence that was before him, we find that the judge's conclusions at paragraphs 13 and 14 disclose no error of law.

14. We now turn to the judge's consideration of the appellant's appeal under Article 8 at paragraphs 16 and 17 of the determination.

15. The judge held as follows:

> "16. In his submissions the appellant's representative went on to argue that it would be an unlawful interference with the Article 8 rights of the appellant and the sponsor if he was refused entry clearance to come to the UK. He pointed out that the appellant's mother was unwilling to provide care for him and he referred to the generally accepted principle that it is in the best interests of the child to be brought up by the parent. The judge found on the evidence that when the sponsor left Iran he chose to leave the appellant in the care of his grandfather, grandmother and aunt, which remains the situation ever since. It is now said that the sponsor's father is unable to continue to look after the appellant because of age and increasing infirmity. Notably, in the Visa Application Form no mention was made of the sponsor's mother or sister, who are also not included in the witness statement he filed for the hearing of the appeal but only emerged in the course of questions. The sponsor said his mother also suffers from poor health but no evidence has been produced to confirm that claim.
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> 17. I am not satisfied that there is any evidence which shows that the appellant is at any risk if he continues to live with his grandparents in Iran. He was 16 years of age at the date of application but was confirmed by the sponsor to be in good health. The sponsor said that he feared for his son's continuing health but gave no concrete reason why that should be at risk, or, certainly, any more risk than had been the case between 2009 and 2013. The sponsor did not give any evidence to suggest that the taking into account the generally accepted principle that a child is best brought up by the parents, that the appellant's mother has made a deposition that she does not wish to continue to care for him, thus negating the principle of a child being brought by both parents, and noting the equal benefits of stability in a young person's life, I am not satisfied that the decision of the ECO to refuse entry clearance on good grounds under the Immigration Rules creates an interference with Article 8 rights that would be unjustified and disproportionate having regard to the weight must be given to the control of immigration to the UK. In this respect I take into considerations the provisions of Section 117A and 117B Nationality, Immigration and Asylum Act 2002 which gives statutory confirmation to the public interest in controlling immigration to the UK. I balance all those factors and conclude that the appellant has not shown that the weight which should given to his best interests to be brought up by his father outweighs the public interest in the control of him. I find that the decision of the ECO was not unjustified and disproportionate interference with Article 8 rights."

16. The grant of permission said that it was arguable that the First-tier Tribunal erred in law in its consideration of the best interests of the child. This has arguably been interpreted by the FtT as requiring the sponsor to show "risk" to the child at paragraph 17 of the decision rather than as a positive enquiry into the holistic best interests of this child. Further it is arguable that the FtT did not make findings on material matters concerning the health of the appellant's grandparents (despite there being substantial evidence of the paternal grandfather's ill-health) and their ability to care for the appellant; and the willingness to provide care on the part of his paternal aunt and mother which would then have enabled a decision to be made on the best interests for the appellant given the option of his being granted permission to stay with his father in the UK.

17. We agree with Mr Duffy that the question of risk does not arise in the consideration of Article 8 appeals. Consequently the judge was wrong to use the word "risk". The "substantial" evidence of the grandfather's ill-health consisted of three documents at pages 16 to 18. The document at page 16 is dated 23 July 2014 when he was 81 years old and states "Who bone density classification: Osteopenia". The document at page 17, which said he was 78 years old, concludes "LLL bronciectasis with probably superimposed infection." The document at page 18 is dated "85/07/29" and states "there is cystic bronchiectasia in left lower lobe. The air fluid levels in the cysts is [sic] in favour of superimposed infection." We accept that the judge did not specifically mention these documents or make a finding on them. However, the judge did consider the submission that it was now being said that the sponsor's father was unable to continue to look after the appellant because of age and increasing infirmity. The judge made the point that it emerged in the course of questions that the appellant also lived with the sponsor's mother and sister in Iran. The judge noted that although it was said that the appellant's own mother suffers from poor health, no evidence was produced to confirm that claim. We also note that although the sponsor said that his mother, who was 75 years old, was not in good health, he did not produce any evidence to confirm this claim.

18. Mr. Ruano said that in his statement the sponsor said he had his own flat nearby and spent several nights each week in both. He also picked up his son from school. This evidence was before the judge and not rejected by him. Mr. Ruano argued that there was some sort of family life between the sponsor and the appellant. There probably was whilst the sponsor was in Iran but there was no evidence of the nature of their relationship since the sponsor left Iran. On the limited evidence that was before the judge, we find that his conclusions at paragraph 17 disclose no error of law.

19. The judge's decision dismissing the appellant's appeal shall stand.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

Signed Date

Upper Tribunal Judge Eshun