The Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/12829/2015

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 21st June 2017	**On 22nd June 2017**

Before

DEPUTY JUDGE OF THE UPPER TRIBUNAL FARRELLY

Between

O.H.R.
(ANONYMITY DIRECTION MADE)

Appellant

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

Representation:

For the Appellant: Mrs Cleghorn, Counsel, instructed by Duncan Lewis and Co Solicitors, Harrow.
For the Respondent: Mr Diwnycz, Home Office Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is a national of Iran born in April 1985. He is of Kurdish ethnicity. He claimed to have arrived here in 2007 and sought protection the following day. His claim included a fear of persecution by reason of imputed political opinion and his ethnicity.

2. His claim was refused and he became appeal rights exhausted. He subsequently made further representations to include sur place activity and an article 8 claim. His application was refused in October 2015. The respondent relied upon the earlier adjudications and it was not accepted he had any profile likely to place him at risk.

3. The appellant's article 8 claim centred on his relationship with a Ms M.M. She is originally from Somalia, having arrived here at the age of 16. She has been accepted as a refugee. She is now aged 24. They went through an Islamic marriage ceremony in December 2011. The respondent did not accept they were in a genuine and subsisting relationship. Even if the relationship with genuine the requirements of appendix FM were not met and EX1 did not apply on the basis there were no insurmountable obstacles to family life continuing, for instance, in Iran.

4. The appeal was heard by First-tier Judge Clarke and was dismissed in a decision promulgated on 8 December 2016. Regarding the claim to protection the judge had regard to the earlier decisions and found that the appellant had produced no new credible evidence that he was at risk.

5. Regarding family life, the judge accepted they began their relationship in early 2011 and there was a religious marriage ceremony in December 2011. The judge found their relationship with genuine and subsisting. Moreover, they now have a son born in September 2015. At the time of hearing the appellant partner was due to give birth.

6. The judge had regard to appendix FM and EX 1. The appellant’s child was confirmed as neither a British citizen nor, having been born in 2015, had he lived in the United Kingdom for the specified seven years. The judge then considered the alternative ground of whether there were insurmountable obstacles to family life with his partner continuing outside the United Kingdom. At paragraph 78 the judge referred to his partner coming to the United Kingdom at the age of 16 and being granted refugee status from the outset. She did not have contact with any of her family in Somalia. She was aware of the appellant's immigration status from the early days of their relationship. At paragraph 83 the judge took the view it was a matter for his partner to decide whether she would accompany the

appellant to Iran. As she and her son have both been granted permanent residency they cannot be forced to leave the United Kingdom.

7. The judge noted she had no experience of life in Iran. The judge pondered whether there were insurmountable obstacles to family life continuing and concluded this was not the case. The judge described her as having resilience and resourcefulness as evidenced by her ability to adapt to life here. The judge pointed out that they could go to Iran as a family unit and that she would be able to integrate into life there as she had done here.

8. Regarding private life and paragraph 276 ADE (1) (iii) the judge did not see very significant obstacles to the appellant's reintegration.

9. The judge went on to consider the appeal on freestanding article 8 basis. The judge referred to the section 55 duty in respect of the appellant's child. Reference was made to the provisions of section 117A and B of the 2002 Act. Following the sequential approach in Razgar the judge concluded that removal was proportionate.

The Upper Tribunal

10. The application for permission related solely to the article 8 claim and family life. Permission was granted on the basis it was arguable the judge failed to have adequate regard to the obstacles likely to be faced by the appellant's partner and their child in Iran. Furthermore, it was noted that at birth the second child would most likely be a British citizen.

11. The appellant's representatives have provided further updated information. The appellant's son born September 2015 has now been granted British nationality as confirmed by a certificate of registration dated 25 April 2017. His partner gave birth to a second child on 26 March 2017 and he has British nationality as evidenced by his passport.

12. At hearing, Mrs Cleghorn adopted her comprehensive grounds used for the application for permission to appeal. At the time of hearing the issue before the judge was whether there were insurmountable obstacles to family life continuing, for instance, in Iran. She submitted that the judge failed to adequately consider his partner's circumstances, namely, she was a black westernised female who had obtained refugee status in the United Kingdom. It was submitted that undue weight was given to the fact that she had successfully integrated into British society. This did not mean she could integrate into life in Iran. Reference was also made to the principle established in HJ Iran and the behavioural requirements

imposed in Iran. This was against the background of the appellant and the children facing difficulties because of his Kurdish ethnicity.

13. She pointed out that if an error of law was found and the decision remade then there has been a material change: the appellant's children have been confirmed as British citizens. In relation to appendix FM EX1 the test in relation to a British child is whether it would be reasonable to expect the child to leave the United Kingdom. In the case of a British partner the test is one of insurmountable obstacles which are considered to present a high threshold: much higher than in relation to a British child. The Zambrano principle was raised but Mrs Cleghorn acknowledged that the point would have more force if it were the child's mother who was being removed. She emphasised the situation in Iran in relation to religious observances and lifestyle, particularly for females.

14. By way of reply, Mr Diwnycz referred me to the rule 24 response. He acknowledged that the test had now changed in the event of a finding of an error of law because of the position of the British children involved. He also acknowledged that there was force in the HJ Iran point made by Mrs Cleghorn in relation to the appellant’s partner and her need to comply. He pointed out that there was no presenting officer in attendance at the First-tier Tribunal to assist the judge.

Consideration

15. Both sides have indicated agreement that the particular circumstances in Iran and the restrictions imposed on women was critical to the assessment of whether the obstacles faced to family life would be insurmountable. Not only are the country conditions relevant but the appellant’s partner’s background has to be factored in. She is a black woman from Somalia who came to the United Kingdom at the age of 16 and was granted refugee status. She is Muslim but has not followed the strict manifestation and upbringing that is the norm in Iran. It does not necessarily follow that because she has been able to adapt from living in Somalia to living in the United Kingdom that she could equally adapt to life in Iran. The United Kingdom is a multicultural society. She would face greater difficulties in Iran. She also would be responsible for the upbringing of two babies whilst your husband would have to try and secure employment.

16. Whilst insurmountable obstacles are a high threshold, in the factual matrix presented I find the First-tier Judge imposed too high a threshold. Consequently I found a material error of law in the decision.

17. The parties have not suggested that the appeal be remitted. It can be remade bearing in mind both children are British. The test then is whether it would be reasonable to expect the children to leave the United Kingdom. It is my conclusion it would be. Here, they have a secure family unit with all the support that Britain can give. The children are British and they and their mother are entitled to be here as of right. In Iran they would have to start afresh. Whilst the appellant's partner has been working here in a pizzeria and has sought to further her education it is likely that in Iran her husband would be expected to be the breadwinner. Without particular skills and being of Kurdish ethnicity he would face difficulties. In the circumstance therefore it is my conclusion it would not be reasonable to expect the children to leave.

Decision.

The decision of First-tier Judge Clarke dismissing the appeal materially errs in law.

I remake that decision, allowing it under the Immigration rules. This is on the basis of appendix FM and the grant of leave to remain as a parent to the appellant. This is on the basis EX 1(a)(i) and (ii) applies.

Deputy Judge Farrelly

21st June 2017