Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03831/2018
HU/03834/2018
HU/03837/2018
HU/03838/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2019	**On 20 November 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

HJ
SRK
EJ 1
EJ 2
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Symes, counsel instructed by Westkin Associates, London
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the remaking of an appeal against the decision of the Secretary of State to refuse the appellants' human rights appeal in a decision dated 17 January 2018. In a decision promulgated on 19 August 2019, I found that the First-tier Tribunal made material errors of law in its determination of this matter and set that decision aside. That decision is annexed.

2. The Secretary of State refused the appellants' human rights applications for the following reasons. Firstly, it was said that the applications fell for refusal on suitability grounds because the respondent requested medical records which were not provided by the deadline of 25 September 2017. Secondly, the applicants were all Iranian nationals, without leave to remain and who had resided in the United Kingdom for three years at the date of the applications. The respondent considered whether the health of the second appellant amounted to exceptional circumstances but concluded that the limited evidence of medical appointments provided did not show that the second appellant's then medical condition would meet the high threshold for consideration under Article 3. Reference was also made to the second appellant's care of her mother who was ill at the time of the application but subsequently died.

Anonymity

3. An anonymity direction is made owing to references to the personal circumstances of the minor appellants.

The hearing

4. Mr Symes advised me that he was intending to proceed by way of submissions alone, but the appellants had attended the hearing and could be cross-examined. He added that the First-tier Tribunal judge had accurately summarised the evidence. Mr Melvin commented that he had not been provided with the evidence which was before the First-tier Tribunal. Nonetheless he was happy to proceed on submissions only.

5. Mr Symes summarised the appellants' circumstances. They arrived in the UK in August 2013 under the Tier 1 Investor route. Their extension application failed owing to incompetence by their previous immigration advisors. While accepting that their presence in the UK was precarious, Mr Symes emphasised that the investor route normally results in settlements after 5 years. Consequently, the appellants were entitled to uproot and sell their property in Iran. EJ2 was born in 2010 and was aged 3 when she arrived in the United Kingdom, whereas EJ1 was aged 8 when he arrived. While neither child had lived in the United Kingdom for 7 years, they had spent a significant proportion of their lives here. In arguing that the decision to expel the family was disproportionate, Mr Symes referred to the evidence of HJ as to the steps taken with a view to settling in the United Kingdom, SRL's evidence regarding the

children as well as the report of the social worker, Julie Meek, in relation to the concerns of the minor appellants. The minor appellants had also written letters. EJ2 spoke very little Farsi and attempts to teach her had been unsuccessful. The social worker's report included analysis of relevant research in relation to drastic change, anxiety and the impact on learning. Mr Symes argued that it was not in the best interests of the children to be removed to Iran and that it would be disproportionate to do so.

6. Turning to the appellants' immigration history, Mr Symes referred to the Rules and identified what went wrong with their extension application. The previous immigration advisor had provided quarterly as opposed to annual financial reports, which wrongly gave the impression that the market value of the second appellant's investments had fallen below one million pounds at the relevant time. The mistake of the previous advisor led to a misunderstanding by the Home Office about the reporting periods.

7. With reference to the letter from Anderson Ross dated 15 December 2016, Mr Symes explained that had the investment dipped at the end of October 2014, they would have advised action, however the investment was over £750,000 and this combined with the property purchased by the second appellant meant that the total sum invested in the United Kingdom was in excess of one million pounds. Mr Symes argued that the appellants' previous immigration advisor confused the Secretary of State by showing interim reports, each for less than one million pounds. The Home Office therefore concluded that there had been dips in the level of investment, but on an annual basis there was no dip below one million pounds.

8. Mr Symes acknowledged that there had been no complaint about the advisor or to a regulator. He argued that it was unlikely that someone would admit their mistake in any event. Anderson Ross, in the letter of 15 December 2016, attributed the error to the immigration advisor who did not understand the difference between quarterly and annual reporting. It was not too late to consider this matter as it was relevant to Article 8. In relation to the precariousness of the appellants' residence, there were differing degrees. The derailment of their previous application was outside the control of the appellants and could be considered by the Upper Tribunal. As for section 117B of the 2002 Act, the appellants were proficient in English and financially independent. The children had developed private lives outside the family unit, thus rendering the decision disproportionate.

9. Mr Melvin submitted a skeleton argument, which he relied upon along with the respondent's decision refusing leave to remain on human rights grounds. He argued that the appellants could not meet any of the Immigration Rules and therefore it was a matter of looking for exceptional circumstances. The appellants were granted entry clearance for 3 years in 2013 and since then had been pursuing administrative review of the decision to refuse to extend their leave to remain as well as this human rights claim. The family would be expected to return to Iran together. He acknowledged

that EJ1 was studying for his GCSE's as well as the evidence that he had expressed a fear of the development of suicidal thoughts because his uncle committed suicide owing to being called up for military service. While both children expressed fears of return, neither an asylum claim, nor Article 3 claim had been made. Mr Melvin dismissed the evidence relating to the children as an attempt to bolster the human rights claim, as there would be no fear of the son performing military service as it would be 4 more years before event raised its head. He contended that there was potential for people to buy their way out of military service, which was to be viewed against the backdrop of a family who were wealthy, in Iranian terms.

10. As for the evidence relating to EJ2 regarding the restrictions of life in Iran and that she associates it with death owing to 3 bereavements, Mr Melvin argued that these were preferences rather than fears as the family would be returning together. There were no welfare issues regarding either children on return. As the family were relatively wealthy, the children would be in the best schools. Mr Melvin argued that it was in the best interests of children to return to Iran, that they had not built up a sufficient private life in the United Kingdom and did not meet the high threshold test of exceptionality. He argued that the minor appellants have a large extended family in Iran, some experience of language and culture and should not be deprived of their heritage. While the son would be two years behind with his education, private tutors could be brought in and within a short space of time could quickly remedy the daughters' reluctance to learn Farsi.

11. Mr Melvin dismissed the social worker's report as an attempt by the family to bolster a weak Article 8 claim. He did not accept that removal would create distress sufficient to bring this case within the category of exceptional circumstances. He challenged the report as exaggerating the children's concerns in the absence of medical evidence relating to either child. The respondent was not willing to accept that the distress levels reach that stated in the social worker's report. He asserted that the children's evidence was likely to be instigated by the family to bolster the strength of the appeal.

12. As for the issue with the investor application, Mr Melvin described this as a near-miss case and that argument had been summarily disposed of by the higher courts. Owing to the findings in *Mansur*, it would only be in a rare case where findings by a professional regulator would affect the weight to be placed on the public interest. The appellants may have had bad advice however, the Rules were not met and the administrative review failed. In conclusion, Mr Melvin submitted that the appellants did not meet the Rules, there was a lack of danger to the children or impact on their health, development or welfare or ability to reach their potential.

13. In reply, Mr Symes argued that there was a need for a true focus on the independent lives of the children. The statutory guidance had a special force. The best interest duty was to promote a child's development and optimum life chances. Furthermore, this was not a near miss case but a negligence case. Referring to *GM (Sri Lanka)* [2019]

EWCA 1630, Mr Symes emphasised the difference where a claimant was on a pathway to settled status. In that case it concerned Discretionary Leave policy, whereas the appellants in this case were on stronger ground.

14. At the end of the hearing, I reserved my decision.

Decision on remaking

15. The appellants have established private lives in the United Kingdom during the preceding six years plus. They entered the United Kingdom with a view to settling under the Tier 1 (Investor) route. As stated in the adult appellants' witness statements, they sold their properties, vehicle and other valuables and ran down the first appellant's business prior to arriving in the United Kingdom lawfully. The application to extend the appellants' leave under the same route failed owing to their failure to demonstrate that their specified investments had not fallen below £750,000. This is rightly described by Mr Symes as a technical failure, because the investments had not actually fallen below this sum at the relevant reporting period. Indeed, Mr Melvin did not argue otherwise. The appellants' financial advisors, (namely Anderson Ross, a representative of an FCA authorised and regulated firm) in answer to the letter refusing administrative review, describe the issue in the following way; "*the value of our client's qualifying investments had always remained above £750,000.*" That letter also states that at the time of the annual report dated 24 October 2014, the qualifying investments were valued at £751,504.51 and together with other investments and a residential property, the second appellant's total assets amounted to £1,028,570.43. Lastly, Anderson Ross explain that the quarterly figures presented by the appellants' previous solicitors were not reporting periods used by the financial advisors and were therefore irrelevant.

16. Consequently, while the appellants did not meet the requirements of the Rules in terms of being able to demonstrate that the specified investments were maintained, the second appellant did not allow her investments to fall below the required level at the reporting period.

17. It is not in contention that the appellants are, in addition, unable to meet the requirements of the Rules relating to family or private life.

18. Like their parents, the minor appellants, now aged 9 and 15 have been residing in the United Kingdom since August 2013. I therefore examine the best interests of those children, as a primary consideration in the balancing exercise. EJ1 completed primary school in the United Kingdom and he is now at secondary school, studying towards his GCSE examinations. EJ2 is in primary school and she has little memory of life in Iran. The children are educated in English. EJ1 speaks elementary level Farsi and EJ2 none at all. Both children are anxious about the prospect of returning to Iran. EJ2 associates Iran with death owing to recently losing three relatives. Furthermore, she is fearful of the cultural impact in relation to having to wear the veil and the fact that the family would be unable to conduct themselves as they do in the United

Kingdom such as going swimming together. EJ1 is fearful in relation to military service which was linked to his uncle taking his life. The second appellant is also fearful for her children's wellbeing and that of the family in relation to Islamic social expectations of women in Iran. These fears are not mere assertions, they are supported by the expert evidence of the independent social worker in her report. In that report, the social worker describes the children's anxieties as being acute, to the extent that they may interfere with their school, home and social life which could threaten their ability to develop to their full potential. The current position is that both children are described as thriving in their respective school environments. The expert evidence was a detailed document compiled by an experienced professional who demonstrated that she understood that her principal duty was to the "court." I can see no reason to reject any aspect of the social worker's report and I have placed significant weight upon it. I have taken into consideration and accept Mr Melvin's argument that the appellants are comparatively wealthy and that this may mean they have more options available to them than the average Iranian family.

19. Having considered all the relevant circumstances, I find that the children's best interests are served by them remaining in the UK, with their parents. I am mindful that the best interests' assessment is not determinative of the appeal, *ZH (Tanzania)* [2011] UKSC 4 at [26] considered.

20. Owing to section 117A (2) of Part 5A of the 2002 Act, in considering proportionality, I am obliged to have regard to the considerations listed in section 117B and do so below.

21. The public interest in the maintenance of effective immigration controls is clearly engaged in this case.

22. I am mindful of the fact that the minor appellants are not qualifying children under section 117B (6), because they will not have been present in the United Kingdom for 7 years until August 2020.

23. That the appellants speak fluent English is a neutral matter in the balancing exercise. As is the fact that they are financially independent and are not likely to become a burden on taxpayers.

24. I have regard to the considerations at sections 117B (5) that little weight should be given to the appellants' private lives, which were developed at a time when their immigration status was precarious. The appellants were granted limited leave to enter, which expired in 2016, following which they have pursued this human rights claim.

25. Notwithstanding the precariousness of their leave, considering the misfortunes and errors which led the appellants to be refused further leave to remain despite having the required investments, I am prepared to attach more weight to their private life than I otherwise would. It is also relevant that it is not open to the appellants to

return to Iran for the purpose of seeking entry clearance to return to the United Kingdom under the same route, as the minimum investment requirement has since doubled.

26. I am guided by *Kaur (children's best interests / public interest interface)* [2017] UKUT 14 (IAC) where the Upper Tribunal concluded that the "little weight" provisions "*do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.*" Furthermore, Sales LJ observed at [53] of *Rhuppiah* [2016] EWCA Civ 803; the "*generalised normative guidance may be overridden in an exceptional case by particularly strong features of the private life in question, where it is not appropriate in Article 8 terms to attach only little weight to private life.*" I find that this is such a case, the private and family life of the appellants has a special and compelling character in that it was established at a time when, they were entitled to expect to be eligible to settle in the United Kingdom. Indeed, in GM (Sri Lanka), the following was held in this regard; [34] "*It follows that a person who could be said to be on a pathway to settled status might, in relative terms, be in a stronger position than one with DLR who was not on such a pathway and this relative position needs at least to be taken into account in the proportionality, fair balance, assessment.* "

27. The respondent's policy guidance, entitled "Family Life (as a partner or parent) and Private Life: 10 Year Routes" updated on 22 February 2018, says the following; "*Significant weight must be given to such a period of continuous residence. The longer the child has resided in the UK, and the older the age at which they have done so, the more the balance will begin to shift towards it being unreasonable to expect the child to leave the UK, and strong reasons will be required in order to refuse a case where the outcome will be removal of a child with continuous UK residence of seven years or more.*" As emphasised above the minor appellants are not qualifying children, however their residence in the UK, the stage of EJ1's education and their genuinely-held subjective fear of returning to Iran helps to shift the balance towards it being unreasonable to expect them to leave the UK. The only countervailing factor in this case is that none of the appellants have leave to remain in the UK currently.

28. Having considered all the relevant matters in the round, including the public interest considerations set out above, I am satisfied that the factors in support of the appellants remaining in the UK are not outweighed by the countervailing considerations, outlined above. I find that the appellants' removal would result in unjustifiably harsh consequences to the minor appellants, as outlined in the expert evidence.

29. I conclude that it would be a disproportionate breach of Article 8 for the appellants to be removed. Accordingly, this appeal succeeds under Article 8.

Notice of Decision

The appeal is allowed on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

TO THE RESPONDENT

FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make no fee award for the following reason. The appellants relied on expert evidence which was not before the Secretary of State.

Signed Date: 19 November 2019

Upper Tribunal Judge Kamara

IAC-AH- -V1

Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/03831/2018
HU/03834/2018
HU/03837/2018
HU/03838/2018

THE IMMIGRATION ACTS

Heard at Field House
On 12 August 2019

Decision & Reasons Promulgated

……

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

HJ
SRK
EJ 1
EJ 2
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr M Symes, counsel instructed by Westkin Associates, London
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Callow, promulgated on 14 May 2019.

2. Permission to appeal was granted by Upper Tribunal Judge Lindsley on 9 July 2019.

Anonymity

3. Such a direction was made previously and is repeated for similar reasons.

Background

4. The appellants are a family unit consisting of two parents and two children currently aged 14 and 9. The appellants arrived in the United Kingdom during 2013 with leave to enter, variously, as a Tier 1 (Investor) in the case of the second appellant, Tier 1 Investor partner and dependants. The appellants sought further leave to remain on the same basis and were refused. Their applications for administrative review of those decisions was unsuccessful as of 7 December 2016. On 21 December 2016 the appellants applied for leave to remain on human rights grounds.

5. The Secretary of State refused those applications in a letter dated 17 January 2018 for the following reasons. Firstly, it was said that the applications fell for refusal on suitability grounds because the respondent requested medical records which were not provided by the deadline of 25 September 2017. Secondly, the applicants were all Iranian nationals, without leave to remain and who had resided in the United Kingdom for three years at the date of the applications. The respondent considered whether the health of the second appellant amounted to exceptional circumstances but concluded that the limited evidence of medical appointments provided did not show that the second appellant's current medical condition would meet the high threshold for consideration under Article 3. Reference was also made to the second appellant's care of her mother who was ill at the time of the application but subsequently died.

The hearing before the First-tier Tribunal

6. At the hearing before the First-tier Tribunal, the appellants argued, *inter alia*, that their previous application for further leave to remain under the investor route, which they had expected to lead to settlement, had been derailed by poor advice. The Tribunal decided that no evidence was tendered to support the appellants' claim of poor advice or service in relation to their funds. In addition, it was found that it would not be unduly harsh for the minor appellants to return to Iran with their parents and that there were no compelling or exceptional circumstances.

The grounds of appeal

7. The grounds of appeal were threefold. Firstly, it was argued that in searching for very significant obstacles or unduly harsh conditions, the judge had applied the wrong test for assessing the best interests of the children and proportionality. Secondly, it was contended that the First-tier Tribunal had overlooked material evidence contained in the independent social worker's report as to the fears of the appellant children. Thirdly, it was argued that the First-tier Tribunal overlooked express material evidence of professional negligence in relation to the reporting period used in the previous immigration application.

8. Permission to appeal was granted on all grounds.

9. The respondent's Rule 24 response, received on 18 July 2019, indicated that the appeal was opposed and robustly defended the decision of the First-tier Tribunal

The hearing

10. Mr Symes reiterated what he had set out in the grounds. He argued that the wrong threshold test had been applied regarding the assessment of the children, in that the judge had referred to both the very significant obstacles and the unduly harsh tests which did not apply. Furthermore, the judge had not assessed the evidence relating to the children's objection to returning to Iran, as set out in an independent social worker's report. As for the remaining issue concerning the appellants' immigration history, Mr Symes argued that the judge was wrong treat the fact that there had been no complaint about the service of the previous immigration advisors as decisive of the issue of whether they had been poorly advised.

11. Mr Melvin relied on the respondent's Rule 24 response. He emphasised that the appellants were a non-qualifying family under the Rules. Submitting that the appellants' case was set out from [6] of the decision, he argued that the judge could not be accused of ignoring the evidence. In finding that there was no problem with the family relocating to Iran where they had lived for many years before coming to the UK, the judge reached a holistic view. Mr Melvin conceded that there was not a great deal of consideration of the children's circumstances but contended that even if it were in the best interests of children to remain in the UK as a preference, the family could face any problems together on return to Iran. Conceding further that the best interests of the children were not set out in the decision, he argued that there were no prospects of success, so any error was a technical one.

12. In relation to the appellants' concerns regarding the previous advisors, Mr Melvin argued that this did not mean that the appeal should succeed under Article 8, when the investor requirements could not be met. He asked me to note that the judge had dealt with the lack of a complaint and to uphold the decision.

13. In reply, Mr Symes argued that the judge missed out the positive case put regarding the children and assessed another case all together, in that all he had mentioned was their studies. As for the other ground, the judge had misinterpreted *Mansur (immigration adviser's failing: Article 8) Bangladesh* [2018] UKUT 00274 (IAC), in that it was relevant whether a regulator made a finding but it was not decisive of the issue.

14. At the end of the hearing, I announced that I was satisfied that the First-tier Tribunal made material errors of law and that the decision would be set aside in its entirety. My reasons are set out below.

Decision on error of law

15. The minor appellants put forward strong objections regarding returning to Iran. These are set out in the report of the independent social worker. Briefly, the third appellant was concerned about his mental state following the suicide of an uncle who was faced with the prospect of performing military service and the fourth appellant had a strong aversion to the veil, aspects of Iranian culture and fear of death following three recent bereavements. The social worker was sufficiently concerned regarding the third appellant that it was recommended that the school be notified. There is no express assessment of this evidence in the decision and reasons. Indeed, all the judge mentions at [15] is the children's schooling and a vague reference to the children's "preferences." While the children were non-qualifying owing to their length of residence, their best interests were entitled to be afforded attention applying *Jeunesse* [2015] 60 EHRR.

16. In addition, the judge was wrong to look for very significant obstacles or to consider whether their circumstances were unduly harsh. Neither test was applicable here.

17. Regarding the immigration history point, the application for further leave under the investor route required the second appellant to maintain her million-pound investment. The previous immigration advisors put in the wrong set of statements according to a letter from Anderson Ross. The mistake was that the advisors provided quarterly reports whereas the reporting period was annual, the latter reports showing no dip in the investment amount. It is acknowledged that the appellants have not made a complaint to a regulator. Nonetheless, the previous judge erred in dismissing this evidence owing to the absence of this complaint. The letter from Anderson Ross gives a strong indication that another professional had failed, that they were negligent and that this led to the refusal of an application which would otherwise have been granted. This is relevant to the consideration of the precariousness of the appellants' residence. At [21], the judge makes the following finding having been guided by *Mansur*. "*In the absence of an admission of guilt and a finding of culpability by a professional regulator or court, the maintenance of effective immigration control prevails.*" This is a misreading of *Mansur*. While it is relevant whether a regulator has made a finding of culpability, it is not decisive of the issue of the weight to be place on the public interest.

Decision

The making of the decision of the First-tier Tribunal did involve the making of an error of on a point of law.

The decision of the First-tier Tribunal is set aside.

The appeal is to be remade following a hearing at Field House on a date to be notified.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date:

Upper Tribunal Judge Kamara