Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04188/2019

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 17 September 2019	**On 25 September 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE O'RYAN

Between

M M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss Patel, Counsel instructed by Broudie Jackson & Canter (Dale House)
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is the appeal brought by the Appellant against the decision of Judge of the First-tier Tribunal Devlin dismissing her appeal against the decision of the Respondent dated 6 April 2019 refusing her protection and human rights claim. Notwithstanding there is agreement between the parties as to the outcome of this appeal, it is

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necessary, due to the length and complexity of the judge's decision, that this present decision also be rather detailed.

2. The Appellant is a national of Iran and had previously sought protection on the grounds of her conversion to the Christian faith, resulting in a decision of Judge of the First-tier Tribunal Herwald dated 30 January 2017 in which Judge Herwald had not found credible the Appellant's claim to be a genuine convert to Christianity.

3. On or around 9 November 2017, i.e. only around 9 months later, the Appellant made further representations to the Secretary of State raising a fresh asylum claim.

4. The Appellant is a member of the Church of Jesus Christ of Latter Day Saints. Both in her appeals before Judge Herwald and in her fresh claim representations she sought to rely upon certain evidence from members of the congregation of her church attesting to their views that the Appellant was a genuine member of their church and was a genuine convert to Christianity.

5. It is important to note that the Appellant has a daughter born in approximately 2009 and was 9 years old at the date of the appeal before Judge Devlin. The evidence within the further representations of November 2017 asserted that not only the Appellant but her daughter were members of the church.

6. The Respondent's decision in relation to the fresh claim was dated 6 April 2019 and rejects that the Appellant was a genuine convert to Christianity and found that no risk of harm would result to the Appellant or her daughter upon return. The Appellant appealed against that decision, the appeal coming before Judge Devlin on 12 June 2019. The Appellant herself gave oral evidence before the judge, as did two members of the church. There were a number of other letters and witness statements provided by other members of the congregation which expressed their opinions that in their view the Appellant was a genuine member of the church.

7. The Appellant also relied upon certain evidence from her Facebook account in which it was said that she had posted various quotes from the Bible publicly and it was argued that that content was likely to have become known to the Iranian authorities and would result in a real risk of serious harm to her on return.

8. The judge considered the Appellant's appeal in a very long decision spanning some 397 paragraphs. The initial part of the judge's decision considered a number of paragraphs of the Appellant's witness statement in which the Appellant sought to demonstrate that the findings of Judge Herwald had been incorrect. Judge Devlin found, examining the Appellant's evidence in that regard in some detail, that the Appellant had not demonstrated that there was anything incorrect in the findings which had been made by Judge Herwald in 2017.

9. The judge thereafter proceeds to consider: the various letters from the church members (at [138] onwards), certain letters from three non-Christian acquaintances of the Appellant who gave evidence that the Appellant had actively encouraged them to attend the church (i.e. evidence of her proselytising) albeit that they had respectfully declined her invitation (at [193]); the relevance and effect of baptism

certificates for both the Appellant and her daughter ([200] to [214]); and the relevance and effect of the Appellant's Facebook posts ([215] to [234]). The judge made certain further findings as to the evidence of the two live witnesses who had attended the hearing to give evidence in support of the Appellant's appeal and gave summary findings at [255] onwards in the decision.

10. The judge found as follows at [277]:

> "277. Looking at everything in the round, and bearing these considerations in mind, I find that the positive pull exerted by the new documentary and oral evidence, although admittedly significant, is insufficient to effectively counteract the negative pull exerted by Judge Herwald's decision; the unfounded claims made by the Appellant at paragraphs 7 to 17 of her statement, in respect of that decision; her failure to make any meaningful attempt to address the other adverse credibility findings made by Judge Herwald; and, her poor presentation as a witness before me.
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> 278. I therefore find I cannot be satisfied, even to the lower standard of proof, that the Appellant is a genuine Christian convert."

11. The judge considered the potential risk of serious harm to the Appellant at the point of return, and referred at [280] to the authority of HB (Kurds) Iran (illegal exit: failed asylum seeker) CG [2018] UKUT 430. The judge also noted at [283] the nature of the Appellant's Facebook postings. The judge drew a distinction between the heightened attention that would be likely to be given to Kurds suspected of anti-Government political postings on Facebook on the one hand, and the posting of Christian tracts (which were not overtly critical of the Iranian government) on the other and held that there was no adequate evidence to demonstrate that a person simply having references to the Bible on their Facebook page would necessarily attract any adverse attention at the point of return.

12. The judge considered the position of the Appellant's daughter, and noted as follows as to how potential harm to the daughter might amount harm to the Appellant herself:

> "306. I accept that, if a child is likely to be subjected to serious harm on return, the anguish of a parent in witnessing the pain or suffering to which that child may be exposed may amount to serious harm".

(Indeed, I note that the proposition that the suffering of family members may amount to serious harm for a relative is supported in the following cases: Katrinak v Secretary of State for Home Department [2001] EWCA Civ 832:

> "21. ... It is easier to persecute a husband whose wife has been kicked in a racial attack whilst visibly pregnant than one whose family has not had this experience. What to others may be an unbelievable threat may induce terror in such a man."

and CA v Secretary of State for the Home Department [2004] EWCA Civ 1165:

> "It seems to me obvious simply as a matter of humanity that for a mother to witness the collapse of her newborn child's health and perhaps its death may be a kind of suffering far greater than might arise by the mother's confronting the self-same fate herself."

The judge then made certain findings in relation to the Appellant's daughter's attendance at the church, noting at [321] that the Appellant had produced her daughter's baptism certificate; at [322] that various letters from the church members make mention of the daughter's engagement with the church; at [329] the judge accepted that the daughter had been baptised, albeit that the judge stated that he had reservations about the significance of that consideration (referring to an earlier passage in his decision where he queried what instruction the Appellant herself might have had prior to her baptism). At [331] the judge held as follows:

> "331. None of the members of the Church who provided evidence appear to have any doubt that she is a genuine Christian. Drawing upon my common sense and my ability as a practical and informed person, I consider it to be wholly implausible that a child aged between 6 and 9 years would have been able to engage in the pretence of being a Christian, or to have pulled the wool over the eyes of her fellow Church members for around three years.
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> 332. In all the circumstances, I see no reason to doubt that the Appellant's daughter self-identifies as a Christian, or that – insofar as the expression has any meaning as applied to a 9 year old child – she is a genuine Christian convert. Nor do I see any reason to doubt that she has had a very significant amount of engagement with the Church and its members during her time here."

13. However, the judge held at [333] that there was no adequate evidence that the Appellant's daughter would be at real risk of serious harm at the point of return to Iran, but turned at [334] onwards to consider the position of the daughter after return. At [335] the judge held as follows:

> "335. The difficulty I have is that I know very little about the Appellant's daughter as the individual – other than what is contained in the two statements (*from the daughter*). The evidence gives little indication as to the importance she attaches to openly practising her religion. I have noted that she is 9 years of age. I have no means of assessing her level of maturity. I do not know whether she has the maturity to comprehend and assess the implications of the options open to her. It may be that she has only a limited knowledge or understanding of the realities of life as a Christian in Iran.
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> 336. For these reasons, it is difficult for me to arrive at any concluded view as to whether the Appellant's daughter would choose to live openly as a Christian in Iran, or, if she chose to live discreetly, why she would choose to do so. In the absence of any clear indication as to her character, her commitment to her faith, or what sort of influence social pressures are likely to have on her behaviour, I do not see how I can reach such a view.
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> …
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> 338. For these reasons, I find I cannot be satisfied, even to the lower standard of proof, that the Appellant's daughter would be subjected to serious harm after return to Iran. The corollary of this finding is that I cannot be satisfied that the anguish that the Appellant might suffer in witnessing

the difficulties to which her daughter might be exposed as a Christian convert would be such as to engage Article 3."

14. At [344] the judge considers in the alternative the Appellant's appeal on human rights grounds. The judge considers at [345] the Appellant's rights under Article 8 ECHR and notes at paragraph 346 as follows:

> "346. In R (SG & Ors) v Secretary of State for the Home Department [2015] 1 WLR 1449 (in fact this is a misquote – the proper citation for that case is R (SG & Ors) v Secretary of State for the Department of Work and Pensions [2015] UKSC 16), Lord Carnwath JSC described the UN Committee on the Rights of Children, General comment No. 14 (2013) on the right of a child to have his or her best interests taken as a primary consideration (Art. 3, para. 1), 29 May 2013, as 'the most authoritative guidance now available'. I shall therefore direct myself in accordance with that guidance.
>
> 347. General Comment No. 14 lists the elements to be taken into account in assessing the best interests of the child. The first is the views of the child."

15. The judge thereafter summarises what the views of the Appellant's daughter were insofar as could be ascertained from her two short witness statements. These were, at [349]:

(i) [she likes] being a Christian [and does not] really remember being a Muslim;

(ii) "Going to church is a big part of [her] life and [she] would be very sad if [she] could not go to Church"; and

(iii) "[she wants] to be able to continue to go to Church".

The judge saw no reason to doubt that that summary represented the Appellant's daughter's real views.

16. The judge then made the following observations at [354]:

> "354. It is true that I have found … that the evidence gives very little indication of the level of the Appellant's daughter's commitment to her faith, or the importance she attaches to openly practising her religion. Nevertheless, in the light of her age and the evidence of her engagement with the church, I see no reason to doubt that the Appellant's daughter's Christianity forms an important element of her nascent identity.
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> 355. Although I recognise that she has only been in the United Kingdom for three years, I recall that she entered when she was aged 6. I am bound to acknowledge the desirability of continuity in a child's upbringing and to the child's ethnic, religious, cultural and linguistic background – particularly since return to Iran might well result in subjection to traditions and practices that are incompatible or inconsistent with the right to preservation of identity in Article 8 of the UN Convention on the Rights of the Child."

The judge also found as follows:

> "365. Standing the evidence of engagement with the church, I see no reason to doubt the Appellant's daughter's claim that 'she has lots of friends at church', or that those friends play a significant role in her life.
>
> 366. In an ordinary case, and in the absence of evidence to the contrary, I would be inclined to find that any relationships formed by a child, between the ages of 6 and 9 years, could be replicated in the country of return. However, this is not an ordinary case, and I do not consider that any such finding is properly open to me. The reason that I say this is that the friendships to which the Appellant's daughter refers are friendships formed in the context of membership of the Church of Jesus Christ of Latter Day Saints and engagement in worship. This, as it seems to me, is a significant aspect of those friendships and of their importance to the Appellant (*query whether the judge there meant the daughter)*. Given the position of Christians in Iran, I am not satisfied that such friendships could be easily replicated there."

17. At [371] the judge sets out paragraph 73 of the UN Committee on the Rights of Children, General comment No. 14:

> "73. Assessment of the child's best interests must also include consideration of the child's safety, that is, the right of the child to protection against all forms of physical or mental violence, injury or abuse (art. 19), sexual harassment, peer pressure, bullying, degrading treatment, etc."

and held as follows at [372]:

> "It is true that I cannot be satisfied that the Appellant's daughter would seek to exercise her religion openly in Iran. Nevertheless, I consider there to be a reasonably likelihood (*sic*) that the fact of her conversion, baptism and religious activities in the United Kingdom, will come to light. It must be remembered that the Appellant's daughter is a 9 year old child. I do not consider it is realistic to expect her to conceal these matters, or to exercise the degree of discretion as might reasonably be expected from the average adult."

18. Further, at [377] the judge holds as follows:

> "377. Adopting the precautionary principle, I consider that, if the Appellant's daughter … becomes known, and she adheres to her religion, there is more than a mere risk that she will be subjected to discrimination, abuse, peer pressure, bullying, degrading treatment, and that her life chances will be significantly affected – there must is (*sic* - be) a positive likelihood that this will happen.
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> 378. I acknowledge that, as paragraph 2.4.2. of the Country Information and Policy Note puts it:
>
> > '2.4.2 In general, the level of discrimination faced by Christians born into the religion, who are not actively evangelising, is not sufficiently serious in its nature and frequency as to amount to persecution or serious harm.'
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> 379. Indeed, I have found that I am not satisfied that there is a real risk the Appellant's daughter would be subjected to persecution or serious harm on account of her Christianity on return to Iran. However, I remind

myself that I am not concerned here with whether the Appellant's daughter will be subjected to such treatment. I am concerned instead with the best interests of the child, and for that purpose, whether removal of the child from the United Kingdom would be compatible with the obligations in Article 3(2) (*of the Convention of the Rights of the Child*) to ensure the child such protection and care as is necessary for his or her well-being.

380. I also remind myself that – although I am not satisfied that the Appellant's daughter would be subjected to persecution or ill-treatment contrary to Article 3 on return to Iran – the threshold for serious harm may be very much less for a 9 year old female than it is for an ordinary adult. The corollary of this is that very much less may be needed by way of discrimination to amount to serious harm for a child.

381. In all the circumstances, I find that I am satisfied that the Appellant's daughter's safety – understood in the broad sense in which it is used in paragraph 73 of General Comment No. 14, and adopting the precautionary principle – is likely to be significantly compromised by return to Iran if, as seems likely, her conversion, baptism and Christian activities become known and/or she seeks to adhere to her Christian faith."

19. The judge concludes in his assessment of what is in the best interests of the daughter in the following way:

"384. However, I bear in mind that education is predominantly Islamic in Iran, and that, insofar as opportunities exist for a Christian or secular education, that might further compromise the Appellant's daughter's right to safety as previously defined.

385. I now come to look at everything in the round. When I do, I have little hesitation in finding that it would be in the best interests of the Appellant's daughter to remain in the United Kingdom. Indeed, I find that it would be strongly so."

20. The judge then turned at [387] onwards to consider the considerations under Part 5A of NIAA 2002, Section 117B in particular. The judge noted at [389] that the Appellant did not speak English; at [390] that she was not economically self-sufficient and that their private lives in the UK had been developed at a time when their status was unlawful. However the judge directed himself in law at [393] in relation to the case of Rhuppiah v Secretary of State for the Home Department [2018] 1 WLR 5536 in which the Supreme Court held that there was a degree of flexibility about the weight that may be attached to a private life even if developed at a time when the status was precarious or unlawful. The judge concluded at [394] in relation to the Appellant's private life as follows:

"394. So far as I am aware, there are no special features in the Appellant's private life that would justify displacing the generalised normative guidance in Section 117B(4) of the 2002 Act. It follows that her private life is entitled to little weight.

> 395. I take a different view with regards to the Appellant's daughter. I consider that it can properly be said that there are particularly strong features of the Appellant's daughter's private life. That is because she was brought there as a 6 year old child. She had little or no say in the matter. Although she has only been here for three years – much less than the period required to become a qualifying child for the purposes of Section 117B(6) – and I am satisfied that she has put down significant roots here, that could not be easily replicated in Iran. In those circumstances, in my opinion, it is appropriate to override the generalised normative guidance in Section 117B(5) and to (*give*) full weight to the Appellant's (*daughter's*) private life, even though it was established at a time when she was here unlawfully."

21. The judge in the concluding paragraph, [396], determined that he had found that it was strongly in the Appellant's daughter's best interests to remain with the Appellant in the United Kingdom and that her private life should be given full weight. "In the end I consider the matter to be finely balanced, however I find that I am satisfied that the Appellant and her daughter's Article 8 claims are strong enough to outweigh the public interest in their removal. It follows that the Respondent's decision is not (*sic* – the inclusion of 'not' is clearly a slip) disproportionate and that the *Razgar* question 5 falls to be answered in the Appellant's favour." The appeal was thus dismissed on protection grounds and allowed on human rights grounds.

The appeal to the Upper Tribunal

22. It is to be noted that there is no appeal brought by the Respondent Secretary of State against the judge's decision allowing the Appellant's appeal on human rights grounds. The Appellant herself has however sought permission to appeal against the judge's decision dismissing the appeal on protection grounds. Those grounds are contained in an application dated 18 July 2019 which argued that the judge erred in law, in summary, in:

    (i) erring in his approach to the status of the decision of Judge Herwald allegedly treating that decision as a starting point and also the end point of the judge's deliberations (grounds paragraphs 11 and 12);

    (ii) failing to give proper consideration to evidence from the church members as to the genuineness of the Appellant's Christianity (grounds paragraphs 13 to 14);

    (iii) erring in his assessment of the weight and significance of the Appellant's evidence on Facebook relating to her Christian faith (grounds paragraphs 15 to 16);

    (iv) erring in allowing the Appellant's appeal under Article 8, on the basis that it was irrational to have found that the Appellant's daughter would suffer harm as set out in [377] to [381] of the judge's decision, but finding that such harm did not amount to serious harm under the Refugee Convention and additionally erring in failing to allow the Appellant's own appeal on the basis that it ought to have been recognised that the Appellant's daughter was likely to suffer serious harm.

23. Permission to appeal was granted by Judge of the First-tier Tribunal Scott-Baker in a decision dated 14 August 2019. Little merit was thought to be found within the ground relating to the weight to be attached to evidence from the members of the congregation, but at paragraph 5 of the decision granting permission, Judge Scott-Baker thought there was merit in the grounds relating to the judge's approach to the harm that might be experienced by the Appellant's daughter.

Discussion

24. I have heard submissions from the parties today. Although there is no Rule 24 response from the Respondent in this matter, there is agreement. It has been necessary for me to set this matter out in some detail because it is important to recognise the exact nature of the agreement. It is part of Ms Patel's case that the judge erred in law in finding that the Appellant's daughter would experience significant compromise to her safety, contrary to her rights under the Convention of the Rights of the Child, as understood by reference to paragraph 73 of the General Comment No. 14 of the United Nations, whilst also finding that the daughter would not be at real risk of serious harm under the Refugee Convention or Article 3 ECHR.

25. Insofar as the Appellant thereby advances a proposition there is no distinction capable of being drawn in law between (i) a finding under Article 8 ECHR that it is a child's best interests to remain in the UK because her safety, as defined under paragraph 73 of General Comment number 14, will be significantly compromised, and (ii) a finding that the child would be at risk of serious harm under the refugee Convention and/or article 3 ECHR, I do not find that the Appellant's argument is made out. There may well be a distinction to be drawn between the two assessments of harm under different international instruments. However, it is not necessary for me to make a determination of exactly what distinction there may be between those two tests in this appeal. That is because I find, and Mr McVeety agrees, that the judge has materially erred in law in making the findings that he did in relation to the specific level of harm that would be faced by the Appellant's daughter, and in finding that such harm did not in fact reach the level of serious harm for the purposes of the Refugee Convention and Article 3 ECHR.

26. In relation to the level of harm that the judge found would be likely to persist for the daughter, the passage at [377] is of particular relevance, wherein the judge finds that it was likely that she would be subjected to discrimination, abuse, peer pressure, bullying, *degrading treatment* and that her life chances would be significantly affected.

27. Article 3 ECHR prohibits the infliction of torture, and inhuman or *degrading treatment* or punishment. Thus, on the judge's own findings at [377], which are not disputed by the Respondent, I find that the level of harm which has been accepted as existing for the Appellant's daughter satisfies the Article 3 threshold. There can be no doubt that that harm would be for reason of the daughter's religion.

28. I am also aware that at [380] the judge directed himself on the basis that the threshold for serious harm may be very much less for a 9 year old female child than it is for an ordinary adult, but does not seek to justify by any further reasoning why the

degrading treatment which he has found would persist for the daughter would not amount to serious harm for the purposes of the Refugee Convention or Article 3, particularly with regard to her minority. I find that although the Appellant's daughter is not a party to this appeal, her removal to Iran would result in her being persecuted for a Refugee Convention reason; religion.

29. The consequences for the present appeal, where the Appellant is the sole appellant, can be deduced by reference to the judge's own direction in law set out at [306] of the decision, in which he observed that where a child is likely to be subjected to serious harm on return, the anguish of a parent witnessing the pain or suffering to which that child may be exposed may itself amount to serious harm. I have already confirmed that that it is a proposition supported by authority. It is agreed between the parties, and I find that it is appropriate for such agreement to be made, that the present Appellant would experience serious harm herself by reason of experiencing the serious harm to which her daughter would be subjected.

30. It is necessary to consider briefly whether the serious harm that would befall the Appellant herself would engage only Article 3 of ECHR, or might represent serious harm for a Refugee Convention reason. It is also agreed between the parties that the serious harm that would be experienced by the Appellant would be for a reason of her membership of a particular social group: the family of her daughter (Secretary of State for the Home Department v. K and Fornah [2006] UKHL 46).

31. It is therefore not necessary for me to adjudicate upon the balance grounds (i)- (iii) as summarised at [22] above. Had I been required to adjudicate upon them, I would have found they lacked merit, but it is not necessary for me to say anything more about them.

Notice of Decision

For the above reasons I find that the judge's decision involved the making of a material error of law.

I set aside the judge's decision dismissing the Appellant's appeal on Refugee grounds.

I allow the Appellant's appeal on Refugee grounds

The judge's decision allowing the appeal on human rights grounds (Article 8 ECHR) stands.

Signed Date: 23.9.19

Deputy Upper Tribunal Judge O'Ryan

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 her or any member of her 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: 23.9.19

Deputy Upper Tribunal Judge O'Ryan