Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Numbers: HU/08888/2019 (V)**

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THE IMMIGRATION ACTS

Heard remotely via Field House **Decision & Reasons Promulgated via Skype**
On 5th February 2021 **On 09th March 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

CB
SM
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellants: Mr Mavrantonis, instructed by Farani Taylor Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

The appellants, with permission, appeal the decision of First-tier Tribunal Judge Griffith promulgated on 6th March 2020. The hearing was conducted at Taylor House on 20th February 2020 relating to this Iranian husband and wife born on 27th September 1950 and 29th December 1951 respectively and who have two adult children living in the UK who hold dual British-Iranian nationality.

Both appellants last entered the United Kingdom on a five year multi-entry visit visa on 2nd August 2018. Prior to that they had been visiting the country lawfully as visitors for approximately twenty years. On 10th October 2018 they made an application to the Secretary of State for leave to remain on compassionate grounds. That application was refused on 2nd May 2019 with an in country right of appeal, which was dismissed by the First-tier Tribunal in March 2020.

The grounds for permission to appeal were made as follows.

Ground 1. The judge's finding was perverse; family life and real obstacles for dual British-Iranians. Miss SB (S) was a dual British-Iranian national who had lived in the United Kingdom for the last 24 years and Miss FB (F) was also a dual British-Iranian who had lived in the country for the last fifteen years.

Nonetheless, the Tribunal found that there was something more than normal emotional ties at paragraph 87 and that there was family life between CB, SM, SB and FB in accordance with **Kugathas v Secretary of State for the Home Department [2003] EWCA Civ 31**.

It was pleaded that there would be very significant obstacles to the appellants integration in Iran further to paragraph 276ADE(1)(vi) and/or exceptional circumstances with reference to GEN.3.2 because at present their two daughters could not visit them in Iran. The appellants relied on the most up-to-date guidance published by the Foreign and Commonwealth Office (FCO) which was last updated one day before the hearing on 19th February 2020. This guidance was clear that in the case of dual British-Iranian nationals even without any political profile the advice is against all travel to Iran.

The judge appears to have had regard to the FCO guidance at paragraph 87 and in a synoptic assessment at paragraph 100 recognised "that there are risks for dual nationals" but referred to FB's return to Iran in 2018 as one of the reasons why visits could continue. The judge appeared to imply that because FB visited Iran in 2018 the FCO advice was less authoritative or that FB was willing to take the risk.

It was submitted that the judge misdirected herself. It was never disputed that both daughters had in the past visited their parents in Iran but the authoritative evidence of the FCO published on 19th February 2020 was that if they were a dual national in Iran they should "consider leaving". On the contrary, the judge found that SB and FB could visit Iran. That finding was perverse.

The judge had arguably erred in law by placing little or no weight on the authoritative guidance of the FCO.

Ground 2. The judge erred in law because COVID-19 was evident by the date of promulgation. The FCO guidance was updated on 19th February 2020 and was the first to introduce advice on coronavirus in broader terms, referring to the "first confirmed cases in Iran". The matter was promulgated on 6th March. The appellants did not rely on any submissions regarding COVID-19 at the hearing as it had not evolved into the extraordinary disease. However, a short general reference by the FCO to the then endemic COVID-19 was found at AB 658 and 660 and a reasonably informed First-tier Tribunal Judge could have taken judicial notice of the pandemic. The judge had ability to consider reasonable evidence relating to the circumstances of the case until she promulgated the decision on 6th March 2020. The Tribunal was referred to **Secretary of State for the Home Department v RK (Algeria) [2007] EWCA Civ 868** where at paragraph 25 LJ Wilson held: "*There has to come a time, however, at which the opportunity for judicial survey of up-to-date evidence stops. Under our system, and save in exceptional circumstances, it stops upon promulgation of the Tribunal's determination.*"

The Tribunal ought to accept that any change to the FCO's guidance between 20th February and 6th March 2020 could reasonably have been admitted and could have been reflected in the judge's final determination. The guidance was a source as already relied on in the bundle. On 1st March the FCO updated its advice, suggesting that:

> *"… cases have been confirmed in several other countries, including Iran, where there have been a number of fatalities"*
>
> *"As of 1 March [2020], dependants and some staff from the British Embassy are being withdrawn from Iran due to the ongoing coronavirus outbreak"*
>
> *"A large number of airlines, including Emirates and Oman Airlines, have announced a suspension to and from Iran".*

The pandemic had made the circumstances of this case special and unusual. Both appellants had a compromised immune system, CB is a diabetic and has a pacemaker installed and was diagnosed with breast cancer.

With reference to **RK (Algeria)** it was arguable that the judge materially erred in law by not taking into account the extraordinary developments of COVID. Reliance was placed on paragraph 34 of **TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109**, which confirmed that what is relevant for assessing removal was the date of the hearing and **RK (Algeria)** principles arguably extended this to the date of promulgation. It was submitted that whether the Secretary of State was generally removing migrants due to coronavirus or not was of secondary importance. The real legal question for the Tribunal was

whether at the time of promulgation the appellants' obstacles in returning to Iran met the threshold so as to render the Secretary of State's decision disproportionate under Article 8.

At the hearing before me, which was conducted remotely by Skype, the daughter Miss S attended on behalf of her parents and stated that her parents were not with her but with her sister because, four weeks ago her sister had given birth to a baby and they were helping her. An interpreter was present.

Mr Mavrantonis submitted that the crucial section of the judge's determination centred on paragraph 106 where the judge accepted that there was family life. At paragraph 86 the judge recognised that there were risks but also noted that there was a trip taken to Iran in 2018 by one of the adult daughters. The situation had now changed.

I refused to admit evidence of facts which had taken place subsequent to the determination being promulgated on 6th March 2020. The focus was on whether there was an error of law which was material in the determination before me. There was no misunderstanding by the judge of the underlying facts existing at the time of the hearing or the determination **E and R v SSHD** [2004] EWCA Civ 49.

Mr Mavrantonis submitted that the determination did not properly address the difficulties outlined by the Foreign and Commonwealth Office on the risks to dual nationals visiting Iran. He pointed to the Foreign and Commonwealth advice published on 19th February 2020 which highlighted the risk even to dual nationals without a political profile. Further, the judge relied on daughter FB visiting Iran to see her parents in 2018 but that assumption was problematic because the Foreign and Commonwealth Office had changed its advice since 2019. There were reasons why people were unlawfully detained in Iran. He accepted that the archive in relation to the Foreign and Commonwealth Reports had not been submitted from 2018 and that it was not clear as to the nature of the change of advice, but Mr Mavrantonis submitted that there indeed had been a change of advice because of the experiences of current British dual nationals in Iran. The judge had stated at paragraph 107 that family life may continue and the daughter could visit but there was no explicit analysis as highlighted by Judge Sheridan on granting permission as to how they could visit or whether it was proportionate in the absence of such visits.

The advice from the Foreign and Commonwealth Office was weighty advice against visits and this would have an impact on the family life which had not been assessed.

Mr Mavrantonis took issue with paragraph 21 of Mr Melvin's written submissions where he had stated that the assessment in relation to the visit was a tiny part of the proportionality assessment. There was no clear finding on the Foreign and Commonwealth Office advice and as a result the assessment on proportionality must be flawed.

Mr Mavrantonis also submitted that there was a perversity in the judge's findings. I did point out to Mr Mavrantonis that the threshold for perversity was very high, which he acknowledged although he submitted that it was impossible for the appellants' daughters to continue to visit under the present circumstances.

In relation to his second ground, which he acknowledged was less forceful, he relied on **RK (Algeria)**. Both appellants had health difficulties and the first appellant had diabetes and a pacemaker and the second appellant had breast cancer. The COVID pandemic had initiated prior to the promulgation of the decision and it was an error of law for the judge to fail to consider this. It was accepted that Article 3 was not argued but, and this was not the strongest ground but nonetheless the pandemic had commenced prior to the promulgation.

Mr Melvin relied on his written submissions and agreed that there was a "not" missing from the final paragraph 24. It was submitted that whether or not the family were available to visit was not a prominent issue before the judge. The judge found that family life could continue as it had done hitherto, by normal means of communication and the proportionality assessment in the decision was open to the judge. Mr Melvin submitted that he was "amazed" that Judge Sheridan had granted permission. The representatives had not submitted any previous advice to show that there had been any significant change in the Foreign and Commonwealth advice.

In relation to ground 2 the solicitors should have written posthearing to raise the point in relation to the pandemic if that was their wish.

Analysis

Mr Melvin's submissions, relying on his Rule 24 reply, noted that the appellants were both citizens of Iran who both arrived on visit visas on 2nd August 2018 and subsequently on 27th September 2018, made an application to remain in the UK outside the Immigration Rules as adult dependants of their immediate family in the UK. These were refused by the Secretary of State on 2nd May 2019 as they did not meet the requirements of the Immigration Rules and it was not accepted there were serious obstacles to their integration or return to Iran or that there were exceptional circumstances that would result in unjustifiably harsh consequences on them or their family members on return.

He submitted that the determination and reasons given by the judge were clear and sustainable. She treated the appellants as vulnerable witnesses in the light of the medical evidence. She also considered the evidence of the two daughters and the psychological report of Dr Saddik. The judge, although making no specific finding, was concerned about the intention of the visit given in the visit visa applications as the subsequent settlement visa applications were made two months after their arrival in the UK. The judge considered the adult dependent relative Immigration Rules, noting that there were no in country provisions within the Rules.

The judge properly directed herself in accordance with paragraph 276ADE(1)(vi) and the case law of **Kamara v Secretary of State for the Home Department [2016] 4 WLR 152** and **R (Parveen) [2018]** EWCA Civ 932 [2018] there is an exacting standard and threshold to show very significant obstacles to return, and a bare assertion that there is no one to support will not meet the evidential standard.

Both appellants held down jobs in Iran and were in receipt of their own pensions and both had medical treatment in the United Kingdom although their conditions were not life-threatening, and they had both been able to access medical care in Iran.

At paragraphs 99 to 100 of the determination, on the evidence, there was a finding that the level of dependency was a gross exaggeration. At paragraph 100 the judge acknowledged the risk to dual nationals but noted that the daughter F returned as recently as 2018 and there was no evidence she came to the adverse attention of the authorities.

The appellants' medical conditions were not so severe that they needed nursing care or round the clock supervision and at 103 the judge rejected the argument on significant obstacles within the Rules, going on to consider the circumstances outside the Rules found that return was proportionate.

There was significant confusion over where the appellants lived but the judge gave them the benefit of the doubt that they were living with daughter F in London despite being registered with a GP in Portsmouth.

The judge accepted that both daughters S and F provided financial and emotional support and that family life did exist and accepted that they were a close family but crucially stated that: "Even if their removal would be sufficient an interference to engage Article 8, I am not, however, satisfied that the interference would be disproportionate."

The judge repeated her findings at paragraphs 90 to 106 at paragraph 107, specifically addressing the PTSD findings, attaching little weight to it for the reasons given and as part of her summing up the judge stated: "The family can continue to keep in touch by telephone and messaging and S and F can visit." It was submitted that the "can visit" remark was made as a "tiny part of an assessment of proportionality that is overwhelmingly one way". The decision was complete and thoughtful and legally sustainable.

It was a matter for the two daughters if they visited their parents in Iran but what was crystal-clear from the decision was whether they visited or not was not, in any way, a prominent issue in the decision dismissing the appeal.

Analysis

Turning to the second ground first in relation to the onset of the COVID pandemic, the decision was promulgated on 6th March 2020 following a hearing date on 20th February 2020. Although there were concerns in relation to COVID-19 on 20th February 2020, by 6th March 2020 the seriousness of the

pandemic was not abundantly evident and the national lockdown did not occur until 23rd March 2020, a fact of which I take judicial notice because it is so obvious.

I am not persuaded that the judge can be criticised in any way for failing to factor into her determination a pandemic that had not been declared and indeed, as Mr Mavrantonis rightly conceded, that evidence was not before the judge. The second ground is unsustainable.

I turn to a consideration of the proportionality assessment.

The focus of the criticism was that the judge failed to factor into the determination an assessment of the risk to the daughters should they return to see their parents in Iran should the parents be removed.

It is important to read the decision as a whole. **Lowe v SSHD [2021] EWCA Civ 62** reminds the Upper Tribunal to be cautious about interfering with the judgments of the First-tier Tribunal and merely because the Upper Tribunal may decide an appeal differently does not necessarily justify an interference where there is no error of law.

It is right to observe that the judge did find that there was family life but noted that the parents, given their extensive medical histories, were registered with a GP in Southsea near Portsmouth, although they claimed to live with their daughter in London. The judge gave the benefit of the doubt to the appellants that they were visiting/living with their daughter in London. I do note from the medical records that both appellants had regular *examinations* at their GP practice until immediately before the First-tier Tribunal hearing or at least the conclusion of the medical notes provided, and the judge noted that the first appellant gave evidence that he had a hospital appointment at a hospital in Portsmouth on 7th February 2020 [32].

The judge did address the central tenets of the appeals which were that the appellants relied on the assistance of their daughters. At paragraph 60 the judge also noted that during the day the parents were on their own as both daughters worked; she found that the level of dependency was not as claimed and at [99] stated

> *'The written evidence of the appellants and their daughters was that the appellants need the help and support of their daughter to carry out their ay-to-day activities. The oral evidence of the first appellant, however, was that he was able to undertake his own personal hygiene tasks such as bathing and that he helps his wife prepare meals. There is no evidence that either suffers from any or any serious mobility issues such that they cannot wash or dress themselves or prepare meals or feed themselves. They are left alone during the day in S' house when she is at work. There is no evidence that they have suffered any accidents or any incident there to raise concerns about their ability to look after themselves. I therefore find*

> *the description of the level of dependency described in the written evidence to be a gross exaggeration'.*

The judge addressed the medical issues, noting that healthcare was available in Iran, and that the appellants had their own sources of income from occupational pensions [100] and found that the appellants had had the benefit in Iran of home helps to assist them with housework and domestic chores [101]. She also noted that their medical conditions "*are not so severe that they require nursing care or round the clock supervision*".

It was found the appellants could not comply with the Immigration Rules for adult dependent relatives but in relation to paragraph 276ADE, having directed herself legally appropriately, the judge, when considering very significant obstacles, found appellants had not shown any hardship or difficulty

> *"or anything else which reaches the threshold. They will be returning to their home country where they have lived all their lives, where they have their own home, family and friends, they can access funds and medical treatment and from which they have been absent for a relatively brief period".* [103].

The judge proceeded to find no unjustifiably harsh consequences to their return at paragraph 104 and that is the backdrop to the assessment on proportionality.

The judge was aware of the length of time the daughters had lived in the UK , and apart from their parents, and the circumstances of their returns to Iran. The second appellant gave evidence which was recorded at [37] that her daughters '*both escaped from Iran as a result of persecution'* and again at [38] that '*Her children cannot relocate because they escaped from Iran'*. The judge noted that daughter S had lived in the UK for more than 24 years and there was oral evidence that during that period she had not *contacted* her parents for a period of ten years [45]. The second daughter, F, had arrived in the UK in 2005 and has been here for fifteen years and the appellants did not live with her. The first appellant stated on one occasion F had been detained and prevented from returning to the UK for four months, [17]. The judge was fully aware that S gave evidence that she had been advised not to return to Iran, [57]. The judge also noted at [62] that S had travelled to Iran in 2013 when she had her passport confiscated. Nonetheless it would seem she had returned. Indeed, S said she was last in Iran five years ago and her sister was there about three years ago [57].

The judge clearly knew that the parents were visiting their daughters and their residence was supposedly temporary.

At paragraph 107 the judge accepted that the family

> *"is a close and loving one and it is not surprising that the second appellant in particular falls into a depression when she returns to Iran and is separated from her children, nor is it surprising that the*

> *children worry about their parents. The pain of separation is natural and to be expected, but there is nothing exceptional about it. The family can continue to keep in touch by telephone and messaging and S and F can visit. It is also open to the appellants to make applications for entry clearance in the appropriate category."*

The judge thus found family life, but the strength of the family life was in the context that the family had lived apart and the daughters had formed their lives in the UK and the parents had each other in Iran.

Against that background the judge factored in the travel information in relation to Iran. The judge was aware of the Foreign and Commonwealth advice before her and was aware of the difficulties. The judge specifically referenced the guidance at [86].

The advice states:

> "*However, for British-Iranian dual nationals the FCDO continue to advise against all travel to Iran. If you are in Iran, you should consider carefully your need to remain, and your presence is not essential, you should consider leaving."*

The advice goes on:

> *"If you decide your presence in Iran is essential, you should maintain a low profile and keep up-to-date with developments, including via this travel advice. … Avoid any rallies, marches and processions, keep away from military sites and follow the instructions of the local authorities at all times."*

The advice proceeds: "*There is a risk that British nationals, and a significantly higher risk that British-Iranian dual nationals, could be arbitrarily detained or arrested in Iran*."

The guidance included the phrase "FCO *continue* to advise against all travel to Iran".

There was no indication of the previous travel guidance that was before the judge and therefore I consider that it was open to the judge to conclude that the daughters had travelled to Iran previously and one of them had indeed travelled in 2018. Bearing in mind the oral evidence given was that the daughters had escaped from Iran because of persecution and yet had visited Iran the judge was entitled to give the weight she did to the FCO guidance. The FCO guidance is just that – guidance.

Even if that were not the case, the judge found that the family could continue to keep in touch by telephone and messaging. In view of the nature of the family life over time and between adults and which had been described in detail, that conclusion was open to the judge. The family had lived apart for many years, the parents moved between sisters and both of the daughters

worked during the day. Further the parents had each other, their own income and were self sufficient in terms of care.

Additionally, the judge found the appellants could make applications for entry clearance in the appropriate category. The judge was careful not to prejudge the success or otherwise of any future applications.

The judge thus was fully aware of the risks to British-Iranian dual nationals as cited at paragraph 100 but also factored in and carefully weighed the strength of the family life. All of the parties involved are adults and it is quite clear that the judge must have taken into account that they were separated for many years. I repeat, the second appellant's evidence was that the daughters had 'escaped' from Iran but in fact they had nonetheless returned.

Particularly, at paragraph 109 the judge finds:

> *"The appellants came here as visitors with no expectation of being allowed to remain. I have been unable to identify any exceptional circumstances, whether individual or cumulative, sufficient to outweigh the public interest in their removal or circumstances that result in unjustifiably harsh consequences to them or their family members in the UK. Accordingly, I do not find the decision of the respondent to be disproportionate."*

Against the background of the judge's findings the judgment displays no material error of law. The submission before the Tribunal referred to the Foreign and Commonwealth advice was that the FCO's ability to provide consular support was extremely limited and the risk applied to all dual British-Iranian nationals irrespective of profile. There was no indication that the judge failed to acknowledge this submission but merely balancing the strength of the family life against the requirements of immigration control, having noted that the appellants could not comply with the immigration rules, the removal was found not to be disproportionate. Perversity has a high threshold which is not made out here and there is no misdirection in law. At paragraph 109 the judge refers, in terms, to the correct legal test of 'unjustifiably harsh consequences' to the appellants or their family members in the UK.

There is no material error of law.

Notice of Decision

The decision before the First-tier Tribunal will stand and the appeals remain dismissed.

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.

Signed Helen Rimington Date 3rd March 2021
Upper Tribunal Judge Rimington