Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: AA/06781/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 April 2016	**On 22 July 2016**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

AH
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms R Chapman, Counsel instructed by Elder Rahimi Solicitors
For the Respondent: Mr P Clarke, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Iran born on [ ] 1995. On 12 August 2014 a decision was made by the respondent to refuse to vary leave to remain, with a removal decision under s47 of the Immigration, Asylum and Nationality Act 2006.

2. The appellant appealed against those decisions and his appeal came before First-tier Tribunal Judge Kimnell ("the FtJ") on 12 August 2015. The appellant's mother was also an appellant before the FtJ.

3. The result of the appeal was that the appellant's mother's appeal was allowed on asylum grounds but the appellant's appeal, on asylum and human rights grounds, was dismissed. It is only the case of the appellant before me who is the subject of these proceedings. The respondent has not challenged the decision to allow the appeal of the appellant's mother.

4. The first appellant's mother claimed asylum on the basis that her life would be in danger in Iran because she is an atheist. When she had previously been in Iran she had completed a form in order to obtain a birth certificate but she left the question about her religion blank. She was asked to return to the relevant office and following her departure from Iran was subsequently summoned by the authorities.

5. The appellant's mother left Iran in March or April 2010 to travel to the UK on a visa with the appellant before me. After a trip to Canada the appellant's mother returned to the UK in April 2012 but then returned to Iran in June 2012 following her husband having heart surgery. A further trip to the UK was made in August 2012, and the appellant's mother last arrived in the UK on 3 February 2013 when she made her claim for asylum. She said that she had previously been arrested and detained in 2009 during which time she was badly beaten, and felt at risk on return, hence the asylum claim.

6. At [11] the FtJ noted that notices of immigration decision were served on the appellant and his mother and that both had lodged notices of appeal, although it had been explained to the FtJ that the second appellant is dependent on the first appellant for his claim.

7. In summary, the FtJ concluded that the appellant's mother had given a credible account of past events. He accepted that she was interrogated and ill-treated during an inquiry into her religious belief in 2009. He also accepted that she had applied for a new birth certificate in 2013 and failed to declare that she was Muslim. He accepted that she had received summonses to attend the authorities on return to Iran. He concluded that there was at least a reasonable degree of likelihood that having regard to the 2009 incident the appellant's mother would be interrogated again because of her failure to answer the question on religion in her latest application and that during the course of an interrogation there was a reasonable degree of likelihood that she would again be ill-treated. He found therefore, that the appellant's mother had a well-founded fear of persecution for a Convention reason, namely her religious belief "or lack of it".

8. I quote in full what the FtJ said about this appellant, at [56]:

> "As regards the second appellant, Mr Hodson acknowledged, as he was bound to do in view of the evidence, that he could not make out a separate claim that he is at risk. There is no indication that other family members living in Iran have been subjected to ill-treatment, certainly not the second appellant's siblings. It may well be that the first appellant having succeeded with her appeal, representations will have to be made to the respondent to grant the second appellant leave in line with his mother's but the second appellant has no well-founded fear of persecution and his appeal against the refusal of asylum cannot succeed. No separate Human Rights argument has been put on his behalf."

Grounds of Appeal before the Upper Tribunal

9. The grounds refer to the appellant having entered the UK on 2 April 2012 with his mother, who had been granted leave to enter as a student visitor until 2 March 2013. The appellant at that time was aged 16 years and was granted leave to enter as her dependent child for the same period. The appellant was included in the application of his mother for asylum as his mother's dependant, he then still being only 17 years of age. In refusing to vary the appellant's mother's leave to remain on asylum grounds, the appellant's application for variation of leave to remain was also refused.

10. The grounds accept that the appellant had never made a claim to be at separate or independent risk on return to Iran, never having claimed asylum in his own right. His application had at all times been that of a dependant on his mother's claim. This is also how the respondent treated the appellant's application for variation of leave.

11. The grounds refer to paragraph 349 of the Immigration Rules, and what is said to be a clear distinction between, for example, a minor child who makes a claim for asylum in his own right and a child who applies as the dependant of an adult parent. In the case of a minor child applying for asylum in his own right, that claim will be considered individually in accordance with para 344. However, it is argued that where the principal applicant, in this case the mother of the appellant, claims and is granted asylum, then any dependant minor child will be granted asylum and leave to remain for the same duration as the principal applicant. It is argued that it is the circumstances at the time at which the application for asylum is made which is determinative.

12. It is also contended that there has been no individual consideration of any purported claim by the appellant in accordance with para 344, because he never claimed asylum in his own right. He had never been interviewed by the respondent and the reasons for refusal letter deals exclusively with his mother's claim. It is contended that it was wrong for the FtJ, in effect, to require the appellant for the first time to show an independent basis of risk on return to Iran as a condition of his qualifying for asylum. This it is argued directly conflicts with the policy and procedures of the respondent as set out in the Immigration Rules. It is contended that the appellant's appeal should also have been allowed on asylum grounds in line with that of his mother.

13. The grounds are elaborated on in their renewal to the Upper Tribunal ("UT") after the First-tier Tribunal ("FtT") refused permission to appeal. In terms of what was or was not advanced on behalf of the appellant before the FtT, it is said that what was agreed to was that no evidence had been put forward to support a claim that the second appellant was at independent risk on return to Iran. It is said that that was a concession about the state of the evidence but not about it being a fact that the second appellant was not at such independent risk. It is contended that it was wholly unnecessary for the second appellant to have put forward such an independent claim supported by evidence because at all times he had been treated as a dependant on his mother's claim. The respondent never required the appellant to provide evidence of any separate risk to him as an individual.

14. That, it is argued, remained the situation at the time of the hearing before the FtT, notwithstanding that the appellant had by then turned 18 years of age. That did not alter his status as a dependant on his mother's claim.

15. The respondent's 'rule 24' response relies on the fact that by the time of the hearing before the FtT the appellant was an adult of 19 years of age. His representative at the hearing before the FtT accepted that he could not make out a separate claim that he is at risk. Accordingly, the FtJ was entitled to find that the appellant had not established a well-founded fear of persecution in his own right, there being no indication that other family members living in Iran had been subjected to ill-treatment, including the appellant's siblings.

Submissions

16. Although the final hearing before me was on 13 April 2016, the appeal was in fact listed on 15 March 2016 when Ms A. Everett appeared on behalf of the respondent. On that occasion I heard submissions from the parties, Ms Chapman representing the appellant. Ultimately, I adjourned the hearing to 13 April 2016, as explained further below.

17. On 15 March Ms Chapman relied on the grounds and referred me to para 349 of the Rules. It was submitted that it was the Home Office's position that a former minor child would continue to be treated as a dependant even after reaching majority. It was accepted that if a dependant had formed an independent life, or had a different nationality for example, or there was criminal conduct, the respondent would not be obliged to grant leave in line with a successful claim by the person upon whom the minor was dependent.

18. Furthermore, Ms Chapman submitted that in principle, under refugee law, a person is a refugee from the time that they make their claim. The appellant's mother was a refugee, having been found to be so by the FtT. The Home Office does backdate a grant of status. Therefore, at the time of the application the appellant, being a minor dependant, was also a refugee.

19. She drew a parallel with entry clearance appeals in terms of the significance of age at the date of application. It was submitted that just because an individual becomes an adult by the time of an appeal, he should not be treated as an adult for all purposes. The FtJ had failed to treat the appellant as a dependant of his mother. The correct decision would have been to allow both appeals. That would not be because he had his own basis of a fear of persecution but simply as his mother's dependant.

20. I was referred to the date on which the asylum claim was made, being 18 February 2013. At that time the appellant was aged 17. The only thing that had changed was the passage of time.

21. I was invited to find that there was a material error of law in the decision of the FtJ and to substitute a decision allowing the appeal. So far as para 349 is concerned, that reveals that it is the circumstances at the time of an asylum application that are determinative. Certainly, that is true in the case of dependants.

22. Ms Everett accepted that it was not likely that the respondent would have appealed if the appellant's appeal had been allowed in line with that of his mother. I was referred to the Asylum Policy Instruction ("API") which it was said indicated that if a dependant is under the age of 18 at the time of the asylum claim, that person would normally be treated as a dependant at the time of any decision. The word "normally" is used; subject to external factors. Thus, it was accepted that where a dependant becomes over the age of 18 during the asylum process, that person would normally be granted leave in line with the adult. That would not amount to refugee status but simply leave in line with the main applicant.

23. However, the case before the FtT was never run on the basis that the respondent's decision in relation to this appellant was not in accordance with the law (because of his mother's meritorious claim). In fact, the FtJ could not have come to any other conclusion than that which he came to. It was submitted that para 349 does not really assist the appellant. Had the argument before the FtT been that the decision was not in accordance with the law on the basis of a failure to follow policy, that may have been an argument open to them.

24. In the circumstances, it is not clear on what basis it could be said that the FtJ had erred in law.

25. In reply Ms Chapman submitted that the respondent's position is misconceived. It would not have made sense for the second appellant to argue that the respondent's decision was not in accordance with the law in terms of the initial decision by the respondent. The focus for the grounds was the risk to the appellant's mother on return to Iran. His position was that he was her dependant.

26. Normally speaking, a decision by the FtT in these circumstances would be that a dependant appellant's appeal would succeed in line with the appeal of the main appellant. Dismissing the appellant's appeal potentially puts him at risk of removal.

27. Albeit that the policy could be said to be rather ambiguous, and even if a dependant would not be granted the same status (as a refugee), they would normally be granted the same duration of leave as the main applicant. These are matters for the discretion of the Secretary of State.

28. In an attempt to resolve the issue at the heart of the appeal before me, I decided that it would be useful to give the respondent the opportunity to consider the matter further. To that effect, I adjourned the appeal with a direction to the respondent that on or before 13 April 2016 she was to confirm in writing to the Tribunal and to the appellant whether or not she would grant leave to the appellant in line with the leave to remain granted to the appellant's mother.

29. Thus it was that the appeal came back before me on 13 April 2016. As it happened however, there was no representation for the respondent, at least not when the case was called on. It was however clear that no action had been taken by the respondent in compliance with the direction that I gave on the last occasion. I was informed that Ms Everett was instructed to appear but there was some difficulty in her being able to attend on time.

30. Mr Deller appeared initially, and informed me that enquiries had been put in train but the outcome of those enquiries in relation to what was proposed in terms of leave was not known. He indicated that he was not aware of any obvious reasons as to why this appellant was not granted leave to remain in line with that of his mother.

31. Mr Deller was in fact only standing in for Ms Everett and had to be elsewhere. Mr Clarke then appeared on behalf of the respondent, although I put the case back to see if Ms Everett was in fact able to attend.

32. Ultimately, Mr Clarke proceeded to present the appeal on behalf of the respondent. In essence, he submitted that it was clear that there was no error of law on the part of the FtJ. All that could be done so far as the respondent was concerned, was to reconsider the position in terms of what leave if any was to be granted to the appellant.

33. Although the issue of the appellant withdrawing the appeal (or at least 'his case', which is all that the UT procedure rules allow for) was canvassed, Ms Chapman indicated that she had no instructions to withdraw the appeal and a determination of the issue was sought. Arguments previously advanced were repeated.

34. It was submitted that the FtJ did materially err in law in dismissing the appellant's appeal, in effect ceasing to treat the appellant as a dependant

and treating him as an appellant in his own right. He had not made any separate claim and was not required to have done so. It was submitted that it were otherwise, all dependants would be required to make a claim in their own right, whatever their age. I was again referred to the API in various respects.

My assessment

35. It is clear that this appellant has always been treated by the respondent as a dependant on his mother's claim. At the time she made her claim for asylum the appellant was still 17 years old. The FtJ at [11] noted that there were notices of decision in respect of the appellant and his mother and that notices of appeal had been lodged in both their cases, albeit that the appellant was dependent on his mother's claim. It is also true to say, as noted by the FtJ in the same paragraph, that this appellant's grounds of appeal are identical to those of his mother, as one would expect in the circumstances.

36. The respondent's decision in the case of this appellant, and that of his mother, was made on 12 August 2014, by which time this appellant was 18 years of age.

37. I have already quoted from [56] of the FtJ's decision, whereby the appellant's legal representative acknowledged that this appellant could not, on the evidence before the FtJ, make out a separate claim on his own behalf that he was at risk.

38. It is as well to set out the legislative and policy provisions to which I was referred. So far as material, para 349 provides as follows:

> "A spouse, civil partner, unmarried or same-sex partner, or minor child accompanying a principal applicant may be included in his application for asylum as his dependant, provided, in the case of an adult dependant with legal capacity, the dependant consents to being treated as such at the time the application is lodged. A spouse, civil partner, unmarried or same-sex partner or minor child may also claim asylum in his own right. If the principal applicant is granted refugee status or humanitarian protection and leave to enter or remain any spouse, civil partner, unmarried or same-sex partner or minor child will be granted leave to enter or remain for the same duration. The case of any dependant who claims asylum in his own right will be also considered individually in accordance with paragraph 334 above. An applicant under this paragraph, including an accompanied child, may be interviewed where he makes a claim as a dependant or in his own right."

39. I do not consider it necessary to set out the provisions of para 334 because I do not consider it of particular relevance to the issue to be determined. Suffice to say, that aspect of the Immigration Rules deals with the circumstances in which an individual will be granted asylum. One of the conditions is that the individual is a refugee.

40. The full title of the API's is the Asylum Policy Instruction, Dependants and former dependants version 2.0, dated May 2014. Paragraph 1.1 explains the purpose of the instruction which is, in summary, to give guidance to caseworkers as to how they should process and consider asylum claims where a principal applicant has one or more family members who are either a dependant on the claim or claiming asylum separately in their own right, or both.

41. Paragraph 3.7, entitled "Children who reach the age of 18 before an initial decision" provides as follows:

> "A minor child included as a dependant in the original claim who reaches the age of 18 before an initial decision on the principal applicant's claim should normally continue to be treated as a dependant for the purposes of the claim."

42. That paragraph goes on to state that they cannot continue to be treated as a dependant for removal purposes, for reasons explained.

43. Paragraph 3.10 is entitled "Applications for leave in line following a decision". It refers to various family members and the like in terms of the Family Reunion policy in circumstances where they were not included as dependants before a decision on the principal applicant's claim. It refers to any leave being granted to family members joining a refugee etc. being generally granted leave in line with that of the refugee.

44. Section 4 is entitled "Granting or refusing leave in line". At 4.1 it states that:

> "Dependants of an asylum applicant who have been included in the initial asylum claim will, if the principal applicant is granted Asylum, HP, Family or Private Life leave to remain (LTR) or Discretionary Leave, normally be granted leave of the same duration *and status* as the principal applicant" (my emphasis).

It then refers to para 349 of the Immigration Rules.

45. It goes on the state as follows:

> "Although it may not be appropriate to recognise some dependants as refugees, for example if they specifically request not to be treated as a refugee or they are a different nationality to the principal applicant, they should still be granted LTE/R for the same duration as the principal applicant."

46. To summarise therefore, the respondent's policy as set out in the API's is to grant leave to those dependent on the principal applicant in line with the grant to the principal applicant. They should "normally" continue to be treated as a dependant for the purposes of the claim even though they reach 18 before an initial decision. So far as relevant, para 349 of the Rules is to the same effect at least in terms of a dependant being granted leave of the same duration as the principal applicant.

47. The submissions made on behalf of the respondent were at least consistent in terms of questioning as to how it could be said that the FtJ erred in law. Having heard the submissions on behalf of the appellant I sought to distil what I considered to be the essence of the error of law contended for. It is that the FtJ erred in law by treating this appellant as an appellant in his own right and not as a dependant of his mother. Accordingly, the appeal should have been allowed in accordance with the respondent's policy on the basis that the appellant is a dependant. That formulation of the alleged error of law was assented to on behalf of the appellant, although I do not necessarily suggest that that is the only way that the argument as advanced could be framed.

48. The appellant's grounds contend that what the appellant's representative is recorded as having said at [56] of the FtJ's decision is that there was a concession about "the state of evidence" not about it being a fact that the second appellant was not at independent risk. That however, does not seem to me to alter the position as it was before the FtJ, namely that it was acknowledged on behalf of the appellant that the evidence before the FtJ did not support a self-standing risk on return for the appellant.

49. It is the case that FtJ was bound to deal with the grounds of appeal that were before him in the case of both appellants. There is no doubt about the fact that, in form at least, this appellant was an appellant in his own right before the FtT. There was a separate notice of decision in his case and a separate notice of appeal, albeit that the grounds were identical to those of his mother.

50. It has not been suggested that para 349 of the Immigration Rules or the API's were brought to the FtJ's attention. In that sense therefore, it could be said that the FtJ could not have erred in law for failing to deal with an argument that was not put before him.

51. On the other hand, the FtJ did plainly recognise that this appellant was a dependant. He referred at [56] to the possibility of representations being made to the respondent for the appellant to be granted leave in line with that of his mother. Thus, the issue of what the outcome for the appellant as a dependant should have been, was before the FtJ, regardless of whether the specific arguments which have been advanced before me were ventilated before the FtJ.

52. Para 349 is concerned with, so far as relevant to the matters in issue before me, a minor child being granted leave to enter or remain for the same duration as the principal applicant. It says nothing about the status of the dependant as a refugee. The API's are to like effect, except for the fact that at paragraph 4.1 it states that leave will normally be granted "of the same duration *and status*" (my emphasis) as the principal applicant. Furthermore, it goes on to give examples of circumstances where it may not be appropriate to recognise some dependants "as refugees". The implication is that dependants will be granted refugee status. The

respondent's policy as set out in the API's therefore, is not simply about duration of leave but it is also about status.

53. Neither party referred me to the UNHCR Handbook on Procedures and Criteria for Determining Refugee Status, but I have considered it. Chapter VI is headed "The principle of Family Unity".

54. The relevant paragraphs state as follows:

> "182. The Final Act of the Conference that adopted the 1951 Convention:
>
> "Recommends Governments to take the necessary measures for the protection of the refugee's family, especially with a view to:

> (1) Ensuring that the unity of the refugee's family is maintained particularly in cases where the head of the family has fulfilled the necessary conditions for admission to a particular country.
>
> (2) The protection of refugees who are minors, in particular unaccompanied children and girls, with special reference to guardianship and adoption."
>
> 183. The 1951 Convention does not incorporate the principle of family unity in the definition of the term refugee. The above-mentioned Recommendation in the Final Act of the Conference is, however, observed by the majority of States, whether or not parties to the 1951 Convention or to the 1967 Protocol.
>
> 184. If the head of a family meets the criteria of the definition, his dependants are normally granted refugee status according to the principle of family unity. It is obvious, however, that formal refugee status should not be granted to a dependant if this is incompatible with his personal legal status. Thus, a dependant member of a refugee family may be a national of the country of asylum or of another country, and may enjoy that country's protection. To grant him refugee status in such circumstances would not be called for.
>
> 185. As to which family members may benefit from the principle of family unity, the minimum requirement is the inclusion of the spouse and minor children. In practice, other dependants, such as aged parents of refugees, are normally considered if they are living in the same household. On the other hand, if the head of the family is not a refugee, there is nothing to prevent any one of his dependants, if they can invoke reasons on their own account, from applying for recognition as refugees under the 1951 Convention or the 1967 Protocol. In other words, the principle of family unity operates in favour of dependants, and not against them."

55. The UNHCR Handbook is not binding but is a guide to the Contracting States for the determination of refugee status. The respondent's policy as set out above is consistent with the guidance in the UNHCR Handbook. This appellant never claimed asylum in his own right and did not advance such a claim before the FtT, notwithstanding that he was formally an appellant in those proceedings.

56. In the circumstances, I do consider that the FtJ erred in law in considering the appellant as anything other than a dependant on his mother's claim, impliedly requiring him to substantiate a claim for asylum in his own right where on the facts that is contrary to way the respondent had treated him and contrary to the respondent's policy. It is unfortunate that the FtJ did not have the benefit of argument on the point, with reference to the materials to which I have referred. In terms of whether it was an error of law for the FtJ to have failed to deal with an argument that was not advanced before him, I repeat the observations I have made at [51] above.

57. Having decided that the FtJ erred in law, I set his decision aside (naturally only in so far as it relates to this appellant), in terms of his decision on Refugee Convention grounds. The only proper outcome in those

circumstances is for me to re-make the decision by allowing the appeal on asylum grounds.

Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision to dismiss the appeal on asylum grounds is set aside and the decision re-made, allowing the appeal on asylum grounds.

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 his 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.

Upper Tribunal Judge Kopieczek 21/07/16