



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number:
AA/03625/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 2nd June 2016

Determination Promulgated
On: 5th July 2016

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

FDS
(anonymity direction made)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant:
For the Respondent:

Mr G. Brown, Counsel instructed by A. Seelhoff Solicitors
Mr G. Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of the Islamic Republic of Iran born in 1973. He appeals against the decisions of the Respondent to refuse to vary his leave to remain and to remove him from the United Kingdom pursuant to s47 of the Immigration Asylum and Nationality Act 2006. Those decisions, served on the 19th February 2015, followed from rejection of the Appellant's asylum and human rights claims.

2. The decision in this appeal is being re-made in the Upper Tribunal because on the 1st May 2016 the decision of the First-tier Tribunal was set aside in its entirety. The 'decision on error of law' appears at Appendix A but in brief summary the First-tier Tribunal was found to have erred in a) failing to give adequate reasons b) a failure to take material matters into account and c) misdirecting itself in respect of Article 8 ECHR.
3. Mr Brown asks that in re-making the decision in the appeal I make findings on three matters:
 - i) Is the Appellant entitled to refugee status, having established to the lower standard of proof that he has a well-founded fear of persecution in Iran for reasons of his political opinion;
 - ii) Is the Appellant entitled to further leave in the United Kingdom because he has now accrued over ten years' lawful residence in this country and on a balance of probabilities meets all of the substantive requirements of paragraph 276B(i)-(ii) and (v) of the Immigration Rules;
 - iii) Would the Appellant's removal be a disproportionate interference with his Article 8 rights even if (ii) above is not established?
4. I deal with each ground in turn.

Asylum

Legal Framework

5. The burden of proof lies on the Appellant. He must demonstrate that it is *reasonably likely* that he would face persecution for reasons of his political opinion if returned to Iran today. This is a lower standard of proof than that normally applicable in civil appeals and can also be expressed as a 'real risk'.

The Evidence

6. The Appellant came to the United Kingdom as a student in 2006. He had been here for approximately six years when he claimed asylum. In interviews conducted in December 2012 and January 2013 he told the Respondent that he had a well-founded fear of return to Iran because the Iranian authorities know

or suspect him to have been involved in assisting dissidents in circumventing internet controls and in spreading propaganda against the Iranian regime online.

7. The particulars of the claim were that the Appellant is an expert in telecommunications and electronics. He is also politically opposed to the Iranian government. The Applicant states that in 2009 he started advising a friend called Ali, and others who knew of him through this friend, about how to disrupt filters used by the Iranian security service to prevent people within the country accessing certain information on the web. They set up an email address whereby the Appellant could offer Iranians direct advice about these issues. Ali was arrested in March 2012 and the Appellant stopped operating the email advice service. During 2012 the Appellant published six articles in his own name which were posted on a website called 'Kaleme'. They were also reproduced on his Facebook page and other social media sites. These articles dealt with issues concerning cyber security and discussed the means by which the State is able to use "lawful interception" in order to monitor the online behaviour of its citizens.
8. In November 2012 the Appellant learned that the authorities had issued a summons for him to attend court in Shiraz. When he failed to attend the security services detained his father for one day. The Appellant expressed fears that if returned to Iran he would be detained in pursuance of this summons and that any investigation will very likely present a real risk of serious harm.
9. On appeal the Appellant has provided a detailed witness statement dated 4th July 2015 and further documentary evidence. In respect of the alleged criminal investigation, the Appellant submitted that his family in Iran had instructed a solicitor to act on his behalf. This man, a [P], had acted for him until illness forced him to withdraw from the case. Although the Appellant has managed to get another lawyer to send him relevant documents, a Mr Tabatabaei, he will not conduct an appeal. The Appellant has been told by his father and the lawyers that the following events have occurred in his absence:
 - i) In November 2012 a summons was issued against the Appellant;
 - ii) When the Appellant did not appear the authorities raided the family home;
 - iii) The Appellant's father was subsequently summoned to court;
 - iv) The Appellant's father attended court and was informed that his son was wanted for "cybercrimes" and "crimes against national security";

- v) [P] was able to see from the court file that the authorities are in possession of articles written by the Appellant;
- vi) On the [] 2013 the prosecution collapsed because a judge ruled that there was insufficient evidence;
- vii) The prosecution gathered further evidence and disputed the ruling;
- viii) A new hearing took place on the [] 2014. The Appellant was convicted *in absentia* and was sentenced to eight years in prison, and ten years in exile;
- ix) There is a live warrant for the Appellant's arrest in place;
- x) An appeal was lodged against the sentence but it is not now pursued due to [P]'s retirement on health grounds.

10. The Appellant supported his account by the production of several documents (all accompanied by certified translations):

- a) Summons issued by the Prosecution Office of Shiraz, 22nd Branch, requiring the attendance of the Appellant (or someone with his name) within three days of issue on the [] 2012
- b) A 'Warning notice' issued by the Prosecution Office of Shiraz on the [] 2012 to the effect that the Appellant must answer to the summons or a warrant will be issued for his arrest
- c) An email from [YT], First Grade Lawyer, sent on the [] 2015 attaching a letter and a copy of the verdict of the Public and Revolutionary Court of Shiraz. This appears to have been sent in response to an email from the Appellant dated the [] 2015 seeking information about the case
- d) The letter attached to email from [YT] mentioned above. The letter is dated [] 2015 and is on headed notepaper, indicating that his office is in Tehran. He explains that the Appellant's father instructed him on the 9th April 2015. He was asked to "chase the file" and find out what had happened in the case opened against the Appellant in the Public and Revolutionary Court of Shiraz. He was assisted by a colleague who is based in the city, a [A]. [YT] reports that the file was opened on the [] 2012. It is based on a series of article that the Appellant shared on the internet. The warrant is still live. On the [] 2012 the Appellant's father attended court to update the investigators but was himself "arrested for a short period of time".

The letter goes on to detail how the prosecution stalled in August 2013 only to be reopened once more evidence was obtained. The Appellant was convicted and sentenced to 8 years in prison plus exile for ten years. An appeal was lodged but later dropped

- e) Copy of the court verdict issued by the Public and Revolutionary Court of Shiraz on the [] 2014 indicating that the conviction was for violation of Article 505 of the Islamic Penal Code and Article 18 of the Cyber Crimes Code
 - f) Various articles written by the Appellant (or someone with his name). These appear as screenshots from the website 'Kaleme'
11. The Appellant relied on these documents to submit that he would be arrested upon return to Iran.
 12. In his oral evidence the Appellant confirmed that he had told the truth at his asylum interviews and when he gave his statement to his solicitor. He was asked by Mr Harrison why he had come to the UK in 2006. He explained that he was feeling uneasy about what he was being asked to do in his work in Iran. He did not want to be involved in the systems that the government were trying to create, or in hacking. So, although he had studied for a long time already, he decided to come here in order to put some distance between himself and this activity. He came to the UK in order to study for a doctorate. The Appellant stressed that he had never been overtly involved in politics in Iran. When he started posting things online and publishing articles he did so because of his own views about the way that the government were seeking to control communications - he was not aligned to any particular opposition group or figure. That was why he had set up the email advice service.
 13. The Appellant was asked about his name. He said: "if you 'google' this name I am the only person you will find". It's a three part name and the last part refers to the city where his family originate.
 14. The Appellant said that he maintains regular contact with his family. He spoke to them the day before the hearing. They are elderly and need his support. He has one brother left in Iran. His sister obtained a green card and has gone to live in the USA with her husband and children. He has another brother in Austria who has his own problems with the authorities in Iran - he would never obey the religious police.
 15. The Appellant confirmed that he travelled back to Iran in 2010, before he had published anything online. He did not have any problems during that trip. His family have experienced problems because of the case being brought against him. His father has been detained for one day. They are worried about him.

16. The Appellant was asked about his friend Ali. He and Ali had been in regular contact until suddenly in March 2012 he went silent. The Appellant was later told that he had been arrested. Ali had been sentenced to 8 years in prison. In April 2015 the authorities let Ali out of prison on temporary release because he needed an operation on his leg. During that period he spoke on the phone to the Appellant. he told the Appellant of how he had been arrested and what prison was like. He did not think that the authorities had ever found out about the email advice service. The Appellant did not know if Ali would be able to contact him from inside prison - by writing or calling - but since he had not heard from him again he presumed that he had gone back inside after his operation. In his evidence the Appellant appeared emotional when he explained that Ali was a good friend and that he would want to contact him if he could: the Appellant believes Ali to be experiencing very bad conditions.

Discussion and Findings

17. The Respondent refused the Appellant asylum because she did not believe that the claims were reasonably likely to be true. In her refusal letter dated 19th February 2015 the Respondent gave the following reasons for her conclusions:

- The articles that the Appellant claims to have written can no longer be found online
- It is not considered credible that the Appellant would publish articles in his own name
- It is not considered credible that the Iranian authorities would be able to trace the Appellant to his family home just on the basis of the name used in the articles - there are 70 million Iranians

The Respondent does not consider that the Appellant would be at risk today since he is not politically active, nor could he be described as a high profile blogger.

18. I remind myself of the lower standard of proof. I find as follows.

19. I have read the Appellant's interview records and witness statement with care. I have had an opportunity to see him give oral evidence. Having done so I am satisfied that his evidence has been detailed and internally consistent. In closing submissions Mr Harrison could not point to any discrepancies of even minor significance. This was a lengthy and sometimes complex account and I find that it lends weight to the Appellant's case that he was able to recount it in a consistent manner.

20. I find that the account is plausible, set in the context of the country background material. It is the Appellant's detailed evidence that he was drawn into supporting dissent in Iran because he was so horrified at the State's program of

surveillance and interference with the ability of ordinary Iranians to access information online and through other media. That the Iranian state have such programs, and that they can mete out heavy punishment to dissidents accused of working online (particularly those based in Iran) is a notion supported by the background material: see for instance AB and Others (internet activity – state of evidence) Iran [2015] UKUT 0257 (IAC), and the Respondent's own Country Information and Guidance *Iran: Journalists and Bloggers* published 9th October 2014.

21. I find that the account is broadly plausible, set in the context of the Appellant's own circumstances. The Appellant is a telecommunications expert and as such his account of work with the government, and establishing contact with radical students, is plausible. Less plausible is his claim that he published in his own name matters implicitly critical of the Iranian government. The Respondent fairly asks why someone with a working knowledge of the Iranian state's efforts to monitor telecommunications of all descriptions would expose himself to any risk. I have taken that point into account alongside the submission that none of the articles produced before me have actually been proven to have ever appeared online. Although the Appellant's bundle contains what appear to be screenshots of articles in the Appellant's name from the website 'Kaleme' these can not now be traced to that source. I have weighed that matter in the balance.
22. The Appellant has produced a good deal of documentary evidence. I bear in mind that documents from Iran – indeed from any country in the world – may be forged. They may have been obtained by bribery from some corrupt official. I have considered the documents in the round with the oral and written evidence of the Appellant.
23. The paper trail indicates that the Appellant was initially summoned, in November 2012, to appear at the Prosecution Office of Shiraz, 22nd Branch, with a view to investigating the offence of "cyber crimes and acting against national security". He thereafter engaged a lawyer to investigate what has happened in the case. He emailed that lawyer, [YT], and on the 6th July 2015 he received a detailed reply. [YT]'s letter is on headed notepaper and full contact details are provided. He explains that his colleague in Shiraz has managed to establish that the file against the Appellant was opened on the [] 2012 and that it is based on a series of articles published by the Appellant online. The arrest warrant issued in the course of the investigation remains live and judicial officers maintain a right to arrest the Appellant at any time within Iranian borders. [YT] provides a detailed report, purportedly based on matters discovered from the court file, of how the prosecution was initially dropped for lack of evidence but then due to new evidence emerging a new indictment was prepared and a new hearing date set. The hearing was attended by [P] who represented the Appellant but the Appellant was found guilty and sentenced in absentia to eight years in prison and ten years exile. [YT] appends to his letter a document purportedly

issued by the Public and Revolutionary Court of Shiraz 22nd Branch Shiraz which confirms the information provided by [YT] and specifies that the Appellant has been sentenced in accordance with Article 505 of the Islamic Penal Code and Article 18, Chapter 5 of the Cyber Crimes Code.

24. Having considered these documents in the round I find them to be supportive of the Appellant's claims. The documents are *prima facie* genuine, that is to say there is nothing on the face of them that would obviously indicate them to be false. They are detailed to the point of containing particulars such as the fact that the prosecution was initially dropped for lack of evidence, a story feature one might not expect to be the work of a forger. They are consistent with the Appellant's account. They are also consistent with the country background material. The Appellant's bundle contains a translated copy of the Islamic Penal Code of Iran¹ which shows Article 505 to read as follows:

"Anyone who, with the intention to disrupt national security, gathers information through any means under the cover of State authorities or government officials, if they intend to provide them to others shall be sentenced to two to ten years' imprisonment [if successful] and otherwise to one to five years' imprisonment [if unsuccessful]" .

The Articles that the Appellant claims to have caused him problems could certainly attract prosecution under this Article. They were based on information he gleaned in his work in telecommunications in Iran and were aimed at informing the general public as to how the State aimed to control internet activity: eg [at 32 A's bundle] "the regime is always finding ways to expand espionage on the internet; however with special precautions people can avoid the unfair interception of the government to access users' information on the internet". Article 18 of Chapter 5 of the Cyber Crimes Law is similarly consistent with the account: "it may be summarised as criminalising the use of a computer or telecommunications to 'disseminate lies'"².

25. I have considered all of the evidence in the round. This is a detailed account which is both internally and externally consistent, and is supported in large measure by documentary evidence. I bear in mind that the Appellant has not claimed to have any great political involvement: he has limited his case to an almost tangential involvement with the work of Iranian activists and I find that this goes to his credit. For instance, it would have been very easy for the Appellant to claim that the email account had been uncovered: to the contrary he expressly asserts that Ali assured him that it was not detected. I am satisfied that the Appellant has not sought to inflate or exaggerate this aspect of his account. What he has done, on his own case, is publish obviously problematic articles online in his own name and on his own Facebook page. He has not to date given any satisfactory explanation as to why he might have done that. He

¹ Translated and published by the Iran Human Rights Documentation Centre www.iranhrdc.org

² *Islamic Republic of Iran: Computer Crimes Law* page 37, document published by Article 19 in 2012

may have done it because of an editorial policy of Kaleme (an explanation I consider to be unlikely, given the content) or because he felt secure because he was in the UK, or because he deliberately sought to create problems for himself in order to claim asylum. Whatever the truth of that matter I am satisfied on the lower standard of proof that those articles did appear and that they have brought him to the adverse attention of the Iranian authorities. As the Tribunal observes in AB, it is trite asylum law that a refugee cannot be denied protection because he has created his own misfortune.

26. It was the Respondent's case before the First-tier Tribunal that the story cannot possibly be true because there is no way that the Iranian authorities would be able to identify the Appellant simply from his name, given that there are 70 million people in Iran. Mr Harrison wisely did not seek to advance this case before me. The Appellant has a name which identifies him, or his family, as coming from a relatively small town. That would narrow the search considerably. Furthermore it is evident from the articles themselves that the author is a person with some expertise in telecommunications, and with the government's attempts to control them: for instance one explains in detail how the microwave frequencies emitted by the government to disrupt satellite signals are damaging to human health. Given that the Appellant was himself employed by the Iranian state in this very department it is not too great a leap to accept that they might have worked out who he was. Finally as the Appellant himself observes, they might just run a simple internet search: "if you 'google' this name I am the only person you will find".
27. Having taken all of those matters into account I am satisfied that it is reasonably likely that this account is true, and that the Appellant has a well-founded fear of persecution in Iran today for reasons of his political opinion. The appeal is allowed on human rights (Article 3) and asylum grounds.

Long Residence

The Legal Framework

28. Paragraph 276B of the Immigration Rules sets out the requirements for a grant of indefinite leave to remain based on long residence:

276B. The requirements to be met by an applicant for indefinite leave to remain on the ground of long residence in the United Kingdom are that:

(i) (a) he has had at least 10 years continuous lawful residence in the United Kingdom.

(ii) having regard to the public interest there are no reasons why it would be undesirable for him to be given indefinite leave to remain on the ground of long residence, taking into account his:

- (a) age; and
- (b) strength of connections in the United Kingdom; and
- (c) personal history, including character, conduct, associations and employment record; and
- (d) domestic circumstances; and
- (e) compassionate circumstances; and
- (f) any representations received on the person's behalf; and

(iii) the applicant does not fall for refusal under the general grounds for refusal.

(iv) the applicant has demonstrated sufficient knowledge of the English language and sufficient knowledge about life in the United Kingdom, in accordance with Appendix KoLL.

(v) the applicant must not be in the UK in breach of immigration laws except that any period of overstaying for a period of 28 days or less will be disregarded, as will any period of overstaying between periods of entry clearance, leave to enter or leave to remain of up to 28 days and any period of overstaying pending the determination of an application made within that 28 day period.

29. For the purpose of the Rules "continuous" residence would not be broken for short periods of absence. "Lawful residence" means residence with either valid leave to enter or remain, or such leave extended by section 3C of the Immigration Act 1971.

30. Section 3C of the Immigration Act 1971 (as amended) provides:

13C Continuation of leave pending variation decision

(1) This section applies if –

- (a) person who has limited leave to enter or remain in the United Kingdom applies to the Secretary of State for variation of the leave,
- (b) the application for variation is made before the leave expires, and
- (c) the leave expires without the application for variation having been decided.

(2) The leave is extended by virtue of this section during any period when –

- (a) the application for variation is neither decided nor withdrawn,
- (b) an appeal under section 82(1) of the Nationality, Asylum and Immigration Act 2002 could be brought while the appellant is in the United Kingdom against the decision on the application for variation (ignoring any possibility of an appeal out of time with permission), or
- (c) an appeal under that section against that decision, brought while the appellant is in the United Kingdom, is pending (within the meaning of section 104 of that Act).

(3) Leave extended by virtue of this section shall lapse if the applicant leaves the United Kingdom.

(4) A person may not make an application for variation of his leave to enter or remain in the United Kingdom while that leave is extended by virtue of this section.

31. Paragraphs 276A1 -276A2 of the Immigration Rules provide for an extension of leave where all of the requirements of 276B (specifically the requirement to have passed the Life in the UK test) are not met:

276A1. The requirement to be met by a person seeking an extension of stay on the ground of long residence in the United Kingdom is that the applicant meets each of the requirements in paragraph 276B(i)-(ii) and (v).

Extension of stay on the ground of long residence in the United Kingdom

276A2. An extension of stay on the ground of long residence in the United Kingdom may be granted for a period not exceeding 2 years provided that the Secretary of State is satisfied that the requirement in paragraph 276A1 is met (but see paragraph 276A04), and a person granted such an extension of stay following an application made before 9 July 2012 will remain subject to the rules in force on 8 July 2012.

The Evidence

32. The Appellant's passport shows that he arrived in the United Kingdom on the 15th April 2006 with leave to enter a student, valid until the 30th November 2008. The Respondent's record shows that on the 30th October 2006 the Appellant made an in-time application to vary his leave so as to extend it. Leave was granted until the 31st March 2010. On the 10th March 2010 the Appellant made a further in-time application to extend his leave and this was granted until the 30th January 2014. The Appellant claimed asylum on the 23rd November 2012. This was treated as an application to vary and since the claim was rejected on the 19th February 2015 the Appellant has been on '3C leave'.
33. The Appellant has left the United Kingdom on one occasion since his arrival. In August 2010 he returned to Iran for a period of two weeks.

Discussion and Findings

34. The burden of proof lies on the Appellant and the standard of proof is a balance of probabilities.
35. I am satisfied that the Appellant arrived in the United Kingdom on the 15th April 2006. The Respondent's explanatory bundle gives his arrival date as September of that year: it is apparent from the Appellant's passport, and his credible oral evidence, that this is incorrect. I find as fact that the Appellant has had valid leave to enter or remain, or leave conferred by section 3C, since

that time. He has had no breaks in continuity of residence, nor has his leave lapsed at any time. He accrued his ten years' residence on the 16th April 2016.

36. I am not aware that there are any reasons why it would be undesirable for the Appellant not to be given leave to remain. As far as I have been made aware there are no matters arising as to his character. He has never overstayed.
37. The Appellant has not passed his "life in the UK test".
38. The Appellant has not demonstrated that he meets all of the requirements of paragraph 276B because he has not passed his "life in the UK test". I am satisfied that he meets all the other requirements of that provision and has such would qualify for limited leave to remain under paragraph 276A2.
39. There was some discussion at hearing as to whether such a finding could lead to the appeal being allowed outright under the Immigration Rules. Although Mr Harrison did not dispute the accuracy of my findings he pointed out that the Appellant has not made an application. He could not have done so at any point since he reached the 'ten year mark' since he was on 3C leave at that time and so would be precluded from making a further application. Mr Brown directed my attention to the Respondent's document "Guidance - Long residence - version 13.0":

The applicant completes 10 years continuous lawful residence while awaiting a decision of an appeal

A person may complete 10 years continuous lawful residence whilst they are awaiting the outcome of an appeal and submit an application on this basis. Under sections 3C and 3D, it is not possible to submit a new application while an appeal is outstanding. However, the applicant can submit further grounds to be considered at appeal.

If the applicant has an outstanding appeal against a decision to refuse leave to remain or indefinite leave to remain, and submits an application for long residence, you must void the long residence application and refund the fee. You must create a file or sub-file and mark it 'PRIORITY'. You must send the file or sub-file to the presenting officers unit (POU) dealing with the appeal. You must send a letter to the applicant or their representative informing them their application has been linked with their outstanding appeal. You must use Doc Gen letter ICD.3207 for this purpose.

40. This is clearly published as guidance for case-owners, as opposed to judges. Although not spelled out it would appear that the Respondent would recognise a finding on appeal. I therefore allow the appeal with reference to the Immigration Rules.

Article 8: Family and Private Life

The Legal Framework

41. The starting point for consideration of Article 8 is the framework set out in Appendix FM and paragraphs 276B/276ADE of the Immigration Rules.
42. The Appellant has already established that he meets the requirements for leave to remain on 'private life' grounds. In this section I consider only the question of his family life on the alternative hypothetical basis that he failed in that claim (and indeed his asylum claim).
43. Appendix FM provides for leave to remain to be granted where the applicant has a 'partner' in the UK. A partner is defined at GEN.1.2 *inter alia* as someone with whom the applicant has lived in a relationship akin to marriage for two years or more. The applicant's partner must be settled in the UK. If that 'eligibility' criteria based on relationship is met, the applicant must further show that he is eligible because he has sufficient funds. This means demonstrating a minimum household income requirement of £18,600 with reference to 'specified evidence'. The applicant must have passed the relevant English language test. The applicant must demonstrate that he is 'suitable' to be granted leave to remain, a test concerned primarily with character.
44. If the Appellant cannot meet the requirements of Appendix FM I may go on to consider Article 8 'outside of the rules' if satisfied that on the facts the article is engaged, notwithstanding the failure under FM. In my consideration of Article 8 outside of the rules I must apply the framework set out in *R v SSHD ex parte Razgar* [2004] UKHL 27. In my assessment of proportionality I am bound to consider the factors set out by parliament at s117B of the Nationality, Immigration and Asylum Act 2002.

The Evidence

45. The Appellant states that he met his partner, Ms MR, in 2007 when they were both studying for their doctorates at university in the UK. She is Russian. They moved in together in 2008 in a property owned by the Appellant. In 2007 they went together to Russia and he met her parents. In 2009 his parents visited the UK and met with MR. They are committed to each other in a loving and stable relationship. The Appellant states that they do intend to marry at some point in the future but wanted to resolve his status first. At the moment MR sees her future in the UK. She is reluctant to return to Russia because there are limited opportunities for someone in her field of research there. The Appellant believes that MR would face significant difficulties in Iran. She is Christian and has no intention of changing her religion. She does not speak Farsi and would find it very difficult to adapt to the culture in Iran.

46. I heard evidence from MR. She confirmed that she has been in a relationship with the Appellant since 2007 and that they have been living together since 2008. MR completed her doctorate after her arrival as a Tier 4 (Student) General Migrant and is now employed as a Research Associate at [] University. Her field of study is Material Science. Her salary is approximately £33,000 per annum. She describes her relationship with the Appellant as loving and stable. They would like to be married but have put it off because of the uncertainty about his future in the UK. MR sees her future in the UK. She will qualify for settlement in October of this year and she would like to remain at Manchester University where she is working on photocatalytic materials. This is an area of study she would find it difficult to pursue in either Russia or Iran. The academic structure is different in Russia and she would find it very difficult to obtain funding. Russian friends with whom she studied are now doing random jobs back home because they cannot get jobs in scientific research – one is selling coffee machines, another wallpaper. Her work means a lot to her and she cannot contemplate giving it up. As for Iran MR expressed serious misgivings about being able to go and live there. She has no idea whether as a woman she would be able to lead an independent life and carry on her work. She would not want to convert to Islam and fears that she would come under pressure to do so. She and the Appellant want to marry in the future, but on their own terms. She would not want to have to convert to Islam in order to be married.

Discussion and Findings

47. The Appellant cannot qualify for leave to remain under Appendix FM because at present MR is not settled in the UK. There does not appear to any doubt that she will in due course be granted settlement (she is eligible to apply in October 2016) and that they would meet the financial requirements, since her salary alone far exceeds the required minimum. There are no suitability issues and the Appellant is clearly able to speak fluent English, having studied at doctoral level in the UK. Whilst I am satisfied that the Appellant will very likely meet the requirements of Appendix FM at some point in the reasonably foreseeable future, he cannot do so today.

48. I therefore consider whether Article 8 is engaged outside of the rules. I bear in mind that the Rules have been framed so as to exclude partners of persons who are not settled in the UK. However, I find that in the particular circumstances of this case there is good reason to go on to consider Article 8. There is no doubt that the Appellant and his partner are in a long-term, genuine and loving relationship that means a good deal to both of them. MR is not settled now but in all likelihood soon will be. Her qualification – and indeed that of the Appellant- is a matter of months away. I am satisfied that there is a family life and that the decision interferes with it in such a way that the Article is engaged.

49. The decision to refuse leave to remain to persons who do not qualify under Appendix FM is obviously one that is lawfully open to the Respondent to make and I am satisfied that it is a decision rationally connected to the legitimate aim of protecting the economy.
50. The question is whether the decision is proportionate. In answering that I must take s117B into account. The maintenance of immigration control is in the public interest. Although the relationship with MR was formed at a time when they were both lawfully in the UK, as students their status must be considered to be "precarious" and little weight can therefore be attached to it. Although the Appellant is financially independent and speaks good English these are not matters capable of positively weighing in his favour.
51. I am satisfied that there is no way that MR is going to go to Iran with the Appellant. She made it very clear in her evidence that she cannot see a future in that country. She fears restrictions on her religious freedom and her independence as a woman. She does not want to marry because of the expectations of a society or theocracy that she does not recognise. She fears losing her career and the research opportunities that she has been afforded in the UK. Whether or not all of these fears are well founded is besides the point. I accept that these are views that she genuinely holds and that in the context of Iran they are not irrational or unreasonable. MR will not go with him. I am satisfied that if the Appellant were removed permanently to Iran there would in effect be a severance of their relationship. There is however no proposal to exclude him permanently. He has never overstayed in this country and in the absence of any criticism of his character there would be absolutely nothing that would stand in the way of him making an application to come back to the UK as MR's partner once she has obtained settlement. Any separation would therefore be a temporary, albeit I accept upsetting, frustrating and possibly lengthy one. Given that the status of both parties is presently precarious, I cannot be satisfied that such a limited interference with the family life that they currently enjoy would be disproportionate.
52. In the alternative it was suggested that the two could continue their family life in Russia. Mr Harrison pointed out that there are many Muslims in Russia and that there would be no restrictions on the Appellant learning Russian or trying to work there. Both witnesses averred that they could not move to Russia because of the funding structure of academia and the fact that their careers would suffer. Whilst I appreciate those concerns, these do not appear to be of the same gravity as those held by MR about moving to Iran. If the couple were forced to move in order to be together they would face some degree of hardship and I appreciate that it would damage their respective careers. It has not however been demonstrated that a move to Russia would have "unjustifiably harsh" consequences for them.

53. I appreciate that the man on the Clapham Omnibus might find this decision odd. These two young people are exactly the kind of educated and motivated individuals that the UK would like to attract. It is difficult to discern how the public interest might be served by removing the Appellant, risking their relationship and their careers. That is however the effect of a statutory scheme which requires that "little weight" be placed on a relationship formed when the individuals concerned held a precarious immigration status. That provision must be applied even where the individuals concerned are research scientists.

54. For those reasons I must dismiss the appeal on Article 8 grounds.

Decisions

55. The determination of the First-tier Tribunal contains errors of law and it is set aside.

56. The decision in the appeal is re-made as follows:

- i) The appeal is allowed on asylum and Article 3 ECHR grounds
- ii) The appeal is allowed with reference to paragraphs 276A2 and 276B of the Immigration Rules
- iii) The appeal is dismissed on Article 8 (family life) grounds.

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

Upper Tribunal Judge Bruce
24th June 2016