Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/20892/2015**

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 9 October 2017	**On 23 November 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE L J MURRAY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ALIEEH MOSSAVIEVAKY
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr Richards, Senior Home Office Presenting Officer
For the Respondent: Ms Nowaparast, NLS Solicitors

DECISION AND REASONS

Background

1. I refer to the Appellant as the Secretary of State and to the Respondent as the Claimant in this appeal. The Claimant is a national of Iran who was born on 3 March 1953. On 7 January 2013 she applied for leave to remain in the UK on the basis of her family and private life with her son Amir Reza as her dependant. The application was refused on 5 November 2013. The

application was reconsidered and refused again on 17 July 2014 and her son's application was granted under the private life route until 17 December 2016. The Secretary of State considered her application under the parent and private life route and refused her application in a decision dated 11 May 2015. The Claimant appealed against this decision to the First-tier Tribunal under section 82 (1) of the Nationality, Immigration and Asylum Act 2002. Her appeal was allowed by First-tier Tribunal Judge O'Rourke in a decision promulgated on 20 October 2016.

2. The Secretary of State sought permission to appeal to the Upper Tribunal and permission was granted by Designated Judge of the First-tier Tribunal Manuell on 14 February 2017. The grounds for the grant of permission were that it was not easy to see how an appeal which was bought under Article 8 ECHR could have been allowed under the Immigration Rules, let alone which Immigration Rule applied. The reasoning was found to lack discernible logic.

3. I found that there was a material error of law in the decision of the First-tier Tribunal for the following reasons recorded at paragraph 9 of the decision:

> "The Respondent's decision is dated 11 May 2015 and hence the appeal provisions introduced by the Immigration Act 2014 applied and the Claimant had an appeal on human rights grounds only unless transitional provisions applied. It does not appear to have been argued that the new provisions did not apply to the Claimant nor is any finding made by the First-tier Tribunal in that regard. In the circumstances, the First-tier Tribunal had no jurisdiction to allow the appeal under the Rules. Further, the First-tier Tribunal's conclusion that the Claimant met the requirements of the Rules is unreasoned. It is not clear which Rule is being applied to the Claimant or why the Claimant, whose son was 21 years old, would satisfy the requirements of that Rule. The reasoning is not adequate as fairness requires that the losing party should be left in no doubt why they have won or lost. In this case it is unclear why the appeal was allowed. In the circumstances I find that there was a material error of law."

4. I set aside the decision of the First-tier Tribunal and adjourned with directions for the remaking of the decision in the appeal in the Upper Tribunal. I preserved the findings of fact at paragraph 15 of the decision of the First-tier Tribunal.

The Re-making of the decision in the appeal

The Hearing

5. The Claimant and her son, Amir Reza, adopted their witness statements. They were not asked questions in examination in chief or cross-examined. I heard submissions from both representatives. Mr Richards submitted that it was clear that the Claimant had no claim to remain under the Rules and it was purely a claim under Article 8 outside of the Rules. Given the findings of fact in paragraph 15 of the First-tier Tribunal's determination it was clear that there was no family life in the UK. The Claimant's sons were adults and were perfectly capable of looking after themselves. There was

nothing of an exceptional nature in her private life in the UK and when the Claimant's rights as an individual were balanced against the public interest in maintaining an effective immigration control, the decision of the Secretary of State was clearly proportionate especially when one bore in mind that the Claimant also had children in Iran. He asked me to dismiss the appeal.

6. Ms Nowaparast confirmed that the Claimant relied on Article 8 outside the Rules. However, she asked me to attach weight to the history of the case. Had the application been decided in accordance with the law the Claimant would have had leave. The Claimant had an established private life with her eldest and youngest son. She resided with her eldest son and was dependent on him financially. She also had a family life with her younger son although they lived under separate roofs. Despite the unfortunate circumstances where they were forced to live apart there was a dependency on his mother. Her son's evidence was that he stayed with them whenever possible and the only reason was that they were living apart was due to the unfortunate circumstances that there was inability to keep up mortgage payments. Despite them both being adults and despite the ability of the oldest son to look after himself, the youngest son's evidence was that he needed his mother there. She asked me to find that there was a family life that existed between all three family members. It was of note that the Claimant and her son's evidence regarding the breakdown of the relationship with the father was the same. She did not have a husband. Addressing proportionality and the public interest, when balancing her rights she asked me to take into consideration that she had the ability to speak English and she was here for a long time with lawful residency and she had established a private life. In terms of proportionality the history of the case was something that ought to be taken into consideration. She asked me to take into consideration that she had been here since 2003. She addressed return to Iran in paragraph 5 and 8 of her witness statement. There was an error in relation to period of her absence from the UK in the decision of the First-tier Tribunal. She asked me to take into consideration the effects on her two sons in the UK should they be separated from their mother. Any separation was likely to be more than temporary.

Discussion

7. I preserved the findings of the First-tier Tribunal at paragraph 15 of the decision. First-tier Tribunal Judge O'Rourke found that at the date of the hearing before him, the Claimant's youngest son, as a 21 year old in employment, no longer had any greater dependency on the Claimant than any other young man of the same age would have on his mother. He found that he was independent and self-supporting. He did not accept the Claimant's descriptions of her connections in Iran. She had two sons and two siblings there and he found that there was no reason to suppose they would not support her. Further, no medical evidence was provided and there was no reason to assume that treatment for her conditions would not be available to her in Iran. In respect of her private life he found that she

had never worked, being latterly financially dependent on her son, Amir Masood and formerly on her husband. She ceased her studies in the UK in 2005 on health grounds, but no medical evidence had been presented in respect of those matters. There were letters of support attesting to her good character. She remained fluent in Farsi.

8. At the hearing before me, the Claimant relied on a witness statement which was received under cover of a letter dated 5 October 2017. In it she states that she came to the UK in April 2003 in order to find a place of study and was accepted by Swansea University. She returned to Iran after three months and then was granted entry clearance as a student and came to the UK in September 2011 with her three children. She details how she remained here as a student until February 2009, returning to Iran in December 2009 when her mother was ill. She describes her studies and says that her health is deteriorating every day. She considers that she has now adapted to UK society. Amir Reza now works full time in Toby Carvery. She lived with him in a house she had bought in 2007 but this was repossessed in January 2016 as she could not keep up the mortgage payments. She then went to live with her eldest son in a two bedroom flat and Amir has lived with a family friend near to his place of work. She says she still plays a role in his life and he depends on her emotionally. She cooks for him, washes his clothes and is there for him. She is concerned about his future if she were to return to Iran.

9. Amir Reza's statement is at page 7 of the Claimant's bundle. He states that his mother is his rock and the thought of her returning to Iran makes him feel devastated. He feels his mother and his older brother in the UK are the only family he now has. Although they do not live together she does a lot for him. He would feel scared for her if she went back and a woman of her age and illness would not be able to cope with the change.

10. In **PT (Sri Lanka) v Entry Clearance Officer Chennai** [2016] EWCA Civ 612 the Court of Appeal court considered **Ghising (family life – adults – Gurkha – policy)** [2012] UKUT 00160 (IAC) and its post- Ghising decision in **Singh v Secretary of State for the Home Department** [2015] EWCA Civ. 630. Underhill LJ stated (at [26]) that the principles in **Kugathas** had to be understood in the light of the subsequent case law, including the decision in Singh's case. In Singh's case Sir Stanley Burnton, stated at [24] that there was no requirement of "exceptionality", that all depends on the facts, and that there must be something more than the love and affection between an adult and his parents or siblings which will not of itself justify a finding of family life. He also stated that a young adult living with his parents will normally have a family life to be respected under article 8.

11. The First-tier Tribunal made no finding as to whether family life existed between the Claimant and her sons. However, as stated above, he found that Amir did not depend on his mother, lived independently and was self-supporting. At the date of the hearing before me, the Claimant and her son live apart, he is now 22 years old and works full-time. Whilst I accept that

they see each other regularly, and that she will cook for him and wash his clothes, I find that the love and affection between them is normal and there are no additional elements of dependency or evidence of 'real', 'committed' or 'effective' support (**Ghising**).

12. The Claimant's older son with whom she lives did not give evidence at the hearing and there is no witness statement from him. He was born in 1980 and he and the Claimant are living together through force of circumstances as she was unable to pay her mortgage payments and her house was repossessed. The evidence before me does not show that they enjoy family life.

13. In addressing the questions in **Razgar** [2004] UKHL 27 I find that the Claimant does not enjoy family life in the UK but that she has established a private life since she came here in 2003. I also find that the proposed interference is of sufficient gravity to engage the operation of Article 8 and that the interference is in accordance with the law and necessary in a democratic society. The remaining question is therefore whether the interference is proportionate to the legitimate public end sought to be achieved.

14. My starting point in terms of proportionality is whether the Claimant can satisfy the Immigration Rules. Ms Nowaparast did not seek to argue that the Claimant met the requirements of E-LTRP2.2. She did not seek to persuade me that the Claimant meets the requirements of paragraph 276 ADE (1) (iv) of the Rules which require her to demonstrate that there would be very significant obstacles to her integration, but I consider it here for completeness. As an Immigration Rule, it ranks as a statement of the Secretary of State's policy, to be contrasted with a legal Rule. I am required to give considerable weight to such policy statements: **Hesham Ali v Secretary of State for the Home Department** [2016] UKSC 60 at [46]. The First-tier Tribunal found that there would be no serious obstacles to her integration into Iran as she had spent fifty years of her life there, is well-educated, speaks Farsi and has two adult sons, two siblings and a husband (even if estranged) living in that country.

15. In **SSHD v Kamara** [2016] EWCA Civ 813 Lord Justice Sales gave a broad definition of '*integration*' –

> "It is not confined to the mere ability to find a job or to sustain life while living in the other country … The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

16. In **Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test)** [2017] UKUT 00013 (IAC) the Hon. Mr Justice McCloskey held at [37]:

"The other limb of the test, "very significant obstacles", erects a self-evidently elevated threshold, such that mere hardship, mere difficulty, mere hurdles and mere upheaval or inconvenience, even where multiplied, will generally be insufficient in this context. The philosophy and reasoning, with appropriate adjustments, of this Tribunal in its exposition of the sister test "unduly harsh" in **MK (Sierra Leone)** [2015] UKUT 223 at [46] apply."

17. According to the Claimant's witness statement, she has visited Iran in December 2005 and from September 2006 to January 2007. It remains the case that she has close relatives there. Although she states in her witness statement that her health is deteriorating every day and that she is under a consultant for asthma, diabetes and high cholesterol, no supporting medical evidence has been submitted nor is there any evidence to show that medication would not be available in Iran. She is well-educated and still speaks fluent Farsi. In the circumstances I find that on return to Iran she would still be an 'insider' and have the capacity to participate in society there. I find that whilst there may be initial inconvenience in relocating, given the length of her residence and existence of close relatives there would not be very significant obstacles to her integration.

18. I find therefore that the Claimant does not meet the requirements of the Immigration Rules in any capacity.

19. I now also address, having regard to all the factors relevant to the balancing exercise, and applying the "balance sheet" approach approved by the Supreme Court in **Hesham Ali v Secretary of State** [2016] UKSC, whether the Claimant's removal would be proportionate.

20. Sections 117A and 117B are found in part 5A of the 2002 Act and apply in all cases where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's rights under Article 8.

Section 117A is as follows:

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), *"the public interest question"* means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

21. The considerations referred to in section 117A(2)(a), which are said by that provision to be applicable in all cases where the public interest question is under consideration, are as follows:

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

22. In **Treebhawon and Others (NIAA 2002 Part 5A - compelling circumstances test)** [2017] UKUT 00013 (IAC) the Upper Tribunal held that in the case of a foreign national who is not an offender the following test applies in relation to private life at [47]:

"We return to the question posed above: what is the legal test to be applied in a case such as the present? The answer, which we deduce from a combination of the governing statutory provisions and, in particular, the decision in Rhuppiah, is that these Appellants must demonstrate a compelling (not very compelling) case in order to displace the public interests inclining towards their removal from the United Kingdom. In formulating this principle, we do not overlook the question of whether the adverb "very" in truth adds anything to the adjective "compelling", given that the latter partakes of an absolute flavour. It seems to us that the judicially formulated test of "very compelling circumstances" has been driven by the aim of placing emphasis on the especially elevated threshold which must be overcome by foreign national offenders, particularly those convicted of the more serious crimes, who seek to displace the potent public interests favouring their deportation. In contrast, immigrants such as these Appellants confront a less daunting threshold."

23. The Claimant entered the UK in April 2003 and was granted successive periods of entry clearance as a student until February 2009. In September 2009 she applied for leave to remain under Article 8 with her son Amir Reza and this was refused on 6 October 2009 with a limited right of appeal. On 7 January 2013 she applied for leave to remain on the basis of her family and private life but this was refused on 5 November 2013. The application was reconsidered and refused again in July 2014. The Claimant's private life was therefore established at a time when her status was precarious between 2003 and 2009 and thereafter she had no leave and she was in the UK unlawfully. By statute I am required to give little weight to her private life. I have born in mind also what Mr Justice McCloskey has recently said in the case of **Kaur (children's best interests / public interest interface)** [2017] UKUT 00014 (IAC), namely that the "little weight" provisions in Part 5A of the 2002 Act do not entail an absolute, rigid measurement or concept; "little weight" involves a spectrum which, within its self-contained boundaries, will result in the measurement of the quantum of weight considered appropriate in the fact sensitive context of every case.

24. In relation to the other factors required to be considered under s117B, the maintenance of immigration control is in the public interest. The Claimant can obtain no positive right to a grant of leave to remain from either s117B (2) or (3), whatever the degree of fluency in English, or the strength of her financial resources as these are neutral factors (**Rhuppiah** [2016] EWCA Civ 803). In **Rhuppiah** the Court of Appeal held at paragraph 63 that the expression 'financially independent' should be given its natural meaning of as indicating someone who is financially independent of others. The Claimant is not financially independent because she is dependent on her son. There is no supporting evidence as to her ability to speak English and but I accept given the period she has been here and the fact that she studied at Swansea University that she may well do so.

25. The Claimant argues that it would be disproportionate to remove her because of her relationship with her sons, her health, her integration into the community in the UK and the fact that she has no one to go to and no house to return to in Iran. She also argues that she made an application for

leave to remain in January 2013 when her youngest son was under the age of 18 and she should have been granted leave in line with him. She argues that the Secretary of State's decision to refuse her leave at the time was unlawful and that this weighs in her favour in the proportionality exercise.

26. I accept that she enjoys a strong relationship with her adult sons and her return to Iran would mean they did not see each other as often. However, both are working and have each other for support. The relationships can be maintained by way of visits and modern means of communication. The Claimant also has two sons in Iran and I do not accept that she would be without accommodation on return or that her UK based sons would not send her money if she needed it. Whilst she may now feel that the UK is her home, she lived in Iran for 50 years and would be able to integrate on return. As stated above, there is no evidence before me as to her medical condition.

27. Ms Nowaparast has not sought to argue that this case is analogous to the 'historic' injustice line of case law and in any event, the ratio of these cases is that where children have grown up and embarked on lives of their own, the bonds which constituted family life are no longer be there and Article 8 has no purchase. Whilst I accept that the fact that Amir Reza may well have satisfied the requirements of the Immigration Rules in 2013 when the application was made and had the decision been made correctly, the Claimant may have been granted leave in line. However, he is now 22 and leads an independent life. Whilst I accept that some weight has to be given to the fact that she should have been granted leave in line with her son in 2013 I do not consider that weight to be great in the light of their present circumstances.

28. Weighing all the factors in the balance and giving due weight to the public interest I find that the Claimant has not demonstrated a compelling case and that the Secretary of State's decision is a proportionate one as the interests of immigration control outweigh the Claimant's private life ties.

Notice of Decision

Having set aside the decision of the First-tier Tribunal I re-make the decision in the appeal by dismissing it on Article 8 grounds.

No anonymity direction is made.

Signed Dated

Deputy Upper Tribunal Judge L J Murray