Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/11473/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 31st October 2018	**On 12th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE HILL QC

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SEYED DAVOOD MOOSAVI NEJAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe
For the Respondent: Mr D Sellwood

DECISION AND REASONS

1. This is an appeal from a decision of First-tier Tribunal Judge Mitchell promulgated on 30 July 2018.

2. The appellant is a citizen of Iran, born on 3 March 1966. He is married and there are children of the marriage.

3. In the course of his decision, the judge considered whether the appellant was entitled to succeed under paragraph 276ADE of the Immigration Rules. A careful evaluation of the background led the judge to conclude:

> [27] There does not appear to be any reason as to why she [that is the appellant's wife] cannot travel to Iran. The appellant's wife was brought up in Iran and obviously can speak a language of that country. Although there may be associated discrimination against women that does not appear to be any reason as to why she could not return to Iran with her husband apart from the fact that her children would be unwilling to do so.
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> [28] I do not consider that the appellant has shown that there are very significant obstacles to his reintegration into the country to which he would have to go; similarly there is no unjustifiable harshness or very substantial difficulties for his wife going there with him. I therefore do not consider that the appellant has shown that he has met the requirements of paragraph 276ADE(1)(vi) of the Immigration Rules. (emphasis added)

4. Having therefore dismissed the appeal under the Rules, the judge went on to consider the application of Article 8 outside the Rules by reference to the test articulated by the Supreme Court in **Agyarko v the Secretary of State for the Home Department [2017] UKSC 11**, recognising that a human rights appeal may succeed if the consequence of the refusal decision were to cause very substantial difficulties or there were exceptional circumstances or it would constitute unjustifiable harshness to the appellant.

5. In dealing with this matter the judge said this:

> [35] However the public interest in the maintenance of this decision based solely on the English language test assessment is not necessary in this democratic society. The analysis in the case of **Bibi** shows that the interference in this case is not proportionate to the public end sought to be achieved and ultimately that the public end sought to be achieved is not legitimate in this particular case. The facts of this case are quite unique and peculiar and I conclude that it is unreasonable to expect the appellant and his family to relocate to Iran in all the circumstances or for them to be separated. I do conclude that there are insurmountable obstacles to the appellant and his family relocating to Iran simply because the family will not go with the appellant and the consequences would be separation. The circumstances are exceptional. The interference is not proportionate to the legitimate aim sought. There are compassionate or unjustifiably harsh consequences as a result of the decision. I do not consider that the decision is a proportionate interference with the appellant's, his wife's or his family's Article 8 rights. I do consider that the decision to refuse leave is not proportionate to the legitimate public end sought to be achieved. I therefore allow the appeal under Article 8 of the European Convention on Human Rights. (emphasis added)

6. I indicated to the representatives my provisional view that there was a fundamental difficulty with the decision because of what I consider to be an irreconcilable dissonance between the content of paragraph 28 and the content of paragraph 35, both of which I have rehearsed in full and with added emphasis. This irreconcilable dissonance is such that the reader cannot, with confidence, place reliance on the decision as a whole.

7. I raised with Ms Willocks-Briscoe whether she wished to argue that the decision under the Immigration Rules was correct and that the judge ought not to have entertained the matter under Article 8 outside the Rules. She declined that invitation, in my view properly. She said that the mutually contradictory nature of the decision was such that the better course would be for it to be set aside and for the matter to be remitted to the First-tier Tribunal for a fresh hearing.

8. Mr Sellwood, who acts for the respondent to the Secretary of State's appeal, has sought to defend and uphold the decision. The substance of his submission is that the tests are different whether one is applying paragraph 276ADE or whether one is looking at exceptional circumstances or unjustifiable harshness when considering the effect of a refusal decision on the Article 8 rights of an individual and his or her family. Whilst I fully accept that the tests to be applied are different, the assessment of evidential issues must be consistent. Notwithstanding Mr Sellwood's sustained submissions to the contrary, the conclusions reached by the judge in the two paragraphs I have cited cannot sensibly be reconciled.

9. Mr Sellwood submits that although the decision may be inelegantly drafted, it can safely be relied on. He argues that there were two separate Immigration Rule claims before the judge. In addition to paragraph 276ADE, there was a separate claim under the partner route at EX.1, to which reference is made in the decision at [14]. He argues that paragraph [35] of the judgment, in adopting the language of "insurmountable obstacle", amounts to a determination of the appellant's alternative claim under EX.1.

10. The interpretation contended for by Mr Sellwood would necessitate a wholesale re-writing of the decision. I do not consider it appropriate for the Upper Tribunal to uphold a decision which requires to be substantially re-cast in order to make sense of it. If Sellwood is right that EX.1 was in play, then then the failure of the judge to deal with it expressly is a further reason why the decision should be set aside. That said, I do not see how Mr Sellwood's reading of paragraph [35] can be right. In terms of content and context, it is self-evidently addressing Article 8 outside Rules, as heralded by the references to **Agyarko** and **Razgar** in paragraphs [31] and [32] respectively which precede immediately precede it in the determination.

11. This decision is not one where an informed reader can, with confidence, conclude that the material issues for determination received anxious and consistent scrutiny. It has at least one fundamental flaw and must be set aside.

12. Mr Sellwood made reference to the issue of the English language requirement and the application of dicta of the Supreme Court in the case of **Bibi [2015] UKSC 68**. It would be improper and unhelpful for me to express any view on his submissions. The matter is to be remitted and that issue will be considered when the appeal is determined at *de novo* in the First-tier Tribunal.

Notice of decision

(1) The appeal is allowed.
(2) The decision of the First-tier Tribunal is set aside and the matter is remitted to the First-tier Tribunal to be heard afresh by a judge other than Judge Mitchell.
(3) No anonymity direction is made.

Signed *Mark Hill* Date 6 November 2018

Deputy Upper Tribunal Judge Hill QC