Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: IA/19912/2013
IA/19904/2013

THE IMMIGRATION ACTS

Heard at Glasgow

on 29th July 2014

Determination promulgated
on 1st August 2014

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

MOZAFFAR SABERI
REBAN HABIBI MARAND

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellants: Mr Byrne, Advocate, instructed by McGill & Co, Solicitors
For the Respondent: Mr Young, Senior Home Office Presenting Officer

No order for anonymity requested or made.

DETERMINATION AND REASONS

1. The appellants are husband and wife, citizens of Iran, aged 79 and 69 at the time of the First-tier Tribunal hearing. Their appeals against removal were brought on the basis of their family and private life interests. By determination promulgated on 28th January 2014 First-tier Tribunal Judge Hutchinson dismissed their appeals under the Immigration Rules and under Article 8 of the ECHR outwith the Rules.

Grounds of Appeal to the Upper Tribunal.

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1. The judge made a material error of law at paragraph 27 … by making the following finding:

    I find that family life for the purposes of Article 8 does not exist. The appeal therefore fails.

    While it was open to the judge to find that ties between adult appellants and their adult children did not go beyond normal emotional ties and did not establish family life for the purposes of Article 8 the judge erred by concluding that the appeal must therefore fail … Failure … to establish … family life cannot be equated to failure to establish … private life. The test for existence of private life is low: *AG (Eritrea)* [2007] EWCA Civ 801 …

2. The judge erred in law by failing to make findings on the existence of private life for the purposes of Article 8. The judge failed to give reasons why she did not consider there to be a private life. While the judge did express a view on the general Article 8 proportionality assessment, this was done in the alternative, and after the judge had already concluded that the appeal must fail as a consequence of her conclusion that family life did not exist.

3. Private life encompasses several factors beyond family life, such as physical or psychological integrity. Private life extends to features integral to a person's identity or ability to function socially as a person. The judge materially erred by failing to give consideration to these factors.

<u>Submissions for appellants (written and oral)</u>.

2. There was before the First-tier Tribunal (although indirectly; the citations are in the written argument) reference to case law (derived ultimately from the European Court of Human Rights) to the effect that in practice the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The threshold of engagement for Article 8 is not high. The First-tier Tribunal went wrong by failing to consider private life either as a matter of form or in substance, making no findings whatsoever on whether private life would be interfered with. A fresh hearing was needed, because the circumstances – family including grandchildren all in the UK, levels of dependency, ill-health, ability to provide privately for care, grandchildren, old age, long connection to the UK - required findings which could not be made "by reference only to the papers; assessment of the interference was not the focus of the FtT, it does not loom in the determination at all, and the evidence was (quite properly) reduced in a determination from the larger hearing."

3. Mr Byrne sought to introduce further grounds of appeal. Ground 2(a) is failure to have regard to the positive obligation on the State to take account of future development of private and family life. The first appellant's dependency on his wider family would increase with age. Reference was made to <u>ZB</u> (Pakistan) [2009] EWCA Civ 834 (and through that case to other jurisprudence) on the positive duty on contracting states to show respect for family life. The FtT failed to take that duty into account in form or in substance. Ground 2(b) is that the FtT erred by failing to take into account that the first appellant had granted power of attorney to his daughter, as mentioned in his statement at paragraph 4.

That constituted a legal relationship of dependency. Ground 3 is that (also on the authority of ZB) the FtT erred by failing to have regard to the fact that the appellants' "entire family lived in the UK and comprised British citizens."

4. The findings in the determination reached in the alternative at paragraph 28 onwards could not save the errors made, because everything said there was *obiter* and came on the back of the faulty finding that non-existence of family life was the end of the case. The Tribunal should have gone on from that point to see whether private life issues arose, to analyse the relevant factors and reach a conclusion. Lack of such analysis could not be put right in the Upper Tribunal, but should be by way of remit to the First-tier Tribunal for full rehearing.

5. Mr Byrne accepted that the point about a positive obligation at 2(a) was not made in the First-tier Tribunal, but he argued that it was an obvious one. That the first appellant's age and relative ill-health would increase dependency was something which should leap out to the decision maker. As to 2(b), even if the power of attorney was not relied upon in argument it was put in evidence and the point was there to be picked up.

6. The evidence made it clear that there was no prospect of the wider family relocating to Iran. The appellant's daughter had tried that. Difficulties regarding her autistic child led the family to return. The determination for all intents and purposes came to an end at the finding of no family life and could not be saved by the *esto* consideration which followed.

Submissions for Respondent.

7. None of the aspects of the appellant's private life were ignored. It was inescapable from their statements and from the whole evidence that family and private life elements were inseparable. All matters going to private life involved the appellants' relatives. It was plain that they are here because of their family. The judge at paragraph 2 set out the private life requirements of the Immigration Rules, paragraph 276ADE, as one of the main issues in the case. She rehearsed all relevant factors before coming to her first conclusion regarding the existence of family life. Reaching her final conclusion at paragraph 37 in relation to the Rules, she referred again to their private life element. She was plainly aware that the Rules provide for private as well as family life cases. If paragraph 27 showed error, it was not material. The determination both before and after that finding revolved around the overall circumstances of the appellants. They had not presented their case as two sets of circumstances, one going to private and one to family life, but as a whole. The new grounds came too late and should not be admitted. As to their merits, factors relating to the first appellant's age were obvious to the judge and were rehearsed eg at paragraphs 18 and 19. The appellants own property both in Edinburgh and Iran, and have granted power of attorney only regarding the property in Iran. The power of attorney was mentioned in one of the statements but was not relied upon in the First-

tier Tribunal as a point of significance. In any event it does not prove an element of dependency. As to ground 3, the overall family circumstances were plainly at the forefront of the judge's mind. There was no error such as to require the determination to be set aside.

8. If a fresh decision were needed, the primary facts were not in dispute. There was no need to remit. The Upper Tribunal should simply substitute its own view.

Reply for Appellants.

9. In response to the argument that the judge set out all the relevant factors at paragraph 16 to 23, Mr Byrne said that these were all directed to whether there were more than ordinary emotional ties among adult family members. Whether or not that was precisely the right test was not currently relevant. Those paragraphs gave the reasons for the judge's conclusion at paragraph 27, which was legally erroneous. They did not constitute a complete assessment of all the facts on the correct approach to proportionality, but were focused on a narrow and insufficient question. Therefore, the error could be put right only by an entirely fresh decision. The determination could not be saved by showing that private life had been considered by circuitous reference to the private life requirements of the Rules. An approach read into the determination in that way fell short of the structured analysis required.

Conclusions.

10. The judge was wrong to conclude at paragraph 27 that a finding that family life did not exist for purposes of Article 8 was decisive. Removal may be disproportionate for interference with private life interests alone. More relevantly, the factors to be examined are the same regardless of whether these are thought to constitute family or private life.

11. The determination, however, has to be read fairly and as a whole. In my view it is not fatally flawed by this one legal mis-statement. There would be no way of separating family and private life factors in this case. The circumstances considered at paragraphs 10-27 leading to the first conclusion and at paragraphs 28-37 leading to the alternative conclusion are the same. There is no reason in principle why a determination may not be sound on the basis of conclusions reached in the alternative.

12. As to the further grounds, the age and health of both Appellants, and the UK residence and citizenship of their relatives, were plainly at the forefront throughout. The existence of a power of attorney was not presented as an issue and I do not think it was capable of advancing the case significantly. The overall family circumstances were not overlooked, but were always the essence of the case.

13. The final question for the judge was not one of primary fact but it was a highly fact sensitive evaluation. The judge's striking of the balance, even

if she wrongly thought it to be an alternative matter, is a judgment well within her scope. It came after thorough rehearsal of all factors put before her by both sides. It did not take into account any irrelevant factors, and did not fail to take into account any relevant factors, whether termed as family or as private life. I find no basis on which the Upper Tribunal should interfere.

14. If I had thought it necessary to set the decision aside, I would have preferred the submission for the respondent that there is no reason for rehearing. The primary facts, as Mr Young observed, are not in dispute. The case is one where, if necessary, the Upper Tribunal could re-make the decision without remitting to the First-tier Tribunal.

15. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law, such as to require its determination to be set aside. The determination shall stand.

30 July 2014
Upper Tribunal Judge Macleman