Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/08391/2015

THE IMMIGRATION ACTS

Heard at Glasgow	**Decision & Reasons Promulgated**
on 7th December 2015	**On 4th January 2016**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

A O MOSTAGHIM

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Devlin, Advocate, instructed by Latta & Co., Solicitors
For the Respondent: Mr M Matthews, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Iran, born on 1 April 1978. His immigration history is summarised at paragraph 5 of the respondent's decision dated 11 February 2015. That decision refused his application for leave to remain in the UK on the basis of his family and private life under the Immigration Rules, and found no exceptional circumstances to warrant a grant of leave outside the Rules.

2. A panel of the First-tier Tribunal comprising Designated Judge J G Macdonald and Judge M Robison dismissed the appellant's appeal by determination promulgated on 10 June 2015.

Grounds of appeal to the UT.

3. These are the appellant's grounds:

2. The Tribunal erred in law at paragraphs 58 and 59 of its decision in that it gave manifestly inadequate weight to relevant considerations *et separatim* failed to give adequate and comprehensible reasons.

58. The appellant argued that considered cumulatively, the facts in this case, and in particular the fact that the appellant's fiancée is a British citizen attending university here, and the fact of her mother's medical circumstances means that she relies on the appellant and his fiancée for support, amount to insurmountable obstacles.

59. We did not accept that these facts amounted to very significant difficulties in this particular case to the appellant and his fiancée continuing family life in Iran. The appellant lived in Iran for 22 years before coming to the UK. Although his fiancée is a British citizen, she is also an Iranian national by birth, and her father lives there, and we were told in evidence that she had visited him only last year …

The structure of paragraph 59 suggests that the Tribunal did not accept that (i) the appellant's fiancée's British citizenship; (ii) her attendance at university here; and, (iii) her mother's reliance on her, amounted to very significant difficulties, since (a) the appellant had lived in Iran 22 years; (b) his fiancée is also an Iranian national by birth; (c) her father lived there; and (d) she had visited him only last year.

It is not clear whether the Tribunal considered the facts narrated in paragraph 58 to be irrelevant to the question of whether there were insurmountable obstacles to the continuation of family life outside the United Kingdom, or whether it considered that the considerations narrated in paragraph 59 reduced the weight to be given to the facts narrated in paragraph 58 (or outweighed them).

Either way, there is nothing in the Tribunal's determination to suggest that it properly assessed and weighed the facts narrated in paragraph 58, against the considerations in paragraph 59. The implication is that it gave manifestly inadequate weight to those facts.

Separatim, the Tribunal failed to give adequate and comprehensible reasons as to why it did not accept that the facts narrated in paragraph 58 of its decision did not amount to insurmountable obstacles to the continuation of family life outside the UK, or why the considerations narrated in paragraph 59, outweighed those facts.

3 The Tribunal erred in law at paragraph 62 et seq of its decision in that it failed to consider the right to respect for family life outside the Immigration Rules.

62. Turning to the appellant's Article 8 argument outside the Rules, Article 8 provides …

[The Tribunal sets out the test in and then continues:]

66. Are there such circumstances in this case? This is an appellant who has developed a strong private life having lived in the United Kingdom for 15 years.

67. The question arises as to what weight we should attach to the appellant's private life over that period …

No mention is made of the appellant's family life with his fiancée.

The implication is that the Tribunal considered that all issues pertaining to the right to respect for the appellant's family life had been adequately dealt with in its consideration of his appeal under the Immigration Rules.

In other words , it considered that all issues pertaining to that right had been adequately dealt with in its consideration of whether there are insurmountable obstacles preventing the continuation of family life outside the UK, for the purposes of paragraph EX.1 of Appendix FM of the Immigration Rules.

However, as Lord Eassie pointed out in *Mirza (AP) v the Secretary of State for the Home Department* [2015] ScotCS CSIH 28*:*

[20] … in our view, when it comes to an assessment of proportionality, it is not appropriate to apply a test of whether there might be an "insurmountable obstacle" to the petitioner's wife being able to join him in Pakistan. We are of course conscious that the phrase "insurmountable obstacle" has been used by the ECtHR as indicating a factor which might be taken into account in judging whether a decision is disproportionate. But that was simply mentioned as a possible factor. A disproportionate decision or measure in this field is not to be equiparated with the existence of an "insurmountable obstacle" …
It follows that the test of "insurmountable obstacles" in section EX.1 of Appendix FM is not exhaustive of the question of whether the respondent's decision is compatible with Article 8 – particularly where (as in this case and *Mirza)* one of the parties is a British citizen (*see AB (Jamaica) v Secretary of State for the Home Department [2008] 1 WLR 1893, per Sedley LJ at paragraph 19).*

It follows that the Tribunal erred in law by failing to consider the appellant's right to respect for his family life outside the Immigration Rules.

4 The Tribunal erred in law at paragraph 59 of its decision in that it applied the wrong test in determining whether the respondent's decision was incompatible with Article 8.

Thus, at paragraph 59 of its decision said:

60. … we could not say in the circumstances of this case that there were insurmountable obstacles to the continuation of family life outside the UK *or that removal would be unjustifiably harsh* (my emphasis).

The clear implication is that the test applied by the Tribunal in determining whether the respondent's decision was compatible with Article 8, was whether "… removal would be unjustifiably harsh."

However, in *Mirza*, infra, Lord Eassie said this:

[21] We are also of the view that counsel for the petitioner is well founded in his submission that insofar as the decision taker considered the compatibility of the refusal of leave to remain in the UK with Article 8 ECHR, the decision taken applied the wrong test. The decision taker proceeded upon the basis whether refusal of leave to remain would lead to "unjustifiably harsh consequences". But the issue is whether the interference with private and family life – substantial even on the erroneous basis of requiring the wife to live in Pakistan – could be justified by the Secretary of State as proportionate to some legitimate objective.

It follows that, in asking itself whether removal would be unjustifiably harsh, the Tribunal applied the wrong test – or, alternatively, asked itself the wrong question (*see, Lord Advocate v Watt 1979 SC1)*.

5 The Tribunal erred in law at paragraph 68 of its decision in that it held that it was bound to give effect to what was said in section 117B(5) of the Nationality, Immigration & Asylum Act 2002.

Thus, at paragraph 67 and 68 of its decision, the Tribunal said this:

67. The question arises as to what weight we should attach to the appellant's private life over that period of time.

68. This is not simply a matter of our views and discretion as we are guided in this question of what Parliament has said – we refer in particular to section 117B of the Nationality, Immigration & Asylum Act 2002 as it now stands inserted into the Act by section 19 of the Immigration Act 2014.

Section 117A of the 2002 Act, provides as follows:

(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 …

Section 117A(2)(a) enjoins the Court or Tribunal to "… have regard … to …" the considerations listed in section 117, which include 117B(d):

(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.

The words "… have regard to … " should have been given their ordinary and natural meaning.

They should not be equiparated with "… give effect to …"

Moreover, section 117A to D must be reasons for refusal letter as being subject to section 6(1) of the Human Rights Act 1998, which provides:

(1) It is unlawful for a public authority to act in a way which is incompatible with a Convention right.

It has never been suggested in the Convention jurisprudence that private life established at a time when the person was in the UK unlawfully, or when his immigration status was precarious, is to be given little weight, irrespective of its strength or the period for which it has endured.

Both the former 14 year, long residence concession and the current paragraph 276ADE(1)(iv) of the Immigration Rules, were framed in order to meet the requirements of Article 8 with regards to respect for private life.

By holding itself bound to give little weight to the appellant's private life, irrespective of its duration, or the circumstances in which it was formed, the Tribunal erred in law.

Submissions for appellant.

4. *Mirza* had been much misunderstood, and was not incompatible with any other authorities. *Mirza* illustrated that insurmountable obstacles did not mean (literally) insuperable obstacles. The Rules were compliant with the ECHR, and so not to be read in that way. The analysis within the Rules had to take account not only of the height of obstacles faced but such factors as a partner's UK citizenship, the length of time such citizenship had been held, the circumstances under which it was acquired, the proportion of a lifetime spent in the UK, educational and employment prospects here, and so on. Paragraph EX1 being ECHR compliant required consideration of all relevant facts and so was likely to contain the answer to almost all cases. (So far, I understood from Mr Matthews this to be all common ground.)

5. The essence of the grounds was that the panel at ¶58 and 59 addressed the central issue in an odd way, which did not explain why the factors relied upon by the appellant did not amount to a disproportionate outcome.

6. The determination then failed to say why only private and not family life arose for any consideration outside the rules.

7. The panel looked for insuperable obstacles or an unduly harsh outcome, both of which were wrong tests.

8. Section 117B of the 2002 Act is inherently ambiguous. The UT could therefore have regard to the *Hansard* record of what the Advocate General for Scotland said when promoting the bill on 1 April 2014:

> Clause 18 [which became s.117B] will make it clear what Parliament thinks is in the public interest … it is then for the courts to have due regard to that when considering the proportionality of any interference …"

Resisting the addition of the word "normally" into the clause, the Advocate General further said:

> … little weight … does not mean no weight …
>
> Where there are other factors – such as the presence of children, disability of the partner, contribution to the community or the fact a young adult has spent half their life in the UK and has no ties with their country of birth – these factors will all need to be weighed in the balance …The need to have regard to other factors is reflected in the … rules. The case law and guidance also make it clear that there may be other exceptional factors … to be taken into account to ensure the decision is compatible with the ECHR.

9. The panel said at ¶ 69 that section 117B(4) "indicates that little weight should be given to private life or a relationship ... established at a time when the person is in the UK unlawfully". The subsection is not a direction or an instruction, which would be incompatible with the ECHR. The panel erred by treating it as such.

10. The determination should be set aside and the case remitted to the First-tier Tribunal as the only way to arrive at "a proper evaluative exercise".

Submissions for respondent.

11. In a Rule 24 response the respondent said that the Tribunal did not misdirect itself as to the meaning of insurmountable obstacles; the grounds are mere disagreement; and the Tribunal considered whether there was any case for leave outside the Rules, but found, compliant with *SS (Congo)* that there were no compelling circumstances to merit such a finding.

12. Mr Matthews further argued that the Rules, in particular EX1, being ECHR compliant, this was not a case which required an answer outside the Rules. Paragraphs 58 and 59 of the determination weighed the relevant factors and came to a conclusion well within the scope of the panel. If that was a sound answer, the case went no further. (Mr Devlin conceded that would be correct.) The phrase "unjustifiably harsh" might not be strictly correct, but that made no substantial difference, and the panel could not be blamed for reflecting the language of the appellant's submission to them (paragraph 48). To the extent that formulation was criticised in *Mirza*, all that was needed to correct it was to complete the sentence by an addition such as "… so as to be disproportionate". The ultimate outcome at paragraph 76 was well justified by the determination as a whole. On section 117B(4), the appellant read into the determination an absolute approach which was not there.

Discussion and conclusions.

13. The appellant's grounds and submissions were long on the correct formulation of the legal approach to family and private life cases. However, I did not understand there to be any significant difference between the analysis offered by Mr Devlin and that offered by Mr Matthews, except perhaps as to the nature of the regard which the FtT ought to have to considerations set out in statute.

14. The respondent's decision set out and applied EX.2 as well as EX.1. It is instructive to quote EX2 (also to be read in light of and as compatible with general jurisprudence on article 8):

> … "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

15. The submissions were rather short on why correction of legal error, if there were any, should require another hearing, or lead to another outcome. The appellant had led all his evidence and made all his submissions. The case was there to be weighed in the balance.

16. As observed in *Macdonald's Immigration Law and Practice* 9th ed. vol 1 at 7.96 the question of the scope of article 8 has recently resulted in a body of law "characterised, unhelpfully in our view, by a proliferation of phrases which all simultaneously attempt to define thresholds and legal tests". Particular cases,

however, generally turn on their own facts and circumstances not on the difference between one refinement of the test and another.

17. The grounds seek to deconstruct paragraphs 58 and 59 to the point of rendering them meaningless. However, I find it plain that the panel was there weighing all significant factors and explaining why they were on balance against the appellant. The grounds on this essential point are only a disagreement. That finding is sufficient for the determination to stand.

18. In any event, I would have had no difficulty in reaching the same conclusion as the panel on the facts of this case.

19. Paragraph 5 of the grounds seeks to limit the effect of part 5A of the 2002 Act in a way which may go rather too far. The point is academic for present purposes. At best it discloses no error in this case. The appellant could not hope to succeed on private life alone. Assuming the *Hansard* passages are admissible, and accurate as to the scope of the provision, I see nothing to indicate that the panel may have misunderstood. The panel recognised that *little* weight does not mean *no* weight (paragraph 74). The self direction that section 117B(4) gave an *indication* is a long way short of an absolute prohibition of any positive finding based on private life under any circumstances.

20. The determination of the First-tier Tribunal shall stand.

21. No anonymity direction has been requested or made.

17 December 2015
Upper Tribunal Judge Macleman