Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/10885/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 15 July 2016

Decision Promulgated
On 19 July 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

IRENA YORSH
(Anonymity Direction Not Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini (counsel) instructed by Paul L Simon, solicitors
For the Respondent: Mr K Norton, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. This is an appeal by the Appellant against the decision of First-tier Tribunal Judge N J Bennett promulgated on 23 November 2015, which dismissed the Appellant's appeal on all grounds.

Background

3. The Appellant was born on 1 November 1946 and is a national of Israel. The appellant entered the UK on 23 July 2014 as a visitor with leave to enter valid until 23 January 2015.

4. On 20 January 2015 the Appellant applied for leave to remain in the UK on article 8 ECHR grounds. On 7 March 2015 the Secretary of State refused the Appellant's application.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge N J Bennett ("the Judge") dismissed the appeal against the Respondent's decision.

6. Grounds of appeal were lodged and on 16 June 2016 Upper Tribunal Judge Allen gave permission to appeal stating

> It is arguable as is contended in the grounds that the findings in respect of the Immigration Rules, which are relevant to the evaluation outside the Rules, are flawed as contended at paragraphs 5 and 6 of the grounds, and as regards the decision outside the Rules which has in any event to be seen in the light of the points made in respect of the findings under the Rules, that the matters raised in respect of the finding of an absence of family life between the appellant and her grandchildren and the health issues raised in particular at paragraph 22 of the grounds are also arguable.

The Hearing

7. (a) Mr Bazini, counsel for the appellant, moved the grounds of appeal. He told me that although it is conceded that the appellant cannot fulfil the requirements of the immigration rules, the Judge failed to follow the guidance in SS (Congo) because (he said) the Judge's assessment of the appellant's claim under the immigration rules was flawed. He told me that the Judge accepted the appellant and the appellant's daughter to be credible witnesses, and accepted the medical evidence produced, but then failed to resolve conflicts in the evidence at [47] of the decision and reached conclusions which were contrary to the weight of evidence accepted by the Judge.

(b) Mr Bazini took me to the precise terms of E-ECDR 2.4 & E ECDR 2.5, correctly recorded by the Judge at [44] the decision, and then argued that the Judge conflated the requirements of those paragraphs of the rules at [47] and [48]. He placed great emphasis on the report dated 20 October

2015 from the London Psychiatry Centre, reading almost the entire report before criticising the findings made between [63] and [68] of the decision. He told me that the decision contains a number of material errors of law, and asked me to set it aside.

8.. For the respondent, Mr Norton told me that the decision does not contain any errors of law, material or otherwise. He told me that the Judge had written a careful and detailed decision, containing findings of fact which were open to the Judge before reaching conclusions which were well within the range of conclusions reasonably open to the Judge to reach. He told me that there were no defects in the fact-finding exercise, and that the Judge had correctly directed himself in law. He said that the arguments advanced for the appellant amounted to a perversity challenge which was without foundation. He asked me to allow the decision to stand & to dismiss the appeal.

Analysis

9. The first ground of appeal is that although the appellant cannot fulfil the requirements of the immigration rules there has been inadequate analysis of the appellant's case against the immigration rules, and that analysis should have informed consideration of article 8 out-with the rules.

10. There is no merit to that ground of appeal. At [42] of the decision the Judge clearly considers paragraph 276 ADE of the immigration rules and focuses immediately of paragraph 276 ADE(1)(vi). At [43] of the decision the Judge correctly sets out why the appellant cannot qualify for leave to remain under appendix FM of the rules. At [44] & [45] the Judge sets out the requirements of sections E-ECDR2.4 & E ECDR2.5 of appendix FM, before (at [45]) setting out the evidential requirements of appendix FM-SE.

11. At [47] & [48] the Judge sets out the reasons why the appellant cannot meet the requirements of appendix FM. In doing so, the Judge clearly demonstrates that he has considered the immigration rules, and is carefully followed the guidance given in SS (Congo).

12. It was argued that the Judge could not possibly come to the conclusions set out at [47] & [48], and from [[61] to [68] after accepting the medical evidence and finding the appellant and her witness to be credible witnesses.

13. It is not an arguable error of law for an Immigration Judge to give too little weight or too much weight to a factor, unless irrationality is alleged. Disagreement with an Immigrations Judge's factual conclusions, his appraisal of the evidence or assessment of credibility, does not give rise to an error of law. Rationality is a very high threshold and a conclusion is not irrational just because some alternative explanation has been rejected or can be said to be possible. In R and Others v SSHD (2005) EWCA civ

982 Lord Justice Brooke noted that perversity represented a very high hurdle. It embraced decisions which were irrational or unreasonable in the *Wednesbury* sense.

14. At [49] the Judge commences consideration of article 8 ECHR out-with the rules. Counsel for the appellant argued that the Judge erred in law in finding that family life does not exist between the appellant and her grandchildren and her son-in-law at [53] of the decision, and at [52] the Judge took account of irrelevant considerations when assessing the quality of family life between the appellant and her daughter. Those criticisms are entirely without foundation.

15. In Dasgupta (error of law – proportionality – correct approach) [2016] UKUT 28 (a dependent relative case) the First-tier Tribunal finding that there was family life as between an 85-year-old and his daughter and two grandchildren of 17 and 16 was upheld. The Appellant in that case had visited his daughter's family in England almost annually since 2007 for periods of between three and five months and had developed a strong close relationship with his grandchildren. The Upper Tribunal in Dasgupta found that the decision of the First-tier Tribunal that there was a family life was one open to the Tribunal (although the Upper Tribunal noted that family life had not been in dispute and the Upper Tribunal did not find in Dasgupta that an alternative finding would not have been open to the Tribunal). In Dasgupta the Tribunal held that the question of whether there is family life in a child/grandchild context requires a finding of something over and above normal emotional ties and will invariably be intensely fact sensitive.

16. In Gupta, JR Petition from UT [2015] CSOH 9 the Indian claimant entered on a visitor's visa, stayed with her son and his children and sought to remain on the basis of medical difficulties. It was held that in immigration cases there was no presumption that a person had a family life, even with immediate family members: Kugathas [2003] INLR 170 applied. The First-tier Tribunal considered there was an absence of evidence that the Claimant required help with personal care; that she did not require financial support; that she had lived in India whilst her son lived in the UK for several years from 2006; that there was an absence of evidence that she had enjoyed a family life with her daughter in law and the children between 2006 and 2010; and that she had lived alone in India after her daughter in law moved to the UK in 2010. The appeal was dismissed - in effect upholding the First-tier decision that there was no family life.

17. It was also held in Gupta, JR Petition from UT [2015] CSOH 9 that a host state's positive obligation to respect family life in terms of Article 8 of the ECHR did not generally extend to reuniting families separated by voluntary relocation (paras 18 – 19).

18. On the facts as the Judge found them to be, it was open to the Judge to find that family life within the meaning of article 8 ECHR does not exist between the appellant and her grandchildren and the appellant and her son-in-law. The Judge found that family life exists between the appellant and her daughter and quite correctly, at [52] of the decision, considered the quality and extent of the family life that exists: that is a necessary part of the balancing exercise. In PT (Sri Lanka) V SSHD (2010) EWCA Civ 251 the Court of Appeal said that the correct approach is to take into account the nature and degree of family life between parents and their daughter in the UK before the applicants came to the UK and joined their daughter here and the Judge was entitled to take into account the comparatively short duration of the emergence of those ties. These were factors to put in the balance, rather than excluding or marginalizing them.

19. Counsel for the appellant suggested that the Judge had only considered article 8 private life. That is wrong. The judge manifestly considered both family and private life, but even if that argument had some foundation, it would be entirely without force because in considering article 8 private the judge carried out a proportionality exercise which embraced all relevant article 8 ECHR considerations. In Vikas and Manesh Singh (2015) EWCA Civ 630 the Court of Appeal said the factors to be examined in order to assess proportionality were the same, regardless of whether private or family life was engaged. To that extent the debate in this case as to whether there was family life was described as academic.

20. The remaining submissions for the appellant related to the medical evidence and consideration of what would face the appellant on return to Israel. It was argued that the appellant's health is so fragile that she risks hospitalisation because of the rigours of the journey, and that violence in Israel is on the increase, creating a significant risk to this vulnerable, elderly, isolated appellant.

21. Those submissions are nothing more than a disagreement with findings made by the Judge, which were clearly drawn from the evidence placed before him. Between [62] and [68] the Judge carefully considered the impact that return to Israel (and separation from her family) will have on the appellant. The Judge carefully considers the medical evidence and, at [68] of the decision, considers the incidents of violence in Tel Aviv. The Judge bemoans the dearth of independent documentary evidence about conditions in Tel Aviv and records the concession that the appeal is not advanced on article 3 ECHR grounds.

22. The decision does not contain material errors of law. The grounds of appeal amount to an expression of dissatisfaction with the conclusion that the Judge reached, but on the evidence placed before the Judge, his decision is one which falls well within the range of conclusions reasonably open to the Judge.

23. In Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC) the Tribunal held that (i) Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge; (ii) Although a decision may contain an error of law where the requirements to give adequate reasons are not met, the Upper Tribunal would not normally set aside a decision of the First-tier Tribunal where there has been no misdirection of law, the fact-finding process cannot be criticised and the relevant Country Guidance has been taken into account, unless the conclusions the judge draws from the primary data were not reasonably open to him or her.

24. There is nothing wrong with the Judge's fact finding exercise. In reality the appellant's appeal amounts to little more than a disagreement with the way the Judge has applied the facts as he found them to be. The appellant does not like the conclusion that the Judge has come to, but that conclusion is the result of the correctly applied legal equation. There is nothing wrong with the Judge's fact finding exercise. The correct test in law has been applied. The decision does not contain a material error of law.

25. The Judge's decision, when read as a whole, sets out findings that are sustainable and sufficiently detailed and based on cogent reasoning.

CONCLUSION

26. No errors of law have been established. The Judge's decision stands.

DECISION

27. The appeal is dismissed. The decision of the First-tier Tribunal stands.

Signed Date 18 July 2016

Deputy Upper Tribunal Judge Doyle