Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34778/2013

THE IMMIGRATION ACTS

Heard at Columbus House, Newport	**Decision & Reasons Promulgated**
On 26 November 2015	**On 7 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

S P
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Harrington, Counsel
For the Respondent: Mr Richards, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is an Iranian national. On 19 June 2012 she applied for further leave to remain in the UK. The Respondent refused her application under paragraph 276 ADE of the Immigration Rules made a decision to refuse to vary her leave to remain on 8 August 2013. The Appellant appealed against that decision and her appeal was dismissed by First-tier Tribunal Judge Knowles in a decision promulgated on 10 April 2014. The Appellant sought permission to appeal against that decision. Permission was refused by First-tier Tribunal Judge Astle on 28 May 2014. The Appellant renewed her application for permission to

appeal to the Upper Tribunal and it was refused by Upper Tribunal Judge Grubb on 28 July 2014. That decision was quashed by his Honour Judge Jarman QC on 25 November 2014. The reasons given were that permission to apply for judicial review was given on 3 November 2014 but neither party had applied for an oral hearing within the terms of CPR 54.7A(9)(a) and the decision was quashed in accordance with CPR 54.7A (9)(b).

2. Permission to appeal was granted by CMG Ockleton, Vice President of the Upper Tribunal, on 9 September 2014 in the light of the decision of the High Court.

The Grounds

3. The Appellant relies on both sets of grounds seeking permission to appeal. The grounds seeking permission to appeal from the First-tier Tribunal assert that the First-tier Tribunal's findings that the Appellant was not a member of a social group are irrational. It is further submitted that the Judge did not apply appropriate weight to the genuine Iranian court document submitted by the Appellant and that the Appellant's husband wanted her to return to Iran to continue their abusive relationship. The First-tier Tribunal had found that the Appellant was the victim of domestic violence from her husband whilst in the United Kingdom and the finding that she was not a member of a social group of women subjected to domestic violence in Iran was irrational and not in accordance with the Respondent's policy. It is further submitted that the Judge erred in speculating that the Appellant would be protected by her family members in Iran and it was speculation that she would be able to successfully bring divorce proceedings against her husband. It is further submitted that the First-tier Tribunal's decision was irrational in the light of the country information referred to at paragraphs 47 to 54 of the decision.

4. The grounds seeking permission to appeal to the Upper Tribunal assert that the Respondent's decision under paragraph 276 ADE was not in accordance with the law as the application should have been assessed under Article 8 ECHR only as it was made prior to 9 July 2012. The grounds further argue that the First-tier Tribunal failed to take into account up to date country information post-dating the country guidance of 2003. It is asserted that the evidence shows that the Appellant was unlikely in 2014 to be able to receive adequate state protection due to the law treating the matter as a domestic violence matter and that no specific domestic violence provisions existed. It is also asserted that the First-tier Tribunal erred in law in failing to make any finding as to whether the Appellant would be at risk of continued violence from her husband in her home area or whether internal relocation was either safe or if not, unduly harsh. Finally, it is asserted that at paragraph 54 of the decision the First-tier Tribunal erred in law by reversing the standard of proof in asylum cases in favour of the Respondent in stating that he found it reasonable that if she chose to

institute divorce proceedings, she would be able to rely on her sister and brother in law for support. It is submitted that the correct question is whether the appellant would be reasonably likely to remain at risk of persecution despite the possibility of seeking protection by instituting divorce proceedings. It is submitted that the First-tier Tribunal's finding on the ability to seek protection by initiating divorce proceedings is vitiated by this and by failing to engage with the evidence on divorce and legal proceedings.

The Hearing

5. Ms Harrington submitted that the Judge dealt with Article 8 in paragraphs 55 and 56 of the determination and considering firstly at whether the case came within the Rules or outside them there were a number of errors. In considering whether she came within the Rules the Judge looked at private life and not the domestic violence Rules. She would not fall within the domestic violence requirement of the Rules due to the fact that she was the spouse of a refugee. A further aspect of domestic violence which had not been considered was in relation to **FH (Iran) (Post-flight spouses) Iran [2010] UKUT 275** which considered the disproportionate effect of the Immigration Rules. Refugee spouses could not bring them within the ordinary spouse rules. She was only outside the Rules because she was the spouse of a refugee. That had not been considered and the Article 8 decision could not stand for those reasons.

6. In respect of the protection aspects, the Judge had approached the risk posed by her husband in the wrong order. What he should have done was consider whether there was a real risk that her husband would use the legal provisions of Iran to make his wife come back him and have her return to his home. If it was reasonably likely that he would do that and it was accepted that he had begun that process her parents could not prevent her return whilst they remain married. If she was returned to his home, domestic violence would continue. What the Judge relied upon in concluding that protection was available was the ability she had to divorce him but that presupposed that she could divorce him before he enforced his legal right. The question was whether there was a real risk that he could enforce his rights before she could enforce her right to divorce where the situation was that it was very difficult for a wife to divorce. The only realistic conclusion was that the husband would win. It was not an answer to say that it the fullness of time she would be able to divorce him. Domestic violence was not a crime and therefore she could not go to the police. There was failure to consider matters in the proper order when looking to consider what the risk was.

7. The Judge had also fallen into error in concluding that she would be able to divorce on the basis of alcohol abuse. There was no supporting evidence of alcohol abuse. Potentially that was the only ground of divorce open to her on the basis of the objective evidence. There were very limited grounds for divorce and there was no proof of the alcohol abuse and there was a limited category into which she could bring

herself. At paragraph 48 the Judge had found that it was not surprising that her husband had not made an allegation of adultery because that would prevent her return. Given that the Judge was looking at the United Kingdom rather than Iran the Judge failed to recognise that it was not the risk on return. The final substantive area of error was that the Judge had failed to consider updating the objective information and that was set out in the second set of grounds of appeal. There had been a worsening in the situation in the country guidance. Pages 6 and 8 of the objective bundle were relevant as was a longer article which set out the changes over the last 20 years and given the very substantial passage of time the Judge needed to do more. Further there were errors of law in relation to his findings on social group. At the end of paragraph 48, because of the error regarding being accused of adultery that fed into an error regarding social group. At paragraph 49 there was simply no explanation as to why women in Iran who are subjected to domestic violence were not a social group. As was dealt with in the grounds, the Respondent's own guidance noted women in Iran who were subject to domestic violence were a social group. This was a decision that had a number of errors of law which were clearly material and matters needed further consideration. There was no anonymity direction and one needed to be made in the light of the evidence.

8. Mr Richards submitted that there was no material error of law in determination. Article 8 was dealt with adequately and the Judge made a finding that there was effectively no family life in the UK and there was nothing controversial about that. He went on in paragraph 56 to deal with private life and to deal with positive features. She was studying and working but his consideration of private life claim led to the finding that there was a preference for the freedom here. That worked perfectly well as a proportionality analysis and was not flawed in law. Ms Harrington referred to domestic violence rule which could not be met in any event. There was nothing in the skeleton argument or submissions recorded which drew attention of the Judge to the domestic violence Rule and it was unclear how the Judge was required to deal with that in any way. There was no material error of law in the way the judge dealt with Article 8.

9. Dealing firstly with the question of particular social group, from what the Judge said at the end of paragraph 38 it followed that she was not a member of a social group. If he was minded to find that there was a risk she would fall into a group. He was not looking at things in reverse order. There was no material error because the Judge found that there was no real risk from her husband or anyone else. Her husband was in this country in any event. The Judge carried out a perfectly thorough analysis of the evidence and concluded for the reasons given that the Appellant was not at risk on return to Iran and full and cogent reasons were given for that conclusion and it was properly open to the Judge on the evidence. Whilst it may be an unwelcome conclusion to the Appellant it was not infected by an error of law.

10. Ms Harrington said that the Appellant's husband had been in the UK as a refugee but he had returned to Iran at the date of the hearing before the First-tier Tribunal. This was the conclusion that the First-tier tribunal must have reached because the Judge accepted the court document.

Discussion and Findings

11. The first point taken in the grounds of appeal is that the First-tier Tribunal should not have decided the Appellant's Article 8 claim under the Immigration Rules (the new Rules) which came into force on 9 July 2012 but under Article 8 ECHR only. It is clear however, that there was no error of law in the First-tier approach to Article 8 in this regard. In **Singh v SSHD** [2015] EWCA Civ 74 the Court of Appeal held between 9 July and 6 September 2012 the Secretary of State was not entitled to take into account the provisions of the new Rules (either directly or by treating them as a statement of her current policy) when making decisions on private or family life applications made prior to that date but not yet decided. However, thereafter, that position was altered by HC 565 and from that date the Secretary of State was entitled to take into account the provisions of Appendix FM and paragraphs 276ADE–276DH in deciding private or family life applications even if they were made prior to 9 July 2012.

12. The Respondent made her decision in this case on 5 August 2013 and consequently the First-tier Tribunal did not err in considering the Appellant's case under the new Rules.

13. The Appellant argues under paragraph 3.2 of the grounds as a concomitant to the argument above that in finding that there were no arguably good grounds outside of the new Rules, the Appellant's Article 8 case ought to have been considered without reference to the new Rules. It is said that this is material because the Appellant had entered the UK lawfully as the spouse of a refugee and at all times had remained in the UK lawfully. It is asserted that unframed by the new Rules, it would have been appropriate to consider the Article 8 in the light of the Appellant's circumstances and in particular in the light of the Secretary of State's policy with respect to domestic violence. It is said that a different result may have pertained had the First-tier Tribunal not confined itself to framing the proportionality exercise by reference to the new Rules. Ms Harrington argued that the First-tier Tribunal should have considered the question of whether the Appellant met the domestic violence provisions by analogy with the case of **FH (Iran) (Post-flight spouses) Iran [2010] UKUT 275** as an aspect of the proportionality assessment outside the Immigration Rules.

14. The First-tier Tribunal did not err in considering the Appellant's Article 8 claim under the new Rules and the Appellant's argument in the grounds in relation to the domestic violence point is framed as predicated on that ground. Further, it does not appear either from the skeleton argument that was before the First-tier Tribunal or from the submissions as summarised at paragraph 34-38 of the decision that the First-tier Tribunal was asked to consider that the Respondent's decision was disproportionate by analogy with the case of **FH (Post-flight spouses) Iran [2010] UKUT 275**. In that case the Upper Tribunal held that the Immigration Rules as at 1.8.2010 made no provision for the admission of post-flight spouses of refugees with limited leave and that it was unlikely to be proportionate to refuse the admission of the spouse of a refugee where all the requirements of paragraph 281 were met save that relating to settlement. However, neither the grounds seeking permission to appeal to the First-tier Tribunal or the Upper Tribunal assert that an argument was made to the First-tier Tribunal by analogy in relation to the relevance of the domestic violence Rules in an assessment of proportionality.

15. In **GS (India) and Others v SSHD** [2015] EWCA Civ 40 Laws LJ held, in relation to an appeal from the Upper Tribunal, at paragraph [89]

> "Generally, the UT will not make an error of law by failing to consider a point never put to it. That is not, however, an absolute rule. Sometimes new issues are (in the lamentable *patois* of the cases) "Robinson obvious". The reference is to *Robinson v Secretary of State* [1998] QB 929, in which it was held at paragraph 39 that the appellate authorities
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> > "are not required to engage in a search for new points. If there is readily discernible an obvious point of Convention law which favours the applicant although he has not taken it, then the special adjudicator should apply it in his favour, but he should feel under no obligation to prolong the hearing by asking the parties for submissions on points which they have not taken but which could be properly categorised as merely 'arguable' as opposed to 'obvious'… When we refer to an obvious point we mean a point which has a strong prospect of success if it is argued. Nothing less will do."
>
> The *Robinson* hurdle is a high one: see my observations in *R (Khatoon) v ECO Islamabad & Anor* [2014] EWCA Civ 1327 at paragraph 21 ..."

16. The Appellant has not shown that the argument outlined in the grounds in relation to domestic violence was made to the First-tier Tribunal. I do not consider that the argument here is a "Robinson obvious". The First-tier Tribunal took account of the arguments made in relation to Article 8 both as summarised in paragraphs 34 to 38 of the decision and as set out in the skeleton argument. Cogent and sustainable reasons were given at paragraph 56 for the finding that there were no arguably good for granting the Appellant leave to remain outside the Rules. I find that

there was no error of law in the First-tier Tribunal's assessment of Article 8.

17. It is also asserted that the First-tier Tribunal failed to take into account up to date country information post-dating the country guidance of 2003 in relation to domestic violence. It is argued that in the light of the objective evidence the First-tier Tribunal should have departed from the country guidance as it was no longer safe.

18. The First-tier Tribunal made a number of findings in relation to the risk to the Appellant on return. The Judge had regard to the Court documentation which he found to be genuine. That document consisted of a statement from the Appellant's husband dated 17 April 2014 in which he stated that she was living in a strange country without his permission (p5 of Appellant's subjective bundle). Her husband states that according "to Article 114 of the Civil Code (law) of Iran, the right of choosing the place and accommodation of a man and wife is within the man, so the continuation of you living outside of the country is against the common and sharia laws".

19. The First-tier Tribunal found that this was not an allegation of adultery and that the Appellant did not face a real risk of an allegation of adultery and was not a member of a particular social group, namely women in Iran accused of adultery. I find that the First-tier Tribunal gave cogent and sustainable reasons for concluding that the Appellant had not been accused of adultery by her husband and that she would not be so accused on return. He took account of the contents of the letter from the Appellant's brother in law in which he gave an account of a conversation with the Appellant's husband and found that this did not show that the Appellant would be accused of adultery. He found that the statement dated 17 April 2014 did not amount to an allegation of adultery. This finding was open to him on the facts of the case and not, as the grounds assert, irrational.

20. The First-tier Tribunal also considered, at paragraph 52 of the decision, whether the Appellant would be subject to domestic abuse from her husband on return. He accepted that she had been subjected to domestic violence at the hands of her husband whilst they both lived in the United Kingdom and that she was forced to seek help. He found that the Appellant's husband's complaint to the Court in Iran was part and parcel of the manipulative and controlling behaviour associated with such conduct. He had regard to the background material on discrimination against women in Iran and the fact that attitude of the Iranian authorities towards domestic violence did nothing to deter men from abusive behaviour towards their wives. However, he concluded that the Appellant had considerable family support from her sister and husband who would support her in the event that her husband accused her of adultery. He also found that she had regular contact with her parents and it would be unlikely that they would force her to return to her husband's violence and abuse.

21. It is evident from these findings that the First-tier Tribunal did not accept that the Appellant was at risk of domestic violence because it was unlikely that she would be made to return to her husband. Whilst there was a statement from the Appellant's husband before the First-tier Tribunal requesting her return to him, there was no order from the Court requiring her do so. The grounds do not aver that the First-tier Tribunal did not have regard to evidence that showed that the Appellant would be required, by law, to return to her husband. Whilst the grounds of appeal refer at paragraph 4.1 (vii) to Article 1108 of the Iranian civil code which compels a woman's obedience to her husband, in the absence of evidence showing she was be at risk of being forced to return, it was open to the First-tier Tribunal, on the evidence before him, to find that she would not be forced to return to his violence and abuse.

22. The First-tier Tribunal found at paragraph 49 of the decision that the Appellant was not a member of a social group, namely women in Iran who are subjected to domestic violence, on the basis of **ZH (Women as Particular Social Group) Iran CG [2003] UKIAT 00207** without considering firstly whether the country guidance should be departed from in the light of the current objective evidence. However, I do not consider that this error was a material error of law as his findings as to the risk to the Appellant in relation to domestic violence in paragraph 52 were adequately reasoned, referred to objective evidence and were open to him in the absence of evidence showing she would be compelled to return to her husband. Whilst Ms Harrington argues that the First-tier Tribunal should firstly have made findings on whether the Appellant would be compelled by law to return to her husband before considering whether she could enforce her right to divorce, objective evidence showing that she would be so compelled was not before him and there was no court order to this effect.

23. I also find that the First-tier Tribunal gave clear and sustainable reasons for finding that the evidence before him did not justify a departure from **ZH** on the question of whether the Appellant would be able to institute divorce proceedings against her husband in Iran. He had regard to the conclusions of the Upper Tribunal in **ZH** that there were divorce provisions in Iran of which the claimant in that case could take advantage. He also had regard to the background evidence submitted by the Appellant. He referred specifically to the evidence cited in the Respondent's OGN of September 2013 at page 17 of the Appellant's objective bundle. According to the FH report of 3 March 2010 cited by the First-tier Tribunal at paragraph 54 of the decision, where a wife applies for divorce, according to Article 1130 of the civil code, she has the burden of proving that the continuation of the marriage would expose her the "difficult and pressing conditions" which can include the husband's addiction, impotence, adultery, abandonment and physical abuse.

24. He also took account of the background evidence in the OGN at page 18 of the Appellant's bundle that there was one divorce for every seven

marriages in Iran and that the major force behind this was the increasing willingness of Iranian women to manipulate the Iranian legal system to escape unwanted marriages. He found that the Appellant had documentary evidence to support a claim of divorce as a result of the abuse which occurred whilst she was in the United Kingdom and that she would have support from her family. In the light this evidence I find that the First-tier Tribunal did not err in finding that it was open to the Appellant to initiate divorce proceedings or in finding that the evidence before him did not justify a departure from the country guidance.

25. I also do not find that the First-tier Tribunal reversed the standard of proof as asserted at 4.4 of the grounds. He found at paragraph 52 that she would be unlikely to be forced to return to her husband (where the risk of persecution as a result of domestic violence was said to arise) and then at paragraph 54 that it was reasonably likely that she could rely on her sister and brother in law for support in divorce proceedings. This was not a refusal of the standard of proof but a finding in relation to the likelihood of her ability to separate from her husband. Given these findings, the First-tier Tribunal did not need to consider whether internal flight was an option, as he had found she was not at risk of persecution.

Notice of Decision

26. For the above reasons therefore I find that there was no error of law in the decision of the First-tier Tribunal and I dismiss the Appellant's appeal.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Secretary of State. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

Deputy Upper Tribunal Judge L J Murray