



**Upper Tribunal
(Immigration and Asylum
Chamber)** Appeal Number:

IA/42099/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 12th July 2016**

**Decision & Reasons
Promulgated
On 22nd July 2016**

Before

UPPER TRIBUNAL DEPUTY JUDGE ROBERTS

Between

**MISS F F
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Noor, Counsel

For the Respondent: Mr Walker, Senior Home Office Presenting Officer

Anonymity

Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008

An anonymity direction was made by the First-tier Tribunal. It is appropriate to continue that direction.

DECISION AND REASONS

1. The Appellant a citizen of Iran born [] 1987 appeals to the Upper Tribunal, with permission, against the First-tier Tribunal (Judge Ford) which in a decision promulgated on 29th October 2015, dismissed her appeal against the Respondent's refusal to vary her leave to remain exceptionally on Article 8 ECHR grounds.

Background

2. There is a protracted history to this appeal. The Appellant entered the UK in January 2010 with leave as a student. That leave was extended to 20th October 2014; but on 29th August 2014 she applied for variation of the leave on the basis of her Article 8 family/ private life.
3. The Respondent refused her application and her subsequent appeal against the refusal came before the FtT (Judge James) in 2015. Judge James allowed the Appellant's appeal in a decision issued on 18th February 2015 and after making clear findings that should the Appellant be removed to Iran, she would be at risk from the current Iranian Government. The risk found by Judge James extended to the appellant being treated as an apostate, for which the penalty is death, being considered a dissident and political activist. This is because of the expression of her views in her writings on social media. Those findings were on the whole adopted in a subsequent Tribunal hearing, as I set out in paragraph 8 below, with the exception of the conflict arising from the Appellant returning to Iran to access family money as mentioned in paragraph 5 below.
4. The Respondent sought and obtained permission to appeal Judge James' decision on the basis that the judge had failed to have regard to the factors set out in Section 117B of the 2002 Act when considering proportionality and had not resolved the apparent conflict, whereby the Appellant specifically did not seek asylum in the UK because she wished to have the facility to travel to Iran in order to access family monies. It is correct to say that the evidence before Judge James showed that since her entry to the UK the Appellant had travelled back to Iran on several occasions. However she had only remained there for around 3 weeks on each occasion. Her evidence was that it was dangerous to do so but this was the only way she could access family money which was still there. This was the reason she had not claimed asylum.
5. Judge James also found that the Appellant's nuclear family were now all in the UK apart from the Appellant's grandmother who remained in Iran. I pause here to note that the Appellant's grandmother has, since the start of these proceedings, died. No close family members remain in Iran.
6. Following the Respondent having obtained permission to appeal Judge James' decision, the matter came before the Upper Tribunal on 21st May 2015. That Tribunal appeared to accept that Judge James had erred in his proportionality assessment by failing, it was said, to take into account the

considerations set out in S 117 of the 2002 act. That Tribunal remitted the matter, once more to the First-tier Tribunal, for a fresh hearing.

7. The fresh hearing took place before Judge Ford on 14th October 2015. For the purposes of this decision it is recorded that Judge Ford took into account, as unchallenged, the evidence given to Judge James, by the Appellant and her witnesses. It was further noted that the Appellant could not meet the Immigration Rules and that the appeal amounted to an Article 8 claim outside the Rules. After consideration Judge Ford dismissed the appeal directing herself that despite the findings made she could only attach little weight to the Appellant's private life because it had been established at a time when her leave to remain was precarious in that it was temporary leave only.
8. The Appellant sought permission to appeal Judge Ford's decision. Permission was refused initially by the FtT but granted on a renewed application before the Upper Tribunal. The grounds seeking permission argued that Judge Ford's proportionality assessment was flawed because of a misapplication of Section 117B(5) because she considered that the limited weight attaching to private life built up on a precarious basis justified boosting the public interest in removal, thereby outweighing strong factors against removal.
9. The grant of permission succinctly sets out the issues before me and is set out here below:-
 - "1 The Appellant is a citizen of Iran who came to the UK in 2010. She appeals against the decision of First-tier Tribunal Judge Ford dismissing her appeal against the refusal of leave to remain on Article 8 grounds. The Appellant had travelled to Iran on several occasions and did not wish to make a protection claim.
 - 2 The grounds submit that the judge's assessment of proportionality was irrational and incompatible with **Bensaid v UK**. It was accepted that the Appellant could not satisfy the Immigration Rules.
 - 3 The judge concluded that the Appellant's return to Iran would be an affront to her physical and moral integrity. It is arguable that the judge erred in law in concluding that she could only attach little weight to the Appellant's private life, no matter how strong it was, no matter how strong her philosophical and religious beliefs were, in accordance with Section 117B(5). The grounds are arguable."

The UT Hearing

10. Before me Mr Noor appeared for the Appellant; Mr Walker for the Respondent. The Appellant attended the hearing but in the event, I found did not need to call upon her to give evidence.

11. Mr Noor's submissions kept to the lines of the grounds seeking permission. He submitted that there was no challenge to the findings of fact made both by Judge James and Judge Ford. Both Judge James and Judge Ford found that there was a real risk to the Appellant if she were to be forcibly removed to Iran. This is because she would face persecution or ill-treatment. Judge Ford accepted that forced removal of the Appellant would be an affront to her physical and moral integrity. Both Judge James and Judge Ford accepted that the Appellant is an apostate of Islam and has strong anti-regime views.
12. The difficulty in the Appellant's claim arose over the fact that she did not wish to claim asylum. She wished to retain the ability to return to Iran for two to three weeks at a time in order to sort out the family money which was still there and to see her grandmother. (As I recorded earlier by the time of the hearing before me, the Appellant's grandmother had died).
13. Mr Noor further submitted that despite Judge Ford finding as she did, she considered that she was unable to reconcile Section 117B(5) with the Secretary of State's retained discretion to grant leave outside the Rules when there are exceptional compelling circumstances. He submitted that Judge Ford had misdirected herself. She said at paragraph [49]:

"... the statutory provision under Section 117B(5) is clear. I can only attach little weight to the Appellant's private life, no matter how strong it is, no matter how strong her philosophical and religious beliefs are when looking at the proportionality exercise."
14. He submitted that this had led the judge into an irrational assessment under the fifth stage of the **Razgar** test. Judge Ford, he said, appears to contradict herself because at [50] she accepts in her analysis of S. 117 that she takes the phrase "little weight" to be a recognition that there will be a small number of cases where despite the fact that little weight can be attached to the Appellant's private life, the interference will be so great that the decision is disproportionate. He submitted there being no challenge to the fact-finding exercise, the decision of the FtT should be set aside and the decision remade allowing the Appellant's appeal.
15. Mr Walker whilst not conceding the matter, agreed that what was required in this appeal was a re-evaluation of the FtT's findings in the light of the fifth stage proportionality test in **Razgar**. He accepted that should I find an error of law, there was no challenge to the factual matrix set out in the decision. He agreed that I would be in a position to substitute my own decision in this matter.

Consideration

16. I am satisfied that Judge Ford's decision contains a material error and that the decision must be set aside and remade. Whilst this Tribunal will always hesitate to interfere with the reasoning of the First-tier Tribunal, I find that too much emphasis has been placed upon the weight to be attached under

S.117B(5) and this in turn has affected the proportionality assessment such as to render it flawed. The FtT judge appears to have interpreted S 117 B(5) as a cap which fetters the importance of other weighty factors. The decision cannot be sustained.

17. I find force in Mr Noor's submission that the judge misdirected herself at [49] by accepting with reasoned findings, that it would be an affront to the Appellant's physical and moral integrity to force her to return to Iran and then in contradiction to that, saying little weight only can be attached to the Appellant's private life no matter how strong it is and no matter how strong her philosophical and religious beliefs are when looking at the proportionality exercise.
18. That contradiction renders the decision unsustainable and the decision is therefore set aside.

Remaking the Decision

19. I find I am in a position to remake the decision, since no further evidence is required and as Mr Walker sensibly pointed out the facts of the Appellant's case are not challenged.
20. I accept, as did Judge James and Judge Ford that Article 8 is engaged in respect of the Appellant's private life. I identify, as Judge James did, that the proportionality limb of **Razgar** is in issue. The Appellant's case is one which engages exceptional circumstances and I agree.
21. The findings of fact made by both FtT Judges are clear and unchallenged, namely that there would be an affront to the Appellant's physical and moral integrity if forced to return to Iran, where she would feel greatly restricted philosophically, religiously and in her personal and sexual life. Both FtT judges accepted that the appellant no longer adheres to her Islamic beliefs. That places her at risk if forced to return.
22. Whilst I accept that the Appellant has not claimed asylum and the fact that she chooses to place herself at some risk by returning to Iran to access family money that is not a matter to be held against her when it comes to assessing the strength of her claim under Article 8.
23. Her Article 8 claim requires her to show that this is one of those small number of cases where leave to remain should be granted outside the Rules because the exceptional circumstances of the case would result in an unjustifiably harsh decision otherwise. It is hard to see how the facts of this particular case could be otherwise than exceptional since it is clear that both FtT judges found that she would be at risk if forcibly removed and it would be an affront to her moral and physical integrity. The strength of those findings, I find, are capable of outweighing the public interest consideration set out in S.117B(5) when considering the proportionality test under Razgar.

24. For the foregoing reasons therefore the decision of the First-tier Tribunal promulgated on 29th October 2015 is hereby set aside. I remake the decision allowing the Appellant's appeal under Article 8 ECHR.

Notice of Decision

The Appellant's appeal against the Respondent's refusal of leave to remain on Article 8 grounds, is allowed.

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 them or any member of their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed C E Roberts Date 21 July 2016

Upper Tribunal Deputy Judge Roberts

**TO THE RESPONDENT
FEE AWARD**

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award, and have decided to make a fee award of any fee which has been paid or may be payable.

Signed C E Roberts Date 21 July 2016

Upper Tribunal Deputy Judge Roberts