



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: VA/00930/2013

THE IMMIGRATION ACTS

Heard at Field House
On 6 August 2014

Determination Promulgated
On 13 August 2014

Before

UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

SAKINEH SAYAH KHABISI

Appellant

and

ENTRY CLEARANCE OFFICER - ABU DHABI

Respondent

Representation:

For the Appellant: Ms K Cronin, Counsel instructed by Messrs Birnberg Peirce & Partners Solicitors

For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is an appeal by the Appellant a citizen of Iran born on 12 July 1928 against the decision of First-tier Tribunal Judge N J Bennett who sitting at Hatton Cross on 5 June 2013 and in a subsequent determination promulgated on 9 July 2013, dismissed the appeal of the Appellant against the decision of the Respondent dated 21 November 2012 to refuse the Appellant entry clearance as a visitor, the relevant Immigration Rules applicable being as set out at paragraphs 41(i), (ii), and (vi) of the Immigration Rules HC 395 (as amended). In summary the First-tier Tribunal Judge concluded that the Appellant did not genuinely intend to visit her daughters and their families in the United Kingdom for a period of only six to seven weeks and then return to Iran.

2. At the hearing before the First-tier Tribunal, no Home Office Presenting Officer was present. Thus and as confirmed within the determination, there was no cross-examination of the evidence of the witnesses comprising the Sponsor Taraneh Sayyah Khabisi and her sister Parvaneh Sayyah Khabisi who gave oral evidence before the Judge that included the adoption of their prior respective witness statements. Their mother, the Appellant was also the grandmother of her daughters' children. The evidence was that she had a special close relationship with her grandson the son of the Sponsor. As pointed out in the challenge to the Judge's decision there were no inconsistencies relied on by him as to the daughters' evidence either within their own evidence or as between each of them in their statements and/or oral evidence.
3. The Judge in his determination at paragraph 31 concluded that:

"The Appellant's economic personal circumstances are of considerable importance when considering her intentions about her visit".
4. Evidence was also given by another of the Appellant's daughters Nasrin that it was contended was entirely consistent with her sisters' evidence.
5. Nasrin confirmed in her statement as to why her mother was genuine in her wish to visit her daughters and why her life was so rooted in Iran such that she would not remain in the United Kingdom and definitely return at the end of her visit. Her evidence specifically referred to both the Appellant's personal and financial circumstances.
6. Nasrin was married with two children and was a housewife. Her husband was self-employed distributing gold and silver products in Iran in relation to which documentary evidence was attached.
7. Nasrin and her other siblings lived in Iran and visited their mother daily with their children, when sometimes they would stay over at their mother's house.
8. The Appellant saved money at home before she opened a bank account. Six years previously she opened a bank account with Bank Melli for the purpose of receiving a subsidy which the Iranian government paid to all citizens. Previously she had opened an account with Bank Pasargad for the purpose of applying for a visit visa to the UK. Nasrin confirmed her mother's balances. She further confirmed the reason why her mother the Appellant, had every incentive to return to Iran after a visit to the UK primarily due to the support she received from her children and grandchildren in Iran and her life in Iran. Nasrin emphasised that her mother would not want to remain in the UK.
9. Parvaneh Khabisi's evidence was aid to be consistent with the evidence of Nasrin as to their mother's personal circumstances. Parvaneh was married and had two daughters. Her mother the Appellant had six other children. All Parvaneh's siblings

except for Hossin and Taraneh lived in Iran. Hossin had lived in the USA for many years.

10. Parvaneh had not seen her mother since 2010 and was very anxious for her to visit as she could not return to Iran having been granted refugee status. She could not afford the cost of travelling to another country to visit her mother.
11. Parvaneh stressed that her mother had every intention of returning to Iran after the visit having lived in Iran all her life and having enjoyed very strong ties and connections with Iran.
12. Parvaneh stressed that the majority of the Appellant's children and grandchildren of which there were fifteen resided in Iran. They were a very close-knit family and her mother enjoyed spending time with her children and grandchildren. Recently Parvaneh's sister's 10 year old grandson had died of brain cancer so the Appellant was even more needed.
13. Parvaneh's evidence continued that her mother was very active for her years and enjoyed planting flowers and socialising with her many friends. She owned a property and had regular income from the rental of two flats in relation to which she received £500 monthly.
14. It was Taraneh's evidence consistent with that of her sisters that she was married and had a son who was 8 years old. She and her son were recognised as refugees. She kept in close contact with her mother by telephone and had always enjoyed a close relationship with her and missed her very much. It had been two and a half years since she last saw her mother and she was very anxious for her to visit because Taraneh for obvious reasons could not return to Iran. Her son was the Appellant's youngest grandchild and they had a close relationship. He used to see his grandmother regularly when he lived in Iran and missed her a lot. In common with her sister Parvaneh and contrary to the suggestion raised by the Respondent, it would be impossible for her to arrange to visit her mother in another country. Both she and her husband were unemployed and unable to afford the cost of travelling to another country.
15. Having initially failed in her application for permission to appeal the First-tier Tribunal's determination, a subsequent application for judicial review to the Administrative Court of the High Court was successful. In giving her decision Mrs Justice Carr DBE had inter alia this to say:

"I am satisfied there is an arguable case which has a reasonable prospect of success that both the decision of the Upper Tribunal refusing permission and the decision of the First-tier Tribunal against which permission to appeal was sought are wrong in law. The claimant is an octogenarian Iranian national who has lived in Iran all her life. She seeks to challenge the finding that she was not genuinely seeking entry for only a limited period of six to seven weeks to visit two of her six children and grandchildren living in the United Kingdom. It is arguable that there was procedural irregularity and

unfairness for the reasons set out in the detailed statement of grounds. In particular oral and written evidence of the claimant's daughters was not challenged and the First-tier Tribunal Judge had not addressed their evidence or make any findings as to why their evidence should be rejected (other than his comment at paragraph 34 that he was not obliged to accept such evidence on matters that could and should have been established by documents). The documentary deficiencies relied on by the First-tier Tribunal Judge was not put to the claimant or her witnesses. The refusal of permission by the Upper Tribunal to appeal appears to recognise the arguability of at least some of the grounds relied upon ...

The consequences to the octogenarian claimant are significant in that she is otherwise unlikely to see her daughters or grandchildren again".

16. The decision of the Upper Tribunal to refuse permission to appeal was therefore quashed and by a decision dated 7 April 2014 the Vice President of the Upper Tribunal granted permission to appeal in the light of the decision of the High Court in this case.
17. The Respondent's Rule 24 response as set out in her letter of 14 May 2014 stated that in summary she would submit that the First-tier Tribunal Judge directed himself appropriately and had considered all the oral evidence and documentary evidence which was placed before him and that it was open to the Judge to take an adverse view of the documents if they were inherently unreliable.
18. Prior to the hearing of this appeal before me the Tribunal received attached to letters respectively dated 5 and 6 August 2014 from the Appellant's solicitors, two bundles of documents that included an updated witness statement from the Sponsor Taraneh Khabisi and various documents relating to the family situation of the Appellant in Iran.
19. Thus the appeal came before me on 6 August 2014 and my first task was to decide whether the determination of the First-tier Judge disclosed an error or errors on a point of law such as may have materially affected the outcome of the appeal.

The Parties' Submissions

20. Ms Cronin opened her submissions by pointing out that she had the originals of the documents referred to in the two bundles before me and they were provided to Mr Melvin for his inspection.
21. Ms Cronin submitted that the primary error of the First-tier Judge was that he appeared to consider that the only evidence he needed to assess and give weight to, was the documentary evidence as opposed to the oral evidence that stood alongside it.

22. In any event, the Judge's approach to the documentary evidence before him revealed errors of law, not least mistakes of fact triggered by his failure to take account of the relevant documents within the Appellant's bundle.
23. Ms Cronin continued that it was one of those cases where it was the failure of the Judge to consider holistically the evidence that included the live unchallenged evidence of the two witnesses with which the Judge had taken no issue. Had the Judge taken these matters properly into account, it would and should have been clear to him this was an Appellant who had a very real intention to return to Iran on or before the expiry of her visitor's visa.
24. Ms Cronin further submitted that there were errors of approach with the manner in which the Judge dealt with the Appellant's income and resources in Iran.
25. There was a final error in respect of his consideration of Article 8 of the ECHR. At paragraph 1 of the determination the Judge did not accept there was any family life between the Appellant and her daughter and grandchildren. That had to be wrong. It was not a requirement of family life, that one had to live with a person and the Judge failed to have regard to the fact that the daughters in the United Kingdom were refugees who could not live with their mother, a part of the price for them of fleeing Iran where they had previously seen her daily together with the grandchildren. It was relevant that the daughters in the United Kingdom were refugees in this case and Ms Cronin pointed to the obligation of family contact between family members when as here, you had refugees who could not return to their home country.
26. Ms Cronin took issue with the observation of the Judge that they might all meet up elsewhere, that she maintained was inappropriate, not least because of the high cost of travel for all the family concerned and as such it was a disproportionate requirement.
27. With reference to the decision of the Immigration Appeal Tribunal in MNM* 00/TH/02423 to which the "Surendran Guidelines" were annexed. Ms Cronin maintained this was a Surendran guidance case in relation to which she referred to the role of what were then known as Adjudicators at paragraphs 5 and 7 of the guidance.
28. I pause there, because this was indeed a matter in relation to which Mrs Justice Carr considered that the claim raised an important point of principle of practice namely, the question of the extent to and manner in which a First-tier Tribunal Judge could deal with unchallenged oral evidence and questions of procedural fairness in hearings conducted in the absence of a Presenting Officer.
29. Indeed paragraph 5 of the Surendran Guidelines states that where no matters of credibility are raised in the letter of refusal but, from a reading of the papers the Special Adjudicator himself considers that there are matters of credibility arising

therefrom, he should simply point these matters out to the representative and ask that they be dealt with either in examination of the Appellant or in submissions.

30. Paragraph 7 of the guidance states that where having received the evidence or submissions in relation to matters which he has drawn to the attention of the representatives the Special Adjudicator considers clarification is necessary, then he should be at liberty to ask questions for the purposes of seeking clarification. The Tribunal emphasised however that it was not the Judge's function to raise matters which a Presenting Officer might have raised in cross-examination had he been present.

31. Ms Cronin pointed out in that regard that at paragraph 34 of his determination, the Judge stated as follows:

"I am not obliged to accept oral evidence about matters that could and should have been established by documents, particularly in circumstances where the Respondent had said in his decision that he was not satisfied that the Appellant had other family living with her in Iran".

32. I would agree with Ms Cronin. It was indeed very troubling as it was not a question of obligation. This had to be a misdirection in that it was necessary to look at the evidence on its own terms, and not disregard it if it had been accepted and/or not challenged in the live evidence particularly as here, in circumstances where the live evidence was tendered as corroborative of the documentary evidence. I also share Ms Cronin's view that there was no indication within the determination, that the Judge disbelieved the live evidence and it could be inferred that were it otherwise, he would have proceeded to set out his reasons for so concluding.

33. It was also to be noted that in the final sentence of paragraph 34, the Judge stated that he was "not given an explanation for the absence of documents showing current residence" but as identified by Ms Cronin, there was documentary evidence before him that the Judge had clearly overlooked that dovetailed with the live evidence before him. He had therefore misdirected himself in law.

34. Mr Melvin was brief but to the point in his submissions. He relied on the Rule 24 response and maintained that in the determination as reflected by way of example at paragraphs 31 and 32, the Judge had given reasons why he believed that the Appellant would not return to Iran if issued with a visa. It is as well therefore to set out below those paragraphs:

"32. Her personal circumstances include the location of her family. The starting point must be that an octogenarian, would probably like to be surrounded by as many of her children as possible. I was told that she has eight children but one of them lived in America, but the Sponsor her sister lived here and that the remainder lived in Iran with their families. Her bundle contains documents relating to the children who are said to live in Iran. Very few of these documents show that any of these children were normally resident in Iran at the date of the decision. With

the exception of Hassan's gas bill for January 2013 there are no routine documents that show this, such as utility bills, payslips, bank statements and tax documents. Her daughter, Nazrin, produced her husband's licence to deal in precious metals which was issued in January 2011, her medical treatment booklet which was renewed on 17 December 2012, and a certificate from her daughter's university which was issued on 25 February 2013 and which shows that her daughter was enrolled at the Islamic Azad University. Elizabeth Farrell, a senior caseworker at the Appellant's solicitors, says in her statement that she spoke to the Appellant and to her daughter, Nazrin on 21 May 2013, they lived in Iran and that they returned their statements from Iran.

33. The other documents that the Appellant produced about her children, such as the document showing ownership of property and identity cards, are of little value in establishing current residence in Iran because they are either undated or were not recently issued. For example Hassan's identity card is valid until January 2020 but it does not show where it was issued. The ownership document relating to his apartment does not show current ownership it only shows him to have been the owner of the property in June 2010, when he executed a further charge in favour of Bank Saman. Ownership of property in a country does not in any event establish residence in that country. His student identity cards do not show when they were issued. The photographs are undated. As the Sponsor says in her statement that she appeared in three of these photographs they, at least, are not of recent origin".
35. Mr Melvin continued that if I was against him, then he was "happy for you to evaluate the evidence and reach a fresh decision". However following Ms Cronin's submissions, Mr Melvin informed me that if errors of law were found such that the decision of the First-tier Judge was set aside, he would on reflection wish me to remit the case back to the First-tier Tribunal given his understanding there were other relatives of the Appellant seeking entry clearance to the United Kingdom.
36. In that regard, I reminded Mr Melvin that the Tribunal were solely concerned with the evidence as it stood before the Entry Clearance Officer as at the date of decision and I was not persuaded that justice required in such circumstances the case should be remitted. This was a case that had been in the appeal track for some two years. Further my understanding was that cases remitted to the First-tier Tribunal would not be heard until January or February 2015 at the latest. It followed that if a fresh decision was to be made it would be just and expedient that it be made by the Upper Tribunal.

Assessment

37. At the close of the parties' submissions I was able to inform them that I was satisfied that the determination of the First-tier Judge did disclose errors on a point of law such as to have been material to the outcome of the appeal and that in such circumstances the First-tier Tribunal's determination was to be set aside and that in such circumstances it was appropriate to proceed to make a fresh decision and that such decision would be to allow the Appellant's appeal.

38. I pointed out that my reasons for so deciding would follow in a determination that I now give.
39. Upon my own careful consideration of the First-tier Tribunal's determination and the bundle of documents that were placed before the First-tier Tribunal Judge for his consideration and for the reasons not least identified by Ms Cronin with which I entirely agree, I find that the First-tier Judge's determination was vitiated by errors of law such as to warrant the setting aside of his decision.
40. In so concluding, I appreciate that the Judge's task was not assisted by the absence of a Presenting Officer to represent the Respondent. Further he was faced with a large bundle of documents comprising hundreds of pages and whilst his determination reflects the effort that he made to disseminate them, it is regrettable that the tenor of his reasoning was to attach great weight to them in circumstances where he stated at paragraph 34 that he was "not obliged to accept oral evidence about matters that could and should have been established by documents ...". It was also regrettable that as I have found upon my own consideration of the documents, he did not in the event give them the anxious scrutiny that they merited in the formulation of his conclusions.
41. At paragraph 32 the Judge made the assumption as to what informed the Appellant's intentions by saying that "the starting point must be that an octogenarian would probably like to be surrounded by as many of her children as possible" and then at paragraph 34 the Judge accepted that one daughter Nasrin and her family were "probably living in Iran at the time of the Respondent's decision" and that "Hassan may have produced an isolated utility bill but I do not accept that this is sufficient to establish that he is probably in Iran".
42. The Judge also made reference at paragraph 32, to having been told that the Appellant had eight children and that one of them lived in America but the Sponsor and her sister lived here, the remainder lived in Iran with their families.
43. I am satisfied that the Judge misdirected himself as to the evidence in the above regard and also set up a false set of assumptions, not least because it might well be sufficient for a parent to have only one child in the country as an incentive to return.
44. Pages A100 (b) to A121 of the Appellant's bundle, all related to documentation dealing with Nasrin and from which it is apparent they included the Guild card for Nasrin's husband and his ID documentation, birth documents of her children, documents dealing with a social insurance organisation and a medical treatment booklet for herself (A116) that had been issued in 2009 and renewed in 2012. There was also a student card for her daughter (A118) and for her son (A120).

45. In addition and in terms of Hassan, there appeared at B22 an unsigned statement giving his address, his wife's name and that of his two children and his ID card (B24) and birth documents of his children.
46. There was also documentary evidence as to ownership of an apartment (B28) registered in 2001 and a mortgage dated 2010.
47. At B34 there was a property document/ownership deed for his wife with similar dates. A gas bill appeared at (B40 that the Judge made reference to). There also appeared Hassan's son's ID card valid to 2012 and that of his daughter at B42.
48. Further there were documents not referred to at all by the Judge relating to the Appellant's daughter Shamshamsi Khabisi and her family. There was her statement (B46), there followed birth documents, her university ID card (B51) evidence confirming her ownership of property registered in 1999 and renewed in 2011 (B53). Further ownership documents at B67. The Judge appears to have overlooked this significant aspect of and evidence relating to the Appellant's family in Iran.
49. I would thus agree with Ms Cronin who submitted, that taking the evidence as a whole, the Judge had before him an array of clear evidence as to the Appellant's family circumstances in Iran not least that of her children and grandchildren, sons-in-law etc. in Iran.
50. It was indeed in consequence, that Ms Cronin made the appropriate observation that this was one of those cases where it was the failure of the Judge to consider holistically the evidence that had undermined and vitiated the determination.
51. I am further satisfied, that in terms of the documentation that reflected the financial material, the Judge was too prescriptive about this evidence. For example at paragraph 35, all the evidence of rental income was disregarded despite the volume of documentation before him in this regard covering the period 2010 to 2012 (A16 to A36). The very first of those documents was a receipt that predated the lease document for the first property. This showed indeed that there were two apartments in the same building, one on the first floor and the other on the second. There had been an error on the part of the estate agent to the property in that regard that he had subsequently corrected in a further document that appeared in the bundle before the Judge.
52. At A41 there was a copy lease which showed the lease had to be renewed every three years so that the fact it was a three year lease was not inconsistent of the tenant being there in advance of that particular lease having been signed.
53. At paragraph 35 the Judge considered that the evidence about the Appellant's rental income was unsatisfactory as he considered the evidence provided as to the income the Appellant derived from the flats was confused. I reaching that conclusion, the Judge used the exchange rate given in the notice of decision in his calculations, thus

finding that the Appellant did not receive a monthly rental income equating to £500 sterling as claimed.

54. However and as explained by Ms Cronin, this depended on the exchange rate one was using to make that conversion. In fact the exchange rate the Sponsor was giving in evidence before the Judge did equate to £500 based on a free market exchange rate whereas the Entry Clearance Officer and the Judge were using an official exchange rate. Ms Cronin continued "How it correlates to English money does not correlate in any event to the Appellant's incentive to return. Her incentive to return is how much the Appellant earns in Iran and not how it corresponds to here". I would fully agree with that observation.
55. In any event, the evidence before the Judge as to the Appellant's dealings with various banks, did not on my reading of the evidence before him, reflect a lack of funds but a lack of trust on the part of the Appellant in the Iranian banking system. This was indeed evidence supported by the written and oral evidence of the Sponsor and her sister at the hearing before the First-tier Judge. I find therefore that there were errors of approach on the part of the First-tier Judge in relation to the Appellant's income and resources in Iran.
56. It is also apparent to me that the Judge's conclusion that he did not accept there was any family life between the Appellant and her daughters or between the Appellant and her grandchildren was in error. In that regard I would fully endorse Ms Cronin's submissions to which I have above referred.
57. I find that in setting aside the First-tier Judge's determination and in making a fresh decision, I do so not least for the reasons that I have identified above in concluding the First-tier Judge erred in law.
58. I am also reminded that the Tribunal in W (Ghana) [2004] UKIAT 0005 pointed out that the provisions of paragraphs 41(i) and (ii) of the Immigration Rules were two separate requirements. They were not interchangeable:

"That accords with common sense. One can think of a person who intends to leave at the end of his visit but does not have a genuine purpose for his visit. Equally however, it accords with common sense to accept that there is some degree of overlapping: if a person genuinely intends a visit for a limited period, that entails that he will have an intention to leave at the end of that period".

59. It is apparent to me that the purpose of the Appellant's intended visit was clear. This was an octogenarian Iranian national who had lived in Iran all her life, and who wanted to see her children and grandchildren in the United Kingdom albeit for a limited period. Nothing could be more understandable than that a mother and grandmother would be anxious to achieve this objective in the time left to her and mindful that her daughters could not come to Iran in that they enjoyed refugee status in the United Kingdom.

60. I have also reminded myself that in Ahsrif 01/TH/3465 the Tribunal pointed out that:

“The whole point of a family visit is that the existence of family ties will normally furnish the reason for the visit, since it is hardly surprising that members of a family separated by many thousands of miles may from time to time wish to see each other”.

61. I am satisfied that clearly this was the situation in the circumstances in this case.

62. The age and situation of the Appellant may have aroused suspicion in the mind of the Entry Clearance Officer as to whether there was a genuine intention to return to Iran at the expiry of the visa, but there surely had to be extrinsic evidence to justify such a suspicion. Being an 86 year old cannot possibly be the basis itself for justifying the refusal of a visitor’s visa or otherwise there could never be a successful application by an elderly single person to visit loved ones in the United Kingdom.

63. Having considered the evidence in its totality, I therefore conclude for the above reasons that the Appellant has in the event, provided sufficient evidence to the requisite standard of proof to show that only a genuine visit for family purposes was intended.

64. On the totality of the evidence before me and bearing in mind where the burden of proof lies, I find the Appellant has satisfied me as to the true purpose of her proposed visit and that she would intend to leave the United Kingdom upon completion of her visit.

65. I therefore find that the decision of the Respondent was not in accordance with the law and the Immigration Rules applicable to this case.

Decision

66. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.

67. I set aside the decision.

68. I remake the decision in the appeal by allowing it.

Signed

Date 11 August 2014

Upper Tribunal Judge Goldstein