Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/01082/2015**

THE IMMIGRATION ACTS

Heard at Field House
On 10 February 2016

Decision & Reasons Promulgated
On 23 February 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mrs MEHRNAZ ABELCHAIN

Respondent

Representation:
For the Appellant: Ms A Everett, Senior Home Office Presenting Officer
For the Respondent: absent

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. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-

tier Tribunal Judge Coutts, promulgated on 30 July 2015 which allowed the Appellant's appeal on ECHR grounds.

Background

3. The Appellant was born on 26 March 1955 and is a national of Iran.

4. On 10 December 2014 the Secretary of State refused the Appellant's application for indefinite leave to remain in the UK as the partner of a person who has leave to remain in the UK as a retired person of independent means.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Coutts ("the Judge") allowed the appeal against the Respondent's decision on ECHR grounds.

6. Grounds of appeal were lodged and, on 7 January 2016, Judge Grimmett gave permission to appeal stating *inter alia*

> "It is arguable that the Judge erred in concluding that failing to return the Appellant's passport so that she could retake the test was an interference with her article 8 rights when the issues were whether she met the requirements of the rules or whether there was something exceptional about her position."

The Hearing

7. The Appellant did not attend the appeal nor was she represented at the appeal. I am satisfied that due notice of the appeal was served upon the Appellant at the address that was given. I am therefore satisfied that having been served notice of the hearing and not attended it is in the interests of justice to proceed with the hearing in the Appellant's absence as I am entitled to do by virtue of paragraph 38 of The Tribunal Procedure (Upper Tribunal) Rules 2008.

8. Ms Everett, for the respondent, adopted the terms of the grounds of appeal and explained that the Judge had found that the respondent's decision not to return the appellant's passport frustrated her ability to comply with the immigration rules. At [16] the Judge says "*I find that the respondent's failure to return the appellant's passport is a disproportionate interference with the appellant's rights*." Ms Everett told me that the retention of the passport does not amount to a breach of any article 8 rights. She argued that the Judge might have used article 8 ECHR in an attempt to fix a perceived unfairness, but that the Judge fails to demonstrate a disproportionate interference with article 8 rights. She urged me to set the decision aside.

Analysis

9. At [14] the Judge decides that there are exceptional circumstances in this case which merit article 8 ECHR consideration out-with the immigration rules. At [15] the Judge finds that of private and family life rights are engaged. It is at [16] that the Judge finds that the interference with article 8 ECHR is

disproportionate. He specifically finds that the interference is the retention of the appellant's passport. There are no other findings about the manner in which article 8 ECHR is engaged.

10. It is clear that the Judge has taken the view that the appellant's chances of making a successful application for leave to remain in the UK are frustrated because her passport has not been returned to her. It is obvious that having made that finding the Judge has tried to assist the appellant.

11. Article 8 of the ECHR states:

> "(i) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (ii) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

12. At [15] of the decision the Judge sets out the elements which make up private and family life within the meaning of article 8 ECHR in this case, but it's at [16] that he finds that there is a disproportionate interference with the appellant's rights. The Judge does not make findings of fact to demonstrate either the nature of the interference or why he finds that that interference is disproportionate. He does not specify whether the interference is to the right to respect for family life or private life, or both. He does not analyse the impact of the respondent's decision in order to define the nature of the interference.

13. And [9] the Judge refers to section 117 of the Nationality Immigration and Asylum act 2002, but no findings are made about the impact of the factors set out in that statutory provision. The result is that, although the Judge concludes that article 8 ECHR is engaged, his balancing exercise is inadequate and no meaningful assessment of proportionality is carried out. I find that that amounts to a material error of law. I must set the decision aside.

14. The Judge has decided this case solely on the basis that the respondent has retained the appellant's passport and so prevented her from taking the "knowledge of life in the UK "test. That is an error of fact. The evidence indicates that the respondent returned the appellant's passport to her on 19 June 2014, and that the appellant re-sat the test on 8 July 2014, but was (for a second time) unsuccessful.

15. Although I set the decision aside, there is sufficient material before me to enable me to substitute my own decision.

Findings of fact

16. For more than 20 years, the appellant and her husband have regularly visited the UK, in part because the appellant's brother, sister, niece and nephews all live in the UK. In 2009 both the appellant and her husband were

granted leave to enter the UK for five years. The appellant was granted leave as the dependent of her husband, who was granted leave as a retired person of independent means.

17. In March 2009 the appellant and her husband purchased the property in the UK in the UK in which they now live.

18. In April 2014 both the appellant and her husband applied for indefinite leave to remain in the UK. The appellant's husband was granted indefinite leave to remain as a retired person of independent means. The appellant's application was refused. It is against that decision that the appellant appeals.

19. The respondent refused the appellant's application because she had not passed the "life in the UK" test. The appellant attempted to re-sit the "life in the UK test" on 17 June 2014. She was unable to do so because the respondent held her passport. On 10 June 2014 the appellant's barrister wrote to the respondent asking for return of the appellant's passport.

20. On 19 June 2014 the respondent returned the appellant's passport. The appellant then re-sat and failed the "life in the UK" test on 8 July 2014. On 14 July 2014, the appellant's barrister returned the appellant's passport to the Respondent and asked the respondent to exercise discretion and grant leave to remain in the UK.

21. The appellant's husband has returned to Iran a number of times to visit his mother, who is unwell. He has had to travel alone because the appellant cannot accompany him until this appeal is resolved.

Conclusions

22. In the reasons for refusal letter, the respondent says that the appellant's passport was returned to her on 19 June 2014 and that the appellant sat the life in the UK test on 8 July 2014. The respondent's PF1 bundle contains a letter from the appellant's barrister (dated 14 July 2014) to the respondent returning the passport and confirming that the appellant was not able to pass the life in the UK test. That letter returns the appellant's passport to the respondent and asked the respondent to exercise discretion because the appellant is approaching her 60th birthday and might soon be exempt from the life in the UK test

23. The appellant was 60 in March last year, three months before the decision was promulgated. The respondent's own guidance provides

> "There is discretion to waive the knowledge of language and life in the UK requirement if, because of a person's age, it would be unreasonable to expect them to meet it. This is set out in paragraph 2(e) of Schedule 1 to the British Nationality Act 1981.
>
> Where the applicant is aged 65 or over you must waive the requirement
>
> ...

> Where the applicant is aged 60-64, you should normally be prepared to waive the requirements if the time needed to reach the required standard means the applicant would then be aged 65 or over."

24. The appellant's application was considered under paragraph 273D of the immigration rules. The only part of that paragraph that the appellant could not meet is the knowledge of life in the UK test. At the date of the hearing in this case the appellant was 60 years of age. She is now approaching his 61st birthday. The appellant's husband has been granted indefinite leave to remain in the UK. For the last seven years the appellant's home has been in the UK.

25. In Ukus (discretion: when reviewable) [2012] UKUT 00307(IAC) the Tribunal held that (i) If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002); (ii) Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148**.** In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above; and (ii) if the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (a) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (b) reach a different decision in the exercise of its own discretion.

26. The respondent has discretion to waive the requirement to pass the knowledge of life in the UK test. That is a discretion which the respondent has not yet considered. If the respondent follows her own guidance she could find that the appellant fulfils the requirements of the immigration rules. I therefore allow the appeal to the limited extent that I remit the case to the respondent to enable the respondent to exercise the discretion available.

Decision

27. The determination of First Tier Tribunal Judge Coutts promulgated on 30 July 2015 contains a material error of law. I set the decision aside. I substitute the following decision.

28. The appeal is allowed. The application remains outstanding and awaits a lawful decision by the Secretary of State.

Signed Date 15 February 2016

Deputy Upper Tribunal Judge Doyle