Upper Tribunal
(Immigration and Asylum Chamber) HU/06468/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 11 January 2019

Decision & Reasons Promulgated
On 24 January 2019

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

S P

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J Bryce, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mr A Govan, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant has permission to appeal against a decision by FtT Judge Doyle, dated 25 June 2018.

2. The grounds are as follows:

> "The judge has erred in finding the appellant to not have established private life in the UK. It was not argued for the appellant that her relationship with her adult sibling constituted family life but the distinction between family and private life can be arid and academic when both engage article 8; *Singh* [2015] EWCA Civ 630 at [25].

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> The judge in an otherwise thorough decision gives no reason for his conclusion at [20] that "The fact that the appellant has been present in the UK for several years and enjoyed the support of her sister is not enough to establish article 8 private life". That conclusion called for an explanation standing the finding-in-fact at 10 (i).
>
> Once granted there is private life in the UK, questions of proportionality become pressing. On the judge's findings, the appellant was in the UK for over 12 years before she realised that her abuser's actings had denied her immigration status. The judge left unresolved, understandably on his approach to the private life issue, the question whether the marriage had irretrievably broken down by the date of expiry of the appellant's initial period of leave. Were that question to be resolved in the appellant's favour, and there was evidence before the tribunal to allow that, then the appellant would only be deprived of leave to remain under section DV of appendix FM by the chance operation of the transitional provision A208B. A "near miss" would be relevant to the proportionality assessment; *SS (Congo)* [2015] EWCA Civ 387 at [56].
>
> The appeal should be reconsidered on the footing that private life is established and the only issue is proportionality."

3. The finding at 10 (i) is this:

> "The appellant's brother and sister are both settled in the UK. The appellant relies heavily on her sister, with whom she lives in Glasgow. The appellant does not like to leave her home unless accompanied by her sister. The appellant is tormented by the stigma of divorce."

4. *Singh* at [25] says:

> "… the debate as to whether an applicant has or has not a family life for the purposes of Article 8 is liable to be arid and academic. In the present case … the issue is indeed academic, and clearly so. As the European Court of Human Rights pointed out in *AA* … the factors to be examined in order to assess proportionality are the same regardless of whether family or private life is engaged. The question for the Secretary of State, the Tribunal and the Court is whether those factors lead to the conclusion that it would be disproportionate to remove the applicant from the United Kingdom. …"

5. Mr Govan argued that the decision at [18, 20 and 23] was not to be taken literally as holding that the appellant had no private life in the UK, and that the language used was a form of "judicial shorthand" for a finding that although there was private life, the respondent's decision did not interfere disproportionately with it. On that basis, he said that the decision could stand.

6. I was not persuaded by that argument. The appellant conceded in the FtT that her relationship with her sister did not constitute family life within the meaning of article 8. That concession, correctly made, seems to have misled the judge into thinking that he had to exclude the appellant's domestic life and look elsewhere to find any private life. Realistically, even if the appellant's focus is within her sister's household, her history in the

UK since 2001 cannot be said to be such that she has no private life here. The judge treated the finding of no private life as the end of the case, and did not mention proportionality. The decision cannot be read as Mr Govan contended.

7. Having reached that stage, I next considered whether the presumption in favour of remaking decisions in the UT applied.

8. Section 117B(5) of the 2002 Act provides for little weight to be given to private life established at a time when the person's immigration status was precarious. The appellant's status has changed over the years, and it may be relevant to consider whether private life, much as it has existed for several years, was established before her status became precarious. Limitations of her knowledge and understanding of her status may be relevant. Mr Bryce suggested that the benefit of the respondent's domestic violence policy might not be "time-limited", under reference to *JL* [2006] UKAIT 00058.

9. It became common ground that once the decision was set aside, a fresh hearing in the FtT was required.

10. The appellant is directed to file with the FtT, and copy to the respondent, not less than 7 days before the next hearing in the FtT, (i) a note of the specific findings of fact, with dates, which she seeks, and (ii) an outline of her submissions on how such findings may demonstrate a right to remain in the UK. In absence of compliance with this direction, an adverse inference may be drawn.

11. The decision of the FtT is set aside. It is appropriate under section 12 of the 2007 Act, and under Practice Statement 7.2, to remit to the FtT for an entirely fresh hearing. The member(s) of the FtT chosen to consider the case are not to include Judge Doyle.

12. It is doubtful whether an anonymity direction is appropriate; but as the matter was not addressed in the UT, the order made by the FtT is maintained at this stage.

11 January 2019
UT Judge Macleman