



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/17032/2012

THE IMMIGRATION ACTS

Heard at Bradford

On 19th July 2013

Determination

Promulgated

On 7th August 2013

Before

UPPER TRIBUNAL JUDGE D E TAYLOR

Between

SAMIR ZORGUI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: In person

For the Respondent: Mrs Pettersen, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the Appellant's appeal against the decision of Judge Sarsfield made following a hearing at Bradford on 2nd October 2012.

Background

2. The Appellant is a citizen of Tunisia born on 26th March 1979. He came to the UK as the spouse of Michelle Jepson on 30th September 2007.
3. The Appellant has a complex immigration history. He first made an application for leave to remain as the spouse of a person present and settled in the UK on 11th September 2009 and was granted leave to run to 24th October 2011. He had not passed the "Life In The UK" test and would not be able to meet the requirements of paragraph 287 of the Immigration Rules i.e. for indefinite leave to remain and therefore applied under paragraph 284.
4. The Appellant's marriage broke down in about January 2010. In October 2010 the Appellant's estranged spouse wrote to the Secretary of State alleging domestic violence and giving a different address for him.
5. On 13th January 2011 and 16th February 2011 the Secretary of State wrote to the Appellant at the address given by his estranged spouse explaining that consideration was being given to curtailing the Appellant's leave to remain but by that stage the Appellant was living in Doncaster and he did not receive those letters. On 9th March 2011 the Respondent made a decision to curtail the Appellant's leave and noted on the Appellant's file that as the address was unreliable and UKBA would serve the notice of decision on both the address and the file in accordance with paragraph 7.2 of the Immigration (Notices) Regulations 2003.
6. The Appellant's marriage to Miss Jepson was dissolved in August 2011. He submitted an application for indefinite leave to remain on 15th October 2011 and on 28th February 2012 applied for indefinite leave to remain in the UK outside the Immigration Rules, which was refused. On 10th July 2012 the Appellant appealed on the basis of his relationship with a Miss Ridgard. At the time of the hearing before the judge the Appellant was living with Melanie Ridgard having been in a relationship with her since April 2011. Their baby was born in September 2012 after the date of the Respondent's decision but before the date of the hearing before the judge.

The Judge's Determination

7. The judge said that the Appellant's conduct had been disgraceful. He considered that he had deliberately chosen not to inform the Respondent about his new relationship and intended to enter in the UK and avoid returning to Tunisia at all costs. He stated that it was not until the Appellant's bundle was served less than two full working days before the hearing that the Respondent was aware of the full details of the relationship. He said that his former spouse had alleged that the Appellant had been violent and disrespectful to her and that he owed her money and she had had to call the police several times and the Appellant's own evidence supported what she said. His past conduct was indicative of desperation to remain in the UK at all costs.

8. The judge said that the Appellant's actions over the years undermined his claim to have a genuine relationship with Miss Ridgard and he was not satisfied that he intended to live with her and their baby permanently. He had used her to try and remain here.

The grounds of application

9. The Appellant sought permission to appeal on the grounds that the judge had been wrong to state that the Appellant's bundle had been served less than two full working days before the hearing. He had served the bundle five working days before the hearing in accordance with directions. Moreover the judge took into account a revenge letter written by the Appellant's ex-spouse which had not been disclosed to the Appellant until the day of the hearing and had remained silent as to the Respondent's failure to serve the bundle containing the letter from the ex spouse on the Appellant at all. He had shown bias.
10. Permission to appeal was initially refused by Judge Grant on 26 October 2012 but, upon renewal, was granted by Upper Tribunal Judge Chalkley on 20th December 2012. The renewed grounds in addition to the previous grounds make a number of further points.
11. Firstly, the curtailment letter of March 2011 was not properly served and therefore invalid because it was not sent to the Appellant's solicitors at the time, which was the address given for correspondence. As a consequence his further application for indefinite leave on 15th October 2011 should have been treated as an in time application for further leave to remain.
12. Secondly, the Appellant's relationship with Miss Ridgard was properly raised at the correct time in the Section 120 notice and the judge had erred in law in failing to give any proper consideration to the existence of family life between the Appellant and his child.
13. Finally the judge had erred in his conclusions as to the abusive behaviour by the Appellant. The evidence now available and submitted with the Grounds of Appeal to the First-tier Tribunal was the result of a Magistrate's Court trial against the Appellant in which he was charged with assaulting Michelle Jepson and found not guilty. Had the Respondent's bundle been served in accordance with directions this evidence could have been placed before the Tribunal. It supported the Appellant's case that he had not been violent towards his spouse and cast doubt on the reliability of her evidence.

The Hearing

14. The Appellant told me that he had financial problems and was not able to pay for representation.
15. So far as the curtailment issue was concerned he said that he had lived at the address given by his ex-wife for a short period. He then moved to

Doncaster. His last contact with his previous solicitors was in 2009 when they had successfully applied for a further two years leave to remain.

16. The Appellant said that unfortunately his relationship with Miss Ridgard had broken down. They had split up at the end of April 2013 although he still wanted to make the relationship work with his daughter. He had been to the Doncaster County Court and had asked what he needed to do in order to make an application for contact. He said that he had worked hard in the UK and educated himself and learned how to treat people well. He wanted to be able to stay to have a chance to make his relationship work with Miss Ridgard and to have contact with his daughter. He accepted that he had made mistakes but he had tried to do his best and he wanted his family back again. If he was able to work his partner could come off benefits and the financial difficulties which had led to their problems would be resolved.
17. Mrs Pettersen submitted that there was no error in respect of the service of the curtailment letter but she accepted that the judge had been wrong in his criticisms of the Appellant who had complied with directions and put in the bundle in time. She also accepted that the Respondent had arrived on the appeal day with fresh evidence which had not been disclosed and said that the Presenting Officer's note of the hearing indicated that the representative had argued that he had not had the opportunity to address the letter because the bundle had only been seen in court.
18. However she submitted that the Appellant no longer had any basis of stay in the UK, that his attempts to apply for contact were at a very early stage and the appeal should be dismissed.

Consideration of whether there is an error of law.

19. The Appellant argues that his application for leave to remain in the UK outside the Rules made on 15th October 2011 should have been treated as one made by a person with continuing leave to remain because the curtailment decision had not been properly served. However the Respondent had attempted service on two addresses, namely the marital address and the address given by the Appellant's former wife. The grounds state that the correspondence should have been sent to his solicitor in accordance with the notice regulations. However he confirmed in court that Turpin and Miller were not his solicitors at that time, since he had had no contact with them after they had completed his application for two years' leave in 2009. In any event, none of these arguments were raised before the judge who could not have been expected to deal with them.
20. The other criticisms of this determination are, however, well made.
21. Firstly, as Mrs Pettersen properly accepted, the judge's comments about the Appellant's failure to serve his bundle in a timely fashion were wholly unfounded. In fact the bundle was served in compliance with directions

five working days before the hearing. The judge's unwise remarks are all the more disturbing since he makes no criticism of the respondent who did not disclose their evidence until the hearing itself. There is no reference in the determination to the Appellant's representative, as recorded in the Presenting Officer's minute of the hearing, arguing that he had not had the opportunity to address the letter and stating that it should be disregarded.

22. Secondly, the judge in strong language, said that the Appellant's conduct had been disgraceful, that he had acted deceitfully and he was not satisfied that he was in a genuine relationship with Miss Ridgard or the child. On the basis of the evidence as it was before the judge it is difficult to see how he could have reached that conclusion. The Appellant had come to the UK as a spouse and the marriage had subsisted for three years. He made the correct in time application for further leave to remain at a time when the marriage was still subsisting and it is clear that he never received the curtailment decision. When the marriage had broken down he again made an appropriate application, namely one to remain outside the Immigration Rules. He did not seek to conceal the evidence of his relationship with Miss Ridgard – indeed there is no possible reason why it would have been in his interests to do so.
23. There is no consideration of the Section 55 and the best interests of the Appellant's daughter with whom he was living at the time of the hearing.
24. Finally, in finding that the Appellant had behaved violently towards Miss Jepson, the judge chose to accept it unsupported evidence submitted on the day of the hearing by the Respondent of a witness who previously must have been disbelieved by a magistrate during a trial.
25. The decision is set aside and must be remade.

Remaking the Decision

26. The Appellant does not enjoy family life with his ex-spouse, with whom he has no contact, nor with Miss Ridgard with whom he is also estranged. He says, and I accept, that he would like to be able to resume family life with her and his daughter but it is clear on present evidence that the couple have little if any contact. He said that he had not seen Miss Ridgard or her daughter since the end of April. He does however enjoy private life in the UK having been here for some six years. I accept that during that time he has used his time well, clearly working hard to improve his now excellent English and working as a waiter in as number of hotels.
27. Removal would be an interference with his private life but lawful since he has no basis of stay here. The legitimate aim is one which encompasses the need for effective immigration control.
28. With respect to proportionality, the main argument in the Appellant's favour is his evident desire to remain in contact with his daughter and his wish to reconcile with his partner. There is no reason to suppose that the

Appellant is not serious in his intention to maintain contact with her and indeed it would be in her best interests to have a relationship with her father as well as her mother.

29. On the other hand the Appellant has lived all of his life, save for the last six years in Tunisia. His parents are there and he will have gained valuable experience through working in the tourist industry in the UK and acquiring fluent English.
30. The fact is that he has no basis for stay here. He has a conviction for common assault in relation to Ms Ridgard and was given a conditional discharge and prohibited from contacting his partner as a part of the criminal proceedings and therefore re-establishing contact with his daughter will not be straightforward. This is not a situation in which contact proceedings are ongoing and enquiries by the Appellant as to the procedure to be adopted are at a very early stage. He does have the ability to apply for entry clearance to exercise contact within the Immigration Rules.
31. Taking all of the above into account, I conclude that the arguments in favour of the Appellant's removal outweigh those in his favour.

Decision

32. The original judge erred in law and his decision is set aside. It is remade as follows. The Appellant's appeal is dismissed.

Signed

Date

Upper Tribunal Judge Taylor