



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

Appeal Number: IA/13995/2013

THE IMMIGRATION ACTS

**Heard at Glasgow
on 29 May 2014**

**Determination issued
on 30 May 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

DAVID GABUNIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Beagrie, of Maguire, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

- 1) The appellant is a citizen of Georgia, born on 8 March 1972. He has been in the UK since 2005, with a long immigration history, set out in the respondent's decision and in the FtT determination. His relationship with his wife began around 2006 and they married in August 2011. His wife and her adult daughter are citizens of both Georgia and the UK. His wife's daughter has a son, born on 9 October 2013. The child's father is a Georgian citizen, resident in Georgia.
- 2) On 19 April 2013 the respondent refused the appellant's application to remain in the UK under Rule 276ADE and Appendix FM of the Immigration Rules and directed his removal to Georgia.

- 3) First-tier Tribunal Judge D'Ambrosio dismissed the appellant's appeal by determination promulgated on 10 December 2013.
- 4) The following summary of the appellant's grounds of appeal to the Upper Tribunal is adapted from the grant of permission by First-tier Tribunal Judge Shimmin:
 - i) at paragraph 120, applying the wrong test of insurmountable obstacles when assessing the proportionality of removal outside the Immigration Rules, and failing to assess the article 8 rights of the appellant's wife;
 - ii) at paragraph 143, reaching the decision on the basis that there was no reason for the appellant and his wife not to enjoy private and family life together in Georgia, although it is not possible to require a UK/EU citizen to relocate outside the UK/EU or to submit that it would be reasonable for her to do so; interference with family life in such a case can be justified "only on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation" - *Sanade* [2012] UKUT 00048;
 - iii) at paragraph 146, thinking that if the appellant were to succeed on Article 8 grounds he would obtain indefinite leave to remain in the UK, the respondent's policy in such a case being to grant 30 months discretionary leave to remain - an error of fact materially affecting the proportionality assessment;
 - iv) at paragraph 146, taking into account an irrelevant consideration, namely that the starting point is that the Immigration Rules must be satisfied by way of a fee paid application, and overlooking that leave can be granted outwith the Rules.
- 5) By agreement, I heard firstly from Mr Mullen in response to the grounds. He submitted as follows. While paragraph 120 of the determination might be poorly expressed in saying that the appellant "failed to prove that his wife's UK/EU citizenship constituted an insurmountable obstacle to his return to Georgia", a fair reading of the whole determination and in particular paragraphs 123-147 showed that the judge correctly took into account all factors relevant to the eventual outcome in terms of proportionality and reached a properly considered decision. The appellant's wife did not have a permanent right of residence in the UK until 2010, and did not become a citizen until 2012. The judge explained why it was reasonable to expect them to continue their family life in Georgia. She still has Georgian citizenship, and the country is familiar to her. She has always known that the appellant had precarious immigration status. To carry on family life there at most involves minor inconvenience, not real hardship. If anything, the judge overstressed the significance of *Sanade* to the situation of the appellant's wife, overlooking that as an adult she did not fall within the terms of the respondent's concession, as clarified in *Izuazu*. The FtT judge

correctly decided that this was a case where the appellant's wife could be put to such a choice, and that there was nothing unreasonable about continued cohabitation abroad. The position of the appellant's stepdaughter was of no real significance, she being aged 22 and having a child of her own. That did not represent more than the normal ties to be found between an adult and his adult stepdaughter. All the criticisms of the determination amounted to matters of form rather than substance. The appellant had a criminal history, although admittedly minor, and a poor immigration history. The detailed consideration in the determination was more than enough to justify the proportionality conclusion reached. Notwithstanding any minor slips, it did not require to be disturbed.

- 6) Mr Beagrie submitted as follows. There were errors which in combination undermined the determination. At paragraph 146, the judge thought that the appellant should be required to make an application under the Rules, but the respondent had already fully considered his application and the matter should correctly have been determined by the Tribunal in substance, without asking for any further formality. Although the judge did explain at paragraphs 141 and 142 in relation to *Mansoor* why he thought that family life could be continued even if members of the family were geographically separated, he had gone wrong by not finding that the stepdaughter remained dependent upon her mother and stepfather. The stepdaughter proposed to return to University and to rely on the child's grandparents to provide care. They all remain members of the one household. There would be a significant interference with the family life interests of the appellant's stepdaughter. The judge had noted at paragraph 79 that the respondent accepted that there was family life with the appellant's wife and to some degree her daughter and the daughter's child, but then appeared to have overlooked the significance of that factor. The judge was wrong in thinking that success under Article 8 would result in a grant of indefinite leave to remain, the usual practice being to grant 30 months discretionary leave (this was acknowledged by Mr Mullen). Apart from the appellant's admittedly quite poor immigration history and the general public interest in enforcing the Rules, there was nothing significant on the respondent's side of the balance. The appellant would not be able to apply from Georgia for entry under the Rules, because he would be unable to meet the financial requirements. This was not a case raising any *Chikwamba* issue (this also became common ground). The determination should be set aside and the proportionality outcome reversed.
- 7) I reserved my determination.
- 8) *Sanade* states at paragraph 95 that "where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so." In *Izuazu* (Article 8 - New Rules) [2013] UKUT 00045 (IAC) a panel comprising the President, Lord Bannatyne and UT Judge Storey clarified that although the respondent continues to accept that EU law prevents the state requiring an

EU citizen to leave the UK nevertheless the respondent “contends with good reason that this is to be distinguished from a case where an independent adult can choose between continued residence in the UK or continued cohabitation abroad.”

9) The judge plainly took a great deal of care over this case but unfortunately, he did fall into some errors. However, I agree with Mr Mullen that paragraph 120 discloses little more than an error of expression, because the judge went on to weigh all relevant factors rather than applying a literal “insurmountable obstacles” test, in or out of the Rules. In relation to the appellant’s wife, the criterion is to be found in *Izuazu*, not in *Sanade*. In relation to the child, the appellant is not the parent or a principal carer. As the husband of the child’s grandmother, family life exists only in a broad sense. The judge was entitled to find that the child’s mother was able to care adequately for herself and the child even if her mother and the appellant were to return to Georgia (paragraph 129). There was no reason for links to be severed (paragraph 142-143). The judge’s errors as to the extent of leave the appellant would receive if he succeeded his appeal and as to whether he should be required to make a further application were both minor matters.

10) On the fundamental issue in this case, paragraph 57 of *Sanade* is apt:

At one end of the spectrum are cases where both parties to a marriage come from the same country, are nationals of that country, are familiar with the language, religion and way of life there, and face no obstacles to relocation. Immigration action may hardly be an interference with family life at all and very little by way of justification would be required to enforce the ordinary scheme of the state’s immigration control regime. At the other end the practical impossibility of enjoying family life outside the contracting state is likely to make the interference disproportionate.

11) The essential facts of this case are much nearer to the first end of that spectrum than to the second. The grounds of appeal disclose no good reason for interfering with the judge’s striking of the proportionality balance.

12) The determination of the First-tier Tribunal shall stand.



29 May 2014
Judge of the Upper Tribunal