



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

Appeal Number: AA/09222/2013

THE IMMIGRATION ACTS

**Heard at North Shields
On 8 April 2014**

**Determination Sent
On 20 June 2014**

Before

UPPER TRIBUNAL JUDGE DEANS

Between

MR MOHAMMED HAYDARI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms L Brakaj, Iris Law Firm

For the Respondent: Mr C Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

- 1) Judge of the First-tier Tribunal Duff dismissed this appeal on asylum, humanitarian protection and human rights grounds. The asylum claim was found lacking in credibility. The Appellant claimed in addition that his removal would be a disproportionate interference with his private and family life.
- 2) The Appellant is a national of Iran and was born on 2 February 1983. The judge found that since his arrival in the UK he has had a relationship with a Polish woman and they had a child together. The relationship broke down and the Appellant took proceedings to maintain contact with his child. He was not granted direct contact but he was granted indirect contact in the form of sending cards on two occasions each year.

- 3) Following the breakdown of this relationship the Appellant has entered into a new relationship with a Latvian national, Laime Mikelsons, who works in the UK and resides here with her two children, aged 10 and 13. It appears the couple are living together as partners and have been doing so since 2012. The judge accepted that the Appellant and Laime Mikelsons are in a genuine relationship. So far as Article 8 is concerned, the judge found that the best interests of the children would be served "just as well by being with their mother in Latvia or some other country" as they would by being in the UK. If the Appellant and Ms Mikelsons wished to continue their family life they could do so in Latvia or Iran. The removal decision was not disproportionate.
- 4) The decision on asylum and humanitarian protection was not challenged in the application for permission to appeal. The challenge was based on the judge's assessment of family life. It was submitted that the children fell within paragraph EX.1 of Appendix FM. In addition, the children were EEA nationals and it was crucial to ask if it was reasonable to expect them to leave the UK or the European Union and reside in Iran. There was no guarantee that family life could carry on in Latvia. The rights of the Appellant's partner as an EEA national should have been considered. The judge did not properly assess proportionality. He did not consider the effect on the family of any separation if the Appellant was required to return to his country of origin to make a further application.
- 5) Permission to appeal was granted on the basis that the Judge failed to take proper account of the fact that the Appellant was in a relationship with an EEA national exercising Treaty rights in the UK.
- 6) A Rule 24 notice dated 18 March 2014 on behalf of the Respondent stated that the grounds of appeal contained no mention of any rights the Appellant sought to maintain in terms of the EEA Regulations. The relationship between the Appellant and Ms Mikelsons was presented to the First-tier Tribunal entirely on the grounds of Article 8.
- 7) The point raised by the Rule 24 notice is factually correct in that the grounds of appeal to the First-tier Tribunal did not mention any rights that the Appellant might have as the partner of an EEA national, or any rights the partner's children might have as EEA nationals. At the hearing, however, once it became apparent to the Judge that the Appellant was in a relationship with an EEA national and her children, it should have been apparent that EEA rights would come into consideration. To this extent the Appellant was entitled to raise these matters in the application for permission to appeal. Furthermore, the status of the Appellant's partner and her children as EEA nationals were relevant to the balancing exercise under Article 8.
- 8) At the hearing I asked Mr Dewison on behalf of the Respondent to address me on the potential significance of the judge not having considered the implications of the Appellant's partner and her children being EEA nationals. Mr Dewison acknowledged that the judge did not specifically

take account of this but he submitted that this was not a material error. The Appellant could claim to be no more than an extended family member under Regulation 8(5) and to qualify in this regard he had to show that he had been in a durable relationship with an EEA national for two years, by analogy with paragraph GEN 1.2 of Appendix FM. Although the Appellant had fathered a Polish child it appeared that this child had been taken by the mother back to Poland.

- 9) In response Ms Brakaj said that she was not aware of the existence of a two year rule in the EEA Regulations of 2006. She further submitted that the assessment under Article 8 was flawed because the Appellant could not move to Latvia.
- 10) I find that the judge's reasoning in relationship to Article 8 was flawed and contained an error of law. Once the judge accepted that the Appellant is in a genuine relationship with an EEA national and her two children, this should have been taken into account in the balancing exercise under Article 8, even if the Appellant could not rely directly on the EEA Regulations. The judge's decision on proportionality was based to a large extent on his assumption that family life could be continued either in Latvia or Iran. The judge failed to take account of the difficulty in assuming that an EEA national with two children could reasonably be expected either to leave the European Union altogether or to return to her home country when she was exercising Treaty rights in the UK. In effect the Judge of the First-tier Tribunal failed to consider the potential consequences of the Appellant's partner and children's status as EEA nationals on the Article 8 assessment.
- 11) Although the Judge of the First-tier Tribunal was satisfied that the Appellant was in a relationship with Laime Mikelsone, before a proper assessment of proportionality can be carried out further specific findings are required, in particular, to confirm the nationality of Ms Mikelsone and her children, to ascertain her employment history and exercise of Treaty rights in the UK, and to examine the depth and duration of the relationship between Ms Mikelsone and the Appellant. In addition, further findings should be made, preferably based on more detailed and up-to-date evidence, as to the best interests of the children.
- 12) For these reasons I consider that the decision of the Judge of the First-tier Tribunal should be set aside but in respect of Article 8 only and not in respect of the asylum and humanitarian protection grounds, where no error of law has been found. In view of the detailed fact finding which requires to be carried out in respect of Ms Mikelsone and her children, and the Appellant's relationship with them, I consider it is necessary in order for the decision to be re-made under Article 8 for the appeal to be remitted to the First-tier Tribunal under Practice Direction 7.2(b). The appeal should be listed for hearing in relation to Article 8 and any application of the EEA Regulations before a judge other than Judge Duff.

Decision

- 13) The decision of the First-tier Tribunal discloses an error on a point of law such that it is set aside and will be re-made.

Directions

- 14) The appeal is remitted to the First-tier Tribunal on grounds relating only to Article 8 and to the EEA Regulations to be heard by a judge other than Judge of the First-tier Tribunal Duff.

Signed

Date

Judge of the Upper Tribunal