



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/29133/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 23 April 2014

Determination Promulgated
On 28 May 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

ABDUL HASAN

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Bashir, Bashir Consultancy

For the Respondent: Mr Spence, a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant, Abdul Hasan, was born on 20 May 1985 and is a citizen of Bangladesh. On 1 July 2013, a decision was made to refuse the appellant's application for leave to remain on the grounds that the removal would not place the

United Kingdom in breach of its obligations under the Human Rights Act 1998 and to give directions for the appellant's removal from the United Kingdom pursuant to Section 10 of the Immigration and Asylum Act 1999. The appellant appealed against that decision to the First-tier Tribunal (Judge Hillis), which, in a determination dated 6 February 2014, dismissed the appeal. The appellant now appeals, with permission to the Upper Tribunal.

2. On 6 August 2007, the appellant was issued with a working holiday maker visa valid until 6 August 2009. The appellant remained in the United Kingdom unlawfully following the expiry of his visa and entered into an Islamic marriage with a settled person, Rahena Begum on 29 August 2012. He made no attempt to regularise his status in the United Kingdom until he was arrested and detained on 13 June 2013 as an immigration offender. The appellant was served with an enforcement notice (IS151A).
3. Judge Hillis considered the appeal under the Immigration Rules (paragraph 276ADE) and found that the appellant could not qualify for leave. That decision is not challenged in the grounds of appeal.
4. The judge went on to consider Article 8 ECHR. As part of that analysis, he considered the best interests of the child of the appellant and his partner (who was born on 29 September 2013). Some doubt had been cast upon the appellant's relationship with the child [28] but a subsequent DNA test has proved parentage and there was nothing in the judge's analysis under Article 8 to suggest that he did not accept that the appellant is the father of the child. Both the appellant's partner and child are British citizens.
5. The judge [39] noted that the child was only 4 months of age at the date of the hearing and had "no knowledge of life in the UK or Bangladesh and his parents were both born and spent the majority of their lives in Bangladesh and his parental grandparents live in Bangladesh." The judge found that there was "no persuasive reason why [the child] cannot relocate in that country with his parents particularly once his mother has had her gall bladder operation and recovered." The judge also recorded [40] that the "sponsor [the appellant's partner] was completely aware of her husband's precarious presence in the UK and that he was here illegally when they married [by an Islamic marriage] on 29 August 2011. She nonetheless married him as she liked him."
6. I shall deal first with the question of the appellant's partner's medical condition. At the time of the hearing (and at the time of the Upper Tribunal hearing also) she was awaiting a gall bladder operation. I reject the submission that her medical condition should prevent her travelling to Bangladesh to continue her family life with the appellant. The fact that the partner needed an operation was one of the circumstances of the case considered as at the date of hearing under the Article 8 appeal by Judge Hillis. The fact that the operation had not taken place is immaterial.

7. However, I find that Judge Hillis has erred in law in finding that it reasonable that the appellant's partner and the child should relocate with the appellant to Bangladesh. Save for one circumstance, I consider that would be a reasonable course of action. The appellant's immigration history is appalling; he came to this country as working holidaymaker and made no attempt to leave when his visa expired. Both the appellant and his partner have entered into a relationship in the full knowledge the appellant had no legal status in the United Kingdom. However, the judge accepted (as does the respondent) that the appellant, his partner and the child are engaged in a subsisting relationship and enjoy family life in the United Kingdom. That the appellant is the father of the child is not in doubt. The grounds cite *Sanade 2012*] UKUT 00048(IAC):
1. *Section 32 of the UK Borders Act 2007 provides that where a person is sentenced to imprisonment of 12 months or more, he must be deported unless he falls within one of the statutory exceptions.*
 2. *Article 8 provides one such exception but there is no justification for saying that it will only be in exceptional circumstances that removal will violate the family's protected Article 8 rights or that the claim itself must be exceptional: the issue is whether the State can justify the interference as necessary, that is say a proportionate and fair balance in pursuit of a legitimate aim.*
 3. *The more serious the offending, the stronger is the case for deportation, but Parliament has not stated that every offence serious enough to merit a penalty of twelve months or more imprisonment makes interference with human rights proportionate.*
 4. *ZH (Tanzania) v SSHD [2011] UKSC 4 considered in what circumstances it was permissible to remove or deport a non-citizen parent where the effect would be that a child who is a citizen of the United Kingdom would also have to leave. The fact the children are British was a strong pointer to the fact that their future lies in the United Kingdom.*
 5. *Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so.*
 6. *Where in the context of Article 8 one parent ("the remaining parent") of a British citizen child is also a British citizen (or cannot be removed as a family member or in their own right), the removal of the other parent does not mean that either the child or the remaining parent will be required to leave, thereby infringing the *Zambrano* principle, see C-256/11 *Murat Dereci*. The critical question is whether the child is dependent on the parent being removed for the exercise of his Union right of residence and whether removal of that parent will deprive the child of the effective exercise of residence in the United Kingdom or elsewhere in the Union.*
 7. *Where the claimant's conduct is persistent and/or serious the interference with family life may be justified even it involves the separation of the claimant from his family who reasonably wish to continue living in the United Kingdom, *Lee v SSHD [2011] EWCA Civ 348*.*
 8. *The principles for evaluating Article 8 claims in criminal deportation cases are to be found in the Strasbourg jurisprudence of *Boultif v Switzerland* (no.54273/00) [2001] ECHR 479; *Uner v Netherlands* (no 46410/99) [2006] ECHR 873 and *Maslov v Austria* (no. 1638/03) [2008] ECHR 546.*

9. *In cases of the importation and supply of significant quantities of Class A drugs, Strasbourg has recognised why states show great severity to such foreign offenders but there is no special principle in cases of importation or supply of drugs. Deportation must always be proportionate.*

8. Sanade was a deportation case, the Upper Tribunal observing at [106]:

Further as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law, and that as a matter of relevant consideration they cannot reasonably be expected to relocate outside of the European Union. Accordingly, the question is whether Mr Sanade's conduct is so serious as to make it proportionate to the legitimate aim in his case to require him to leave his wife and young children for an indefinite period unless and until the deportation order can be revoked?

9. Notwithstanding the appellant's appalling immigration history, he has not committed any criminal offence whilst in the United Kingdom and is nothing more or less than an illegal overstayer. *Sanade* makes it clear that the appellant's partner and the child cannot, as a matter of European Union Law, be required to leave the European Union. To require them to relocate to Bangladesh would infringe that principle. It follows that Judge Hillis erred in law by finding that there was "no persuasive reason" why the appellant's partner and the child could not relocate to Bangladesh; the "persuasive reason" lies in the *ratio* of *Sanade* (and, in turn, *Zambrano* Case 34/09).

10. In the circumstances, I set aside the First-tier Tribunal's determination and have remade the decision. This appeal is allowed on human rights grounds (Article 8 ECHR).

DECISION

11. The determination of the First-tier Tribunal which is dated 6 February 2014 is set aside. I have remade the decision. This appeal is allowed on human rights grounds (Article 8 ECHR).

Signed

Date 22 May 2014

Upper Tribunal Judge Clive Lane