



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/30283/2013

THE IMMIGRATION ACTS

Heard at Bradford
On 12 March 2014

Determination Promulgated
On 25 March 2014

Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

IHSAN ABDULRAHMAN

Respondent

Representation:

For the Appellant: Mr M Diwnycz, a Senior Home Office Presenting Officer
For the Respondent: In person

DETERMINATION AND REASONS

1. The respondent, Ihsan Abdulrahman, was born on 1 September 1977 and is a male citizen of Iraq. I shall hereafter refer to the respondent as the appellant as he was

before the First-tier Tribunal; I shall refer to the Secretary of State for the Home Department as the respondent.

2. The appellant had appealed against the decision of the respondent dated 3 July 2013 to refuse to issue him with a Registration Certificate as confirmation of his rights of residence in the United Kingdom under European Community law. The appellant appealed to the First-tier Tribunal (Judge Myers) which, in a determination promulgated on 6 January 2014, dismissed the appeal under the EEA Regulations but allowed it in respect of Article 8 ECHR. The Secretary of State sought permission from the Upper Tribunal which was granted by Judge Page (22 January 2014). The appellant appeared in person at the Upper Tribunal hearing at Bradford on 12 March 2014 together with his partner and mother of his two children, Ms Jasmonta, a citizen of Latvia.
3. There are, in essence, two grounds of appeal. The first takes issue with the judge's finding [25] that there was "nothing to suggest that [the appellant] has been engaged in crime or any other undesirable behaviour." The grounds assert that the appellant had engaged in undesirable conduct by remaining in the United Kingdom in breach of immigration control. He had arrived clandestinely and had no legitimate expectation that he would be allowed to remain.
4. The Home Office immigration history in the papers before the Tribunal indicates that the appellant was served with an IS151A form in 2003 ("for being a clandestine" (*sic*)). In oral evidence before the First-tier Tribunal, the appellant explained that he had claimed asylum which had been refused in 2004. He had met Ms Jasmonta in 2009.
5. I do not find merit in this ground of appeal. What the judge said about the appellant not having been engaged in crime was entirely accurate and she was well aware of the appellant's immigration history. It could, perhaps, be said that the judge has given undue weight to the failure of the Home Office to remove the appellant after the refusal of his asylum claim (she refers to this more than once in her analysis) and has attached limited, if any, weight to the failure on the part of the appellant to leave voluntarily. However, viewed as part of the judge's analysis overall and given that the Upper Tribunal should hesitate before reappportioning weight to items of evidence properly considered by the First-tier Tribunal, I do not consider this to be so serious an error as to undermine the determination.
6. The second ground of appeal asserts that the judge had failed to make any proper findings regarding the "alternative remedy" available to the appellant and his partner, namely that of returning to her country of origin, Latvia, to continue their family life together.
7. I note at [13], where the judge deals with the submissions made to her by the appellant's representative, that it was argued on behalf of the appellant that it was -

clearly not in his family's interests to accompany him should he be removed to Iraq and neither was it in their interests to move to Latvia as the youngest children have no

links with that country and the elder ones are settled in the UK. In any event it was doubtful the appellant would be granted entry clearance to relocate to Latvia.

It is true that the judge makes little reference to that aspect of the appeal in her own analysis; at [26] she deals with the possibility of the family being split by the appellant's removal to Iraq but makes no mention of the family returning to live in Latvia. On the other hand, the judge has dealt with Article 8 ECHR in a structured manner, following the familiar sequence of questions posed by Lord Bingham in *Razgar* [2004] UKHL 27. Whilst it is arguable that what she says at [25] (that the appellant's removal is not necessary in a democratic society) indicates a misunderstanding of the jurisprudence, the judge has quite properly gone on to deal with proportionality at [26]. Her analysis is informed by reference to relevant jurisprudence, including that favouring the Secretary of State (for example, *Konstadinov* ECHR 16351/03, the judge noting that it is "an important consideration [their] family life was created at a time when the persons involved were aware that the immigration status of one of them was such the existence of family life in the host country was precarious from the outset.").

From what the judge then says at [26] it appears that she has agreed with the submission of the appellant's representative [13]:

[The appellant] and his family now have a significant connection with the UK. Furthermore under Section 55 of the Borders, Citizenship and Immigration Act 2009 an assessment of a child's best interest must be a primary consideration in taking any decision affecting a child and be accorded very significant weight. In employing the proportionality exercise I take account of the fact that family life was created at a time when the appellant knew his immigration status was precarious, however as no steps were taken to remove the appellant after a failure of his asylum claim in 2004, he was left very much in limbo and it is only to be expected that someone in those circumstances would have established family and private life in the intervening years.

8. Allowing this appeal under Article 8 ECHR was clearly an outcome available to the judge on the evidence; her decision cannot be described as perverse. Her analysis is, in places, slightly problematic as is her failure to deal expressly with the possibility of the family relocating to Latvia. However, the Upper Tribunal should hesitate before interfering with the decision of the First-tier Tribunal which has clearly been based upon the relevant facts and which is in accordance with the jurisprudence. Discussing the family's circumstances with the appellant and his partner at the hearing, I was told that Ms Jasmonta has six children with her in the United Kingdom, three by a previous relationship. Her two children by the appellant had been born in 2010 and 2011 respectively. Further, the First-tier Tribunal Judge does not appear to have been made aware that the child Roberts (age 12) is seriously visually-impaired.
9. The question remains as to whether the judge's failure to consider the family's removal to Latvia is so serious an error as to require the setting aside of her determination and the re-making of the decision. I find that the judge has given proper weight to the interests of the children and to their connections with the

United Kingdom and to the appellant as their father and stepfather. After much consideration and whilst I accept that the judge may have erred in law for the reasons I have detailed above, I am not in this instance prepared to disturb her determination. She has explained why she has found compelling reasons to allow the appeal under Article 8 and her reasons are, in my opinion, sound. In the circumstances, the appeal is dismissed.

DECISION

10. This appeal is dismissed.

Signed

Date 16 March 2014

Upper Tribunal Judge Clive Lane