



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

Appeal Number: IA/30650/2013

THE IMMIGRATION ACTS

Heard at Glasgow

On 11 July 2014

Determination given orally

**Determination
Promulgated**

On 6 August 2014

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHMAD G EHMADI BARKA

Respondent

Representation:

For the Appellant: Mr G Jack, Senior Presenting Officer

For the Respondent: Mr Vassiliou, solicitor

DETERMINATION AND REASONS

1. The Secretary of State appeals with permission the decision of First-tier Tribunal Judge Grant-Hutchison who allowed the appeal by the respondent (“the claimant”) on human rights grounds against a decision refusing to

vary the claimant's leave to remain and to remove him dated August 2013.

2. The claimant is a national of Libya where he was born on 5 October 1981. He first entered the United Kingdom with entry clearance as a visitor in May 2010 and he remained until November that year. He re-entered the United Kingdom in January 2012 again with entry clearance as a visitor with leave to remain until 9 July 2012. In June 2012 he made an application for leave to remain under Article 8 of the Human Rights Convention. The basis of that application was family life between Susan McKenzie, a British national. The couple had met in Tunisia in February 2010 having previously communicated by internet. During the claimant's visit in 2010 Miss McKenzie became pregnant and the couple's child Y was born on 6 May 2011. A second child was born on 21 December 2012. Miss McKenzie also has three children from another relationship.
3. In her decision dated 15 August 2013 the Secretary of State accepted that the claimant had a genuine and subsisting relationship with his partner and child but the parties were unable to succeed under the Immigration Rules because he had entered as a visitor and because he did not have sole parental responsibility for the child then born.
4. The case was also considered under paragraph 276ADE based on the claimant's private life. The respondent did not accept the claimant met the criteria in that provision. She concluded that the application did not raise or contain any exceptional circumstances and thus refused it.
5. The judge heard evidence from the claimant through an interpreter, his partner and her father.
6. The judge directed himself with regard to the authorities in the petition of *MS v SSHD* [2013] CSIH 52 P1053/12 and *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192. He applied the *Razgar* approach and also considered *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. Having reviewed the evidence he considered that the claimant had a good arguable case. Part of the judge's reasoning included the finding that were the claimant to be returned to Libya he would be at some risk. He would find it difficult to gain access to embassy officials and would find it difficult to raise the necessary finances for a new application. His partner and their two children who are British citizens could not reasonably be expected to return with him to Libya for the "indefinite time it may take for him to make an out of country application".
7. The Secretary of State argues that the judge failed to provide adequate reasons for why the claimant's circumstances were either compelling or exceptional and had failed to provide reasons as to what evidence regarding difficulty of access to embassy officials the findings were based on. The judge had failed to provide any reasons why the claimant would not be able to go to Tunisia as he said he would to apply for entry clearance. The couple had begun their relationship in Tunisia in the full

knowledge the claimant may not be able to enter the United Kingdom to continue their relationship and had attempted to circumvent the Immigration Rules by doing so. The best interests of the children could be maintained by remaining with their mother who is their primary carer.

8. I heard submissions from Mr Jack and Mr Vassiliou which I have taken into account in reaching my conclusion. Mr Vassiliou accepted that the claimant could not have succeeded under the Rules because of his status as a visitor although he observed that it would have been open to him to have applied if he had waited for two more weeks until his leave expired and made application within 28 days as an overstayer. That was not however the case and it is not of particular relevance.
9. The challenge by the Secretary of State is in essence a reasons challenge on the basis that the judge had failed to provide reasons for the finding regarding the risk on return to Libya or why the claimant would be unable to go to Tunisia.
10. Mr Vassiliou accepted that the judge's reasoning was sparse but sufficient when the determination was read as a whole. After concluding that the best interests of the children in this case were to remain with Ms McKenzie in the United Kingdom the judge proceeded at paragraph 21 to find in the circumstances of the case that the claimant had a good arguable case. I quote from paragraph 22 which sets out the essence of his reasoning:

“The Appellant and the Sponsor were aware of each other's legal status when they entered into a relationship. The Respondent is correct to state that the public interest is reflected in the legislative framework. Nonetheless having heard the evidence I do not accept that the Appellant or the Sponsor acted with any deliberate intent to circumvent the rules. The Appellant genuinely intended to come to this country for a visit and then experienced certain difficulties. He became uncertain about his safety in Libya. No doubt he should have considered making an asylum application. However the fact remains if the Appellant were to be returned to Libya he would be at some risk. He would find it difficult to gain access to Embassy officials. He would find it difficult to raise the necessary finances for a new application. His partner and his two children who are both British citizens cannot reasonably be expected to return with him to Libya for the indefinite time it may take to make an out of country application. This is particularly true in that this would be destructive of the Article 8 rights of the other children in the family unit. Although the other requirements of Razgar are met it would not be proportionate for the Appellant to return.”

11. There was evidence before the judge of the difficulties that the claimant would face in Libya. That was the oral testimony of the claimant. Mr Vassiliou and Mr Jack accepted that there was also evidence before the judge of advice from the Foreign & Commonwealth Office advising against westerners travelling to Libya.
12. I agree with Mr Vassiliou that the reasoning by the judge is brief but having regard to the care with which he set out the evidence particularly relating to the claimant's concerns I am satisfied that he gave adequate

and sustainable reasons for his conclusion that were the claimant to be returned to Libya he would be at some risk. I find also that there was evidential support for the concern expressed regarding the option of applying in Tunisia, particularly as the reality would be that the claimant would need first to travel to Libya.

13. The further complaint made in the grounds of challenge is that the claimant and Ms McKenzie had begun their relationship in Tunisia in the full knowledge the claimant might be able to enter the United Kingdom to continue that relationship and that he had attempted to circumvent the Immigration Rules by entering as a visitor. The judge however reached a conclusion on this aspect in paragraph 22 and it was one that was reasonably open to him on the evidence.
14. Mr Jack submitted that any consideration of whether an application for entry clearance would succeed or not was impermissible and referred me to the decision of the Court of Appeal in *SB (Bangladesh) v Secretary of State for the Home Department* [2007] EWCA Civ 28 and the decision of the Upper Tribunal in *Sabir* (Appendix FM - EX.1 not freestanding) [2014] UKUT 63 (IAC). This is not a ground on which the Secretary of State relies by way of challenge except in the most oblique terms by reference to doubts about the claimant's intentions which were addressed by the judge.
15. In deciding whether a judge erred in law the answer is not to be found in deciding whether another judge would have dismissed the appeal. I accept that another judge on the evidence may have lawfully come to a different conclusion, nevertheless I am just satisfied that the judge has given adequate reasons for his conclusions on Article 8 grounds which were clearly driven by his finding with regard to the best interests of the children having regard to their nationality as a primary consideration. For these reasons the appeal by the Secretary of State is dismissed and the decision by the First-tier Tribunal stands.

Signed

Date 5 August 2014



Upper Tribunal Judge Dawson