



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: AA/01892/2015

THE IMMIGRATION ACTS

Heard at Field House
On 6th January 2016

Decision & Reasons Promulgated
On 21st January 2016

Before

DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

AL
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Lemer, Counsel; Hoole & Co Solicitors

For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. For ease of comprehension, the parties are referred to by their appellate status and positions before the First-tier Tribunal.
2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Suffield-Thompson allowing the Appellant's appeal against the Respondent's decision refusing to grant him asylum. The judge also made *obiter* findings in relation to Article 8 ECHR although without pronouncing a decision at the conclusion of the determination.

3. The Appellant appealed against that decision and was granted permission to appeal by Designated First-tier Tribunal Judge Campbell. The grounds upon which permission was granted may be summarised as follows:
 - (i) It is arguable that the judge erred by failing to give adequate reasons in relation to the risk on return where the Appellant has not been politically active in 18 years, and
 - (ii) It is arguable that the judge erred by failing to give adequate reasons in relation to the Article 8 matters.
4. I was provided with a Skeleton Argument from Mr Lemer whilst Mr Clarke provided copies of Chapter II of the Assessment of Applications for International Protection, *Jakhu, R (on the application of) v Secretary of State for the Home Department (ETS: legitimate expectations) (IJR)* [2015] UKUT 693 (IAC) and *Secretary of State for the Home Department v SS (Congo) & Ors* [2015] EWCA Civ 387, all of which parties had the opportunity to consider before making their submissions.

Preliminary Issue: Permission to appeal on a new ground out-of-time

5. The Respondent had originally sought to appeal against the decision of Judge Suffield-Thompson allowing the Appellant's appeal however only did so on the basis of the grounds outlined above.
6. Mr Clarke made an application for permission to appeal upon a further ground not canvassed thus far. He submitted that in applying rule 276ADE(vi), the judge had applied the 'insurmountable obstacles' test instead of the 'very significant difficulties' test. Although the appeal was not brought in time it was a *Robinson* obvious point. However, there was no reason given why the appeal was not raised any sooner.
7. In reply, Mr Lemer submitted that the point was not *Robinson* obvious and was without merit given that the complaint concerning the wrong test being mentioned at §40 was a slip as the proper test was in fact applied earlier in the determination at §20 and §26. Mr Lemer also contended that very significant difficulties are mentioned in relation to Appendix FM as well as 276ADE and that insurmountable obstacles are comparable to very significant difficulties, although there is no authority on this point. Moreover, he submitted there was no reason given for the delay and permission should not be given out of time.
8. I indicated to the parties that I refused the application with reasons to follow. Those reasons are as follows. The Respondent and Appellant are both bound by the terms and strictures of The Tribunal (Upper Tribunal) Procedure Rules 2008 and its time limits stipulated for bringing an appeal. There is a wealth of authority that makes clear that reasons must be given for every moment of delay that passes (see *BO and Others (Extension of time for appealing) Nigeria* [2006] UKAIT 00035 and *Samir (FtT Permission to appeal: time)* [2013] UKUT 00003(IAC)). There are no reasons given here. Furthermore, the ground is itself without merit. It is trite that the doctrine of *Robinson* obvious issues are not normally to be employed in favour of the state failing to take an issue in an appeal (see *Miftari v Secretary of State for the Home Department* [2005]

EWCA Civ 481), however there is also nothing *Robinson* obvious in my view that would assist the Respondent. I accept Mr Lemer's submission that the consideration of Article 8 was substantively performed with the correct test in mind and that the referral to 'insurmountable obstacles' is anomalous. Consequently, I refused to extend time to allow the Respondent to advance her new ground.

9. Mr Clarke indicated that he would only pursue Ground 1 given that he had not succeeded in gaining permission to pursue the new Article 8 ground, which effectively meant that the alternate *obiter* basis upon which the judge would have allowed the appeal stood firm.

Error of Law

10. At the close of submissions, I indicated that I would reserve my decision, which I shall now give. I find that there was an error of law in the decision such that it should be set aside. My reasons for so finding are as follows.

Discussion

11. Mr Clarke stated that the source material referred to by the judge at §40 was the Civil Rights Defenders article of 17 May 2014. He submitted that this evidence was not weighed against the Respondent's Response to the COI request of 16 September 2014 at §19 of the determination, which stated that failed asylum seekers were not at risk. The Appellant had an 18-year old claim and his position was not addressed by the Civil Rights Defenders article nor the lack of *sur place* activity. The judge does not engage with the article itself other than the human rights situation being at an "all time low". The COI Request from the Home Office contradicted the article and was not considered. Mr Clarke also referred to Article 4, paragraph 3(a) of Chapter II which confirms that the member state's assessment of international protection should be carried out taking into account all relevant facts. However, the judge has failed to deal with anti-government activity and the Appellant has nothing to do with post-2010 activity. Whilst the Appellant was at one time an activist, there's nothing to show he has anything to do with the activities post-2010.
12. Mr Lemer submitted that the Appellant's claim was not so simple claim as that of a mere failed asylum seeker and there was more to it than that. The judge was not obliged to cite all evidence relied upon however the COI Request was referred to at §19 and was implicitly considered. Mr Lemer was at pains to highlight that the COI Request posited the Appellant's position as that of a mere failed asylum seeker which was not correct. The Appellant's case is set out comprehensively at §17 of the determination, and is quite different from the Respondent's adopted position. The Appellant has a claim that has failed but it still needed to be taken into account and therefore the request posed was wrong in failing to do so. Notwithstanding that, the reply merely referred to passages from a US State Department Country Report but no information was provided which could assist in the assessment of the Appellant specifically. Mr Lemer submitted that the judge addressed the position of failed asylum seekers returning to Belarus at §§34-38, and in particular at §38. He contended that the report complained of dealt with the elections in 2010 but also

dealt with events post 2010; for example, it refers to new legislation introduced in 2012 for more governmental scrutiny and also concerned the “the right to political rights”. Mr Lemer highlighted other material also before the judge including the Belarus Digest which states that the regime encouraged persons to leave Belarus and material from UNCAT talked about frequent detention and conditions faced in detention. Concerning Chapter II, he submitted that there was an obligation on the member state to assist in the fact-finding process however there is no COI Report on Belarus whatsoever, which Mr Clarke accepted. Given that the judge accepted the Appellant’s account, the appeal decision should be maintained.

Conclusion

13. In my view, the Respondent’s appeal is misguided. It is true that the Appellant’s claim is historic, however, the Tribunal can only reach conclusions and make its decision based upon the material that parties choose to put before it. The Respondent’s COI Request was clearly noted and referred to by the judge and was in my view considered. The Civil Rights Defenders article was also similarly noted and referred to by the judge. That the latter impressed the judge more than the former is a decision that the judge was entitled to take. The judge does not refer to the other materials put before him by the Appellant such as the Belarus Digest and the UNCAT, however, it is not complained that those items were not considered, and it is implicit that they were and that the judge reached his conclusion based upon an assessment of the objective evidence overall.
14. The Appellant’s historic claim was known to the judge and all that the First-tier Tribunal could do would be to assess that factual matrix against the objective evidence available. The fact of the historic nature of the claim or the lack of *sur place* activity do not in of themselves detract from the Appellant’s claim without more. There was no positive evidence put forward by the Respondent that the risk on return would deteriorate over time and consequently, such a submission is circular. If the Respondent’s COI Request states that failed asylum seekers are not at risk, that may be one thing, however the judge’s findings do not reveal that the Appellant’s political profile is to be viewed so simplistically. Furthermore, it speaks volumes of the Belarussian state that so little is known about it that the Respondent has been unable to compile any form of COI Report at all.
15. Therefore, in light of the above, the judge’s assessment of the limited documentary evidence put before them was correct and lawful.
16. Consequently, given my findings above, the grounds do not reveal an error of law such that the decision should be set aside.

Decision

17. The appeal to the Upper Tribunal is dismissed.
18. The decision of the First-tier Tribunal is affirmed.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

19. Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Deputy Upper Tribunal Judge Saini