Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/03754/2012

THE IMMIGRATION ACTS

Heard at North Shields

On 30 May 2013

Determination Promulgated

Before

UPPER TRIBUNAL JUDGE KING TD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Mr Shekhay Rasouli

Respondent

Representation:

For the Appellant: Mrs Sotani, Counsel, instructed by Iris Law Firm
For the Respondent: Mr C Dewison, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Claimant is a citizen of Iran being born on 27 August 1991.

2. He arrived in the United Kingdom on 13 July 2010 and being encountered by Immigration Officers on arrival made a claim for asylum.

3. That claim was refused under the terms of the refusal letter dated 29 September 2010. The decision was appealed and by a determination promulgated on 23 November 2010 the appeal was dismissed. Permission to appeal was refused on 17 December 2010.

4. Further submissions were made on 31 January 2012 which were refused by the SSHD in a decision of 29 February 2012. A request for reconsideration was made on 8 March 2012 and subsequently further refusal letter dated 27 March 2012 was issued, together with directions for the Claimant's removal to Iran.

5. The claimant sought to appeal against that decision, which appeal came before First-tier Tribunal Judge Balloch on 11 May 2012.

6. On that occasion the only issue was whether or not removal of the Claimant would contravene his fundamental human rights as enshrined within Article 8 of the ECHR.

7. The Judge upheld the appeal. Subsequently the SSHD sought to appeal against that decision contending that the approach taken by the Judge to Article 8 was fundamentally flawed. Permission to appeal was granted.

8. Thus the matter comes before me in pursuance of that leave. Technically now the appellant in the appeal is the Secretary of State for the Home Department. In order to avoid the confusion as to terms Mr Shekhay Rasouli shall be referred to as the “claimant”.

9. A central issue in the appeal was whether or not there was a genuine subsisting relationship as between the Claimant and his wife Samantha Perry (now Mrs Rasouli).

10. It was the finding of the Immigration Judge that such a relationship did exist. There has been no challenge to that matter by the Secretary of State for the Home Department in this appeal.

11. The claimant and his wife had first met through friends in December 2010 and their friendship had progressed into a relationship in March 2011. They married on 27 October 2011.

12. At the time Samantha Perry was not working, although subsequently she has found employment. Perhaps a significant feature of that relationship was that at the time of the marriage or shortly after it was discovered that Samantha Rasouli was pregnant and a hard decision was taken to have an abortion in October 2011, because it was felt that the circumstances were

not right for a child. There was the uncertainty of the claimant's status and the lack of security. Evidence was given by Mr Rasouli which was included in general germs in paragraph 19 of the determination that she would not be able to cope without him. They are devoted to one another. In February 2012 they moved into their own home and have made plans for their future with the intention of having further children in due course. Miss Rasouli has parents and family with whom she is particularly close.

13. The first challenge that is made to the determination is that the Judge employed the wrong standard of proof in making a finding that there was a possibility that the Claimant would come to the attention of the authorities if returned.

14. It is to be noted that in the determination the Judge recognises that the burden of proof is upon the appellant. In cases of Article 8 it is often difficult to be prescriptive as to the burden and standard of proof to be applied. When considering the issue of interference with the relationship it is often said that the burden rests upon the appellant to show that such interference would be caused by the removal. It is also necessary to show that interference would be such as to engage Article 8. Thereafter it may be considered that the burden shifts somewhat towards the SSHD to show that any removal was proportionate in the circumstances.

15. Mr Dewison, who represents the SSHD, submitted that it was a finding of fact that trespassed unnecessarily into the territory of asylum. The Claimant had been found not to be credible as to his claim for asylum and it was clear from the country guidance case of **SB (Risk on return - illegal exit) Iran CG [2009] UKAIT 0053** that generally having exited Iran illegally was not a significant risk factor. It is therefore contended that the finding that there would be a possibility of the claimant to the attention of the authorities was speculative in the extreme.

16. There would seem to be merit in that contention but it would be dangerous, as I so find to conclude from that particular and limited finding, that the Judge has not approached the Article 8 appeal upon the proper basis.

17. As I indicated to Miss Sotani, who represents the claimant, there seemed to be a lack of structure in the Judge’s approach to Article 8 of the ECHR. She sought to disagree with that and she invited me to find that the determination, when read as a whole, contained the necessary ingredients.

18. The first issue is whether or not there would be interference with the relationship by the removal of the appellant. Miss Sotani invites me to find that there are clear findings on that issue. The claimant's wife is British with family and connections of her own and it was the finding of the Judge that, in the light of the deteriorating situation as between the UK and Iran,

it would not be reasonably possible for the claimant's wife to live with him in Iran on a temporary or permanent basis. Sound reasons have been given in the determination for that conclusion and that is not a matter that has been the subject of an appeal by the Secretary of State.

19. The next matter is whether it would be disproportionate to expect the appellant to return to Iran notwithstanding the interference with family life In that connection Miss Sotani invites me to find that the Judge has looked at a number of factors, including the close nature of the relationship and the dependency by Miss Perry upon the continuing presence of the claimant. She invites me to find that the abortion has particular significance in that regard. It was a dramatic step to have taken and illustrates the turbulent emotional uncertainty that existed at the time that such a decision was taken. Since then the couple have acquired property, she works and there is a real prospect of security. Although perhaps the Judge did not spell that matter out in quite as expressive terms as Miss Sotani in the determination, it is clear from the large volume of documents including statements that that would not be an unfair picture of that relationship and it is reflected generally in what the determination has to say.

20. Miss Sotani highlights that it was the view of the Judge that return would be unreasonable, particularly in the light of any possible difficulties and delays in making an entry clearance application from Iran and also the likelihood that the claimant would fail to meet the new Immigration Rules. The possibility of prolonged separation was, in the circumstances of the emotional dependency by Miss Perry, a relevant and important factor in the equation.

21. Mr Dewison seeks to raise two matters of criticism as to the approach taken by the Judge to the issue of return. The first is that the Judge did not identify any objective evidence to demonstrate that there was an increased risk on return for someone in the appellant's position. In effect that ground is reflective of the first ground of complaint, namely that it was wholly speculative to consider that the claimant would experience any difficulty or obstruction by the authorities on return. Although certain difficulties in making entry clearance application existed it was still open to make one through Abu Dhabi and there is nothing to indicate that upon return there would be any undue delay in that process.

22. Further, he submits that no overt acknowledgment was made by the Judge to the interests of immigration control. The claimant had arrived illegally and had been disbelieved upon his claim for asylum, the relationship had commenced in the full knowledge of his precarious position and all those matters were matters of some importance to have been weighed in the balance by the Judge. It also seems to me to be a meritorious point to make.

23. It is also said in the grounds of appeal that the Judge has failed to apply the decision in **AAO v ECO [2011] EWCA Civ 840**. If the Judge had properly considered the findings in that case she would not have come to the conclusion which she did on the proportionality of the claimant returning to Iran. For my part I do not find that case to be particularly relevant to the circumstances of this appeal. It was an application by a mother to join her daughter in England. The case cited **Huang** and the general principles that the Convention confers no right on individuals or family to choose where they prefer to live. The case stressed that proportionality is a subject of such importance as to require a separate treatment. It was the overriding requirement of the need to balance the interest of society with those of individuals or groups. It would be difficult to see that the Court of Appeal in **AAO** added very much to those general principles.

24. It seems to me that the decision in **Hayat (Nature of Chikwamba principle) Pakistan [2011] UKUT 44 (IAC)** is perhaps a more helpful decision in the circumstances of this case.

25. The essential issue in this appeal lies in consideration as to whether or not it would be proportionate or disproportionate to expect the claimant to return to Iran to make application for entry clearance from that country.

26. Mr Dewison has stressed the need to maintain immigration control and deter queue jumping as being the primary reason why it would be proportionate to return the claimant to Iran.

27. The Tribunal in the course of the judgment highlighted parts of the judgment of Lord Brown in the decision of **Chikwamba** particularly with the comment as set out in paragraph 44 of that particular judgment that in most cases it was better for the Article 8 claim to be decided once and for all at the initial stages. If well-founded leave should be granted, if not it should be refused.

28. At paragraph 21 of the decision was the comment that

> "more generally, there is no indication in paragraph 9.9 that the Immigration Judge brought to bear those factors arising from the evidence she had heard, which fell to be weighed on the appellant's side of the scales, in particular, the degree of practical and emotional support supplied by the appellant to his wife and to the wife's lack of any family in the United Kingdom."

29. Although it not entirely on all fours with the factors of this case, it is clear from the evidence that was presented and from the comments of the Judge in the determination that the issue of emotional support, particularly following the abortion, was an important consideration, as was the need to maintain stability in the family. I interpret the Tribunal in **Hayat** to be

indicating that that was a strong factor to be weighed in the balance in favour of non-removal. The Tribunal went on to say at paragraph 23:

> "The significance of **Chikwamba**, however, is to make plain that, where the only matter weighing on the respondent's side of the balance is the public policy of requiring a person to apply under the Rules from abroad, that legitimate objective would usually be outweighed by factors resting on the appellant's side of the balance."

30. The Tribunal went on to say:

> "Viewed correctly, the **Chikwamba** principle does not, accordingly, automatically trump anything on the state's side, such as appalling immigration history. Conversely, the principle cannot be simply 'switched off' on mechanistic grounds, such as because children are not involved or that (as here) the appellant is not seeking to remain with the spouse who is settled in the United Kingdom."

31. In short the Tribunal in **Hayat** stressed that the decision maker had to apply his or her mind to the relevant factors. The relevant factors in this case, as can be gleaned from reading the determination as a whole, is the importance of emotional and physical support by the claimant to his wife, particularly in the aftermath of the abortion; the likelihood of appreciable delay in making application to re-enter the United Kingdom and the likelihood that that would not succeed in any event because of the changes in the Immigration Rules.

32. This is by no means an easy matter to determine in the circumstances of this case. As I have indicated, I would be assisted by a better structure in the determination. It is not my task to embark upon the merits of the hearing, rather to determine whether or not the reasoning of the Judge was absent or that it was so defective as to constitute an error of law.

33. It seems to me that the clear finding of the Judge was that there would be undue interference with family life were the appellant to be removed and that it was not reasonable to expect his wife to follow him to Iran either on a temporary or permanent basis.

34. Looking at the determination as a whole it is discernible why the Judge concludes that it would not be proportionate to expect the appellant to return to make the application to come back. Although it could, as I have said, have been expressed in clearer and more helpful terms, it seems to me that the findings of the Judge, notwithstanding the comments and criticisms most properly made by Mr Dewison, is capable of being within the reasonable ambit of decision making. As such I do not find there to be a material error of law in these circumstances.

35. Further, even were I to consider that the issue of proportionality could have been better expressed and examined, it seems to me that in the light of the factors as outlined by Miss Soltani and factors which are clearly evident both from the evidence and from the determination, it is inevitable that that aspect would be resolved in favour of the appellant applying the **Hayat** principles.

36. In the circumstances therefore the appeal by the Secretary of State is dismissed. The decision of Judge Balloch allowing the appeal of the claimant on human rights grounds stands.

Signed Date

Upper Tribunal Judge King TD