



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/12017/2017

THE IMMIGRATION ACTS

Heard at Field House (RCJ)
On 25 March 2019

Decision & Reasons Promulgated
On 07 June 2019

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AHMED [H]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Presenting Officer

For the Respondent: Mr S Vokes, counsel instructed by D&A Solicitors

DECISION AND REASONS

1. In this decision the Appellant is referred to as the Secretary of State and the Respondent is referred to as the Claimant.
2. The Claimant a national of Iraq date of birth 10 November 1985 was subject to a deportation order made on 13 March 2014 and appealed against that decision. The Secretary of State's decision to refuse a human rights based claim was made on 8

August 2017. His appeal against that decision was dismissed by First-tier Tribunal Judge Aziz, (the Judge) on 25 April 2018. Permission to appeal was given on 16 May 2018.

3. The Claimant had entered the United Kingdom clandestinely on 11 September 2002 and claimed asylum about one week later. His asylum claim was refused and he was served with removal directions which lead to an appeal which was dismissed and he became appeal rights exhausted. He was convicted at Worcester Crown Court on 23 March 2005 and sentenced to twelve months' imprisonment in a youth offender's institution. There was no appeal against either conviction or sentence.
4. The Claimant applied for indefinite leave to remain in January 2007 which was refused in 2007 and he became an absconder. Deportation documentation was sent and on 11 November 2011 the Claimant responded. Ultimately the decision was made after appeals and the deportation order was signed on 13 March 2014. The Claimant sought Assisted Voluntary Return in May 2014 but that was rejected. The Claimant applied for voluntary return and the application was similarly rejected in 2015. Further representations were made during 2016 and 2017 but the Claimant has at all material times remained in the United Kingdom.
5. The basis of his human rights based application was his claim to family life with children and a stepchild in the United Kingdom. His circumstances were extensively reviewed in the decision of the Judge his appeal and allowed it on Article 8 ECHR grounds on the basis that it would be disproportionate for the Claimant to be separated from his family particularly the two British national children (RA and RI) with whom he and his British national partner/ wife, Ms [M], lived. It was not argued that it would be reasonable for the family to relocate to Iraq. The judge had concluded that it would be unduly harsh to do so. There was a third child X who did not feature significantly in the appeal or its outcome.

6. Essentially the Secretary of State's complaint was that the Judge had failed to carry out the assessment of the Claimant's claim by reference to the Claimant's conduct in the United Kingdom and its relevance to the assessment of the circumstances which might be characterised or were characterised as unduly harsh consequences. Mr Jarvis argued that quite simply the Judge had failed to set the Claimant's history properly as the context bearing in mind the deportation decision. Mr Vokes argued that in fact by reference to the Judge's decision he had done as much as needed to be done to properly assess the Claimant's claim and had properly applied the law in relation to the decision.
7. I reached the view that the Judge had failed to properly set in context the public interest in the Claimant's removal. In particular the Judge seems to have become fixed on the point that following those earlier decisions set out in the immigration history when the Claimant was appeal rights exhausted that the Secretary of State should have removed him and that the failure to remove him enabled the Claimant to diminish the significance of the public interest.
8. Mr Vokes argued that the impact of the Claimant being required to leave in terms of its impact on the Claimant's partner a UK national and the two UK national children was so significant that it showed the Judge was right in concluding that separation and its consequences would have unduly harsh impacts on the Claimant's partner and all his children. It was accepted by the Secretary of State that it would not be reasonable and it would be unduly harsh for the Claimant's partner and children, RA and RI, to move to Iraq. Mr Vokes argued, by reference to the decision, as much as needed to be done was done in terms of assessing the impact of the interference in family life and its effects upon the best interests of RA and RI. The child X also a British national fathered by the Claimant from a previous relationship did not feature largely because of the limited contact that was being exercised between the Claimant and X. The Judge concluded that insofar as X was concerned the Judge did not find that the unduly harsh considerations were met.

9. It seemed to me that read as a whole, on the evidence that was advanced, that there were deficiencies in the Judge's decision and in his analysis but that on the evidence the Claimant's position were the matter to be looked at by another Tribunal would essentially be the same and the outcome was reasonably likely to be the same. I agree with Mr Jarvis that the Judge understated whilst addressing it, the public interest and in the light of the case of RLP [2017] UKUT 00330 (IAC) the Tribunal President Mr Justice McCloskey in the head note summarised the position as follows:

"In all cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making processes is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR."

10. I concluded that it remains a fact sensitive and specific matter and the decision also relied upon of Shou Lin Xu, an unreported Upper Tribunal decision from 2014, is of some interest because Upper Tribunal Judge Gill said

"It also follows that, in the event that consideration of the relevant Immigration Rule and guidance produced a negative answer, the rationale of the Supreme Court ... in *Patel v Secretary of State for the Home Department* [2013] UKSC 72 applies, that is, the Secretary of State is entitled to proceed on the basis that those unlawfully in the UK will leave of their own accord; she is not obliged to remove an individual or issue a removal direction."

11. It seems to me that was entirely correct and that diminished to a degree the consequences for the Claimant of his overstaying by choice and his continued flouting of UK immigration controls. This was plainly applicable to himself but it does not diminish the impact that his removal may have in terms of its effect upon his children. To what extent his partner was in knowledge of his immigration status and circumstances perhaps to that point matters not but plainly once again it is not an absolute position.

12. I conclude therefore that the Judge's decision had contained errors of law but that I do not find them material and that any other Tribunal properly considering the same

findings of fact, which were not substantively disputed, would in all likelihood come to the same conclusion.

NOTICE OF DECISION

The Original Tribunal's decision stands. The appeal of the Secretary of State is dismissed.

ANONYMITY ORDER

No anonymity order was sought nor is one required.

Signed

Date 4 May 2019

Deputy Upper Tribunal Judge Davey

TO THE RESPONDENT

FEE AWARD

The case file shows a fee of £140 had been paid. If one has been paid the appropriate order is that there should be, since the appeal has succeeded, a fee award of £140.

Signed

Date 4 May 2019

Deputy Upper Tribunal Judge Davey