



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: DA/00144/2010

THE IMMIGRATION ACTS

Heard at Birmingham
On 10th November 2010

Determination Promulgated
On 19th November 2010

Before

SENIOR IMMIGRATION JUDGE HANSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

[]

Respondent

Representation

For the Appellant: Mr Smart – Senior Home Office Presenting Officer.

For the Respondent: Miss C Physsas instructed by Genga & Co Solicitors.

DETERMINATION AND REASONS

1. This is a reconsideration of a determination of a panel composed of Immigration Judge Chohan and Sir Jeffery James KBE CMG (non-legal member) promulgated on the 20th April 2010 following a hearing at Birmingham on the 25th March 2010. In the determination the panel dismissed the appeal on asylum and Article 3 grounds but allowed it under Article 8.

The parties

2. The appellant is the Secretary of State for the Home Department who challenges the decision.
3. The respondent who was born on 16th July 1988 is a citizen of Sri Lanka who appealed against a decision to make a deportation order against him under the provisions of section 32 (5) UK Borders Act 2007 and a decision to refuse to grant him asylum under paragraph 336 of HC 395.

The appellants claim

4. []'s immigration history shows that he entered the United Kingdom on 27th August 2001. He made an application for asylum which was refused on 17th October 2001 but was granted exceptional leave to remain. On 27th October 2005 he made an application for indefinite leave to remain which was granted in April 2007.
5. On 15th December 2008 [] was convicted of an offence of robbery and on 13th January 2009 sentenced to 15 months imprisonment.
6. As a result of the conviction on 27th February 2009 [] was served with a notice of liability to deportation and on 1st March 2009 claimed asylum which was refused on 21st January 2010.
7. He claimed he cannot return as he is at risk of facing persecution in Sri Lanka and in relation to Article 8 that he has settled ties within the United Kingdom.

Immigration Judges Findings

8. The panel considered all the evidence and in a detailed determination set out their reasons for dismissing the appellant's asylum claim. They make a number of adverse credibility findings before concluding that it had not been shown that he had a well founded fear of persecution and certainly that there was no risk of persecution, serious harm or ill-treatment for the reasons claimed should he be returned. As a result they dismissed the appeal under the Refugee Convention, Immigration Rules and Article 3.
9. In relation to Article 8 the panel set out the relevant case law that they needed to consider. They record the nature of the offence which involved violence, the seriousness of which was reflected in the 15 month custodial sentence.

10. In paragraph 35 the panel record that the appellant entered the United Kingdom when he was about 13 years of age and that he has been here for a period of eight years as he was 22 in July of this year. The appellant has therefore been here for a considerable period of time during which he has formed a relationship with his girlfriend which has continued for a period of five years.
11. The panel records the presence of family members in the United Kingdom before concluding that the family life is based upon his relationship with his girlfriend. The panel concludes at the end of paragraph 35 that considering the evidence as a whole they are prepared to accept that the appellant has a family life in the United Kingdom.
12. The panel proceeded to consider the matter in further detail at paragraph 41 and record that there was nothing to suggest that since being released from prison the appellant had committed any further offences or that his conduct will be such that it will be in the public interest to remove him from the United Kingdom.
13. In paragraph 43 the panel state that much of what was said in respect of the appellant's family life is relevant to his private life and that they are in no doubt that after a period of eight and a half years he has established a private life in the United Kingdom although some of that time has been spent in prison. The panel found that all his ties are in the United Kingdom, such as friends and other social ties, that he received an education in this country, and has grown up here.
14. The panel concludes in paragraph 44 that although the appellant committed a serious criminal offence that is outweighed by the length of residence and strong family ties in the United Kingdom and as such that they did not find that interference in his private and family life was necessary for any of the reasons stated in Article 8 (2).

Grounds of application

15. The Secretary of State applied for permission to appeal claiming that the appeal was allowed on Article 8 grounds on the basis of the appellant's relationship with his girlfriend.
16. The grounds challenge the panel's acceptance of the relationship between the appellant and his girlfriend without giving any reasons; and in finding that there was family life between the appellant and his girlfriend had not consider the nature of the family life. It is stated that these findings are inadequately reasoned.
17. The grounds also allege that the panel found that the relationship was more than that put forward by the appellant and find in paragraph 39 that the appellant is in effect, in a common law relationship with his girlfriend; yet fail to give reasons as to why the relationship between them is akin to marriage and failed to analyse the relationship. It is claimed that the panel had not considered elements such as

cohabitation/consensus/status being known etc. It is said that the finding in relation to family life has tainted the rest of the findings regarding Article 8 as they then proceeded to conduct the balancing exercise with regard to the relationship as if between spouses.

18. The grounds also allege that the panel materially misdirected itself in law by failing to properly consider or give proper weight to the opinion of the Secretary of State that deportation was required and no proper consideration with regard to the deterrent factor or the public interest aspect. The panel restricted their interpretation at paragraph 41 and 44 by considering whether the question was whether the conviction and sentencing outweighed the family and private life in the United Kingdom. The statement by the panel in paragraph 41 that the conviction and sentence did not outweigh the family and private life indicate the panel failed to consider the matter in accordance with the guidance provided in the relevant case law.

Submissions

19. Mr Smart commenced his submissions stating that the panel had misdirected themselves in relation to whether what existed was family or private life and had confused the two. The relationship with the girlfriend had been given the same status as family life whereas the evidence was only that they had a boyfriend - girlfriend relationship at some distance.
20. He stated that as a result the panel proceeded to consider the balance by reference to their finding that family life existed which make a material difference to the outcome as they referred to the wrong case law and did not consider what could at best could be construed as a private life only appeal.
21. In response Ms Physsas maintained the claim that there was family life and that family life was part of his private life. She submitted that in any event the conclusions will be the same as the panel considered the relationship at paragraph 39.
22. In relation to the proportionality issue and Article 8 there is an intention to marry and the panel accepted there was a strong relationship.
23. The panel also referred to the appellant's time in the United Kingdom and the relevance of the factors that have been taken into account by the panel when considering his ties and time in this country.

Reconsideration

24. As stated the panel considered the matters before them in detail but I do find that they made an error of law in failing to adequately assess why the relationship between the appellant and his girlfriend, who are a courting couple and no more, is sufficient to satisfy the definition of

family life so far as that term is recognised by Article 8 (1) and in particular why they were able to satisfy the definition of a common law man and wife which is a relationship akin to marriage and which ordinarily involves a settled period of cohabitation.

25. The error however is not material to the outcome of the appeal as the panel make findings relating to the relationship and the bond between the appellant and his girlfriend which I find will form part of their respective private lives in any event.
26. I also find that it cannot be said that the finding that family life existed means that the conclusions of the panel as a whole are unsustainable.
27. Although there was reference to case law more applicable to married couples some of that applies equally to parties in other relationships. The panel also set out in paragraph 32 the factors laid down by the European Court of Human Rights in the case of *Bouliff v Switzerland* [2001] ECHR 5427 as confirmed by the Court in *Uner v The Netherlands* which it was necessary for them to considering when assessing whether expulsion measures are necessary in a democratic society or proportionate to the legitimate aim pursued.
28. In paragraph 33 the panel also refer to the case of *Maslov v Austria* and the criteria that they are required to take into account in assessing whether the authority struck a fair balance between the claimants right to family and private life and the prevention of disorder or crime.
29. In paragraph 35 the panel record that the appellant entered the United Kingdom when he was 13 and has been here for eight years, indicating that he was educated and spent his formative years in the United Kingdom.
30. The panel make it clear that they are not minimising the nature and seriousness of the offence in paragraph 41 but find that there was no indication that the appellant has committed any further offences since his release or that his conduct was such that it will be in the public interest to remove him from the United Kingdom. This is a finding based upon the available evidence, part of which is set out in the determination.
31. In paragraph 43 the panel concluded that the appellant has developed private life over a period of years and that all his ties are in the United Kingdom- both family and social. The conclusion in paragraph 44 clearly indicate that the panel found that although the appellant committed a serious crime and that the Secretary of State has an obligation to make a deportation order against him as a result of that crime, which is one half of the balancing exercise, this is outweighed by the other factors in his favour based upon his family and private life in the United Kingdom.
32. I accept that in using the term family and private life the panel may have included the relationship with the girlfriend but when one considers the determination and the findings in the case, setting the relationship with his girlfriend within the private rather than life

aspect as the panel should have done, the decision of the panel cannot be said to be perverse nor irrational.

33. I therefore find that although the panel may have made an error in concluding that the relationship between the appellant and his girlfriend fell within the definition of family life as envisaged by Article 8 (1) this is not material in that the relationship will in any event form a strong part of the private life of the appellant and his girlfriend. When taking into account the 'Bouliff' factors and including the relationship as part of their private life, the findings of the panel are within the range of decisions they were entitled to make based upon the evidence before them. The panel did consider the respondents position and there is evidence of this in the language of the determination but found on balance that the respondent has not shown that the decision was proportionate under Article 8 (2).

Decision

34. There is no material error of law in the decision of the panel. The determination shall stand.

Signed
Judge of the Upper Tribunal

Dated the 15th November 2010