Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/05691/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 15 May 2014	**On 4 July 2014**

Before

MR JUSTICE GREEN
SITTING AS A JUDGE OF THE UPPER TRIBUNAL
UPPER TRIBUNAL JUDGE GOLDSTEIN

Between

MAHARI GEBERSUS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Chen, Legal Representative, instructed by Duncan Lewis
& Co Solicitors (Harrow Office)
For the Respondent: Ms K Pal, Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is a resumed hearing which followed on from the decision of the Upper Tribunal dated 27 March 2014 setting aside the decision of the First-

tier Tribunal upon the basis that the judge therein had misapplied the correct legal test. In this judgment we refer to Mr Gebersus as the "Appellant" and to the Secretary of State for the Home Department as the "SSHD".

2. In the First-tier Tribunal decision the judge applied a test for Article 8 which the Upper Tribunal has subsequently found to be in error. The Upper Tribunal held that the Judge erred in applying Article 8 in a freestanding manner and not by reference to the materially more constrained test laid down in case law which requires compelling or exceptional circumstances within a proportionality test where the facts relating to the individual application are assessed in their own light and then weighed against the important public interest objectives which underpin the immigration regime.

3. In relation to the policy objectives that an individual's personal circumstances have to be weighed against, these have been referred to in many cases. So, for example, in **ZH (Tanzania) v SSHD [2011] UKSC 4** the Supreme Court held that the interests of the children, and in particular with regard to his nationality, whilst very important were not trump cards over all other policy considerations which included "...the need to maintain firm and fair immigration control" (see paragraph 33). In other cases, for instance involving the deportation of foreign nationals found guilty of criminal acts, there is a public interest of considerable potency in deporting criminals and protecting society from criminality. (See for example **SS (Nigeria) v SSHD [2013] EWCA Civ 550**).

4. In the present case it has been, until the present hearing, common ground that the Appellant did not meet the conditions for being granted leave to remain under the Immigration Rules including those components of the Rules which were designed to make an assessment of the right of the Appellant under Article 8. At the outset of the hearing before us today Mr Chen indicated that he wished to contend that, in actual fact and contrary to the formally agreed position, his client met the Immigration Rules. We indicated that we would hear the appeal first upon the basis of the decision as taken below and then, if necessary, we would consider any alternative arguments. For the reasons we give below it has not been necessary to explore whether the Appellant did in fact meet the requirements in the Immigration Rules.

5. The question which arises for us is whether the particular facts and circumstances surrounding the Appellant and his family give rise to some compelling or exceptional circumstances which, when measured within the proportionality test, give rise to an Article 8 right which must be recognised.

6. We note that the Tribunal Judge heard oral evidence and received detailed submissions upon the facts. We also note that the Tribunal's fact-finding differed in material respects from those of the SSHD in her decision of 11 January 2013. However, the facts have been found and it is not for

us to seek to make findings afresh. We hence seek to apply the corrected law to the facts as found in the Judgment below.

7. On the merits of this appeal we have come to the conclusion that we should not disturb the ultimate conclusion arrived at by the judge below.

8. In this respect we would emphasise that this is a finding on specific facts, that it is in our view a marginal decision, and that we do not in any sense consider that this would be a precedent for other cases involving Eritrea or Malta.

9. We have essentially come to this conclusion because when viewed in the context of the usual facts which go into a proportionality balancing exercise we consider that the facts of this case, in combination, are towards the extreme – "exceptional" or "compelling" end of the spectrum. For the very reason that we do not view this as a precedent or having resonance outside of its particular facts we will summarise our conclusions briefly.

10. First, the Tribunal found as a fact that the Appellant and his partner had a longstanding, genuine and subsisting family life. The Tribunal accepted that a subsisting relationship dated from 2003 when the marriage between the two was arranged but that it was prevented from coming to fruition by the Appellant being "taken" by the military in 2005 and that they came back together in the United Kingdom and had a child here in 2013: See the judgment below paragraphs 16-19.

11. Secondly, the Tribunal also found as a fact that there was no realistic option for the partner to relocate to Malta: See judgment, paragraph 22. There was no evidence that she could move to Malta in the sense that the Maltese authorities would accept her at all. In written submissions the SSHD engaged in some ingenious speculation. In the grounds of appeal it is argued that since the partner used her "resourcefulness" to move to the United Kingdom and to establish here, she could in effect use that same resourcefulness to move to Malta. There is however no evidence to suggest that this would be possible and this is inconsistent with the Tribunal's findings. It is well-known that Malta, as a very small island, already has a substantial problem of ever increasing numbers of immigrants chasing limited work. In any event, even if the partner was to relocate to Malta and the Appellant was then removed back to Eritrea there is no question of her returning to Eritrea given that she has refugee status in the United Kingdom.

12. Thirdly, the partner has indefinite leave to remain in the United Kingdom by virtue of her refugee status, as does the child. The position of the child is important, albeit that it is not a decisive consideration: See the analysis of the Supreme Court in **ZH (Tanzania) v SSHD [2011] UKSC 4**.

13. Fourthly, it is argued by the SSHD that the family life is precarious because the Appellant has made his application and sought to establish

that family life whilst having no permanent lawful right to remain in the United Kingdom. His family life in the United Kingdom is hence said to be described as to some degree precarious. We accept of course that in policy terms the SSHD is entitled to treat those with precarious family lives as having weak Article 8 rights where otherwise it would reward breaches of the Immigration Rules and provide an incentive to ignore visa limits. However, in this case we do not consider that the family or private rights are precarious on the facts as they have already been found. They are longstanding and were not generated for the purposes of an application. On the contrary they predated the application by a number of years.

14. Fifthly, it is clear that the family has no connection with Malta and were the Appellant to be removed to Malta there would be no prospect of his family law rights and those of his partner being maintained in a sensible or rational way as indeed, once again, was found by the judge below.

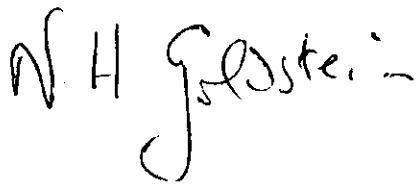
15. Sixthly, and importantly, because the facts of this case are unusual, we are clear that this is not a precedent and it would not harm the integrity of the immigration system. This is not a case of criminality. Nor is this a case where to permit the Appellant to remain would set a dangerous precedent about precarious family life or rights. Further, we do not consider that this ruling will create a precedent which can be used to create what we accept is always intended to be a limited route whereby Appellants may obtain leave to remain. This is in our view simply a case where on the particular facts the family rights of the Appellant and his family have unusually reached the level where they may properly be said to be exceptional or compelling and where the harm to the important policy objectives of maintaining an effective and fair immigration system is limited, and hence, just outweighed.

16. This is in our judgment a proportionate outcome.

17. We are grateful to Ms Pal, appearing for the SSHD for her focus and candid submissions and to Mr Chen, for the Appellant, for his helpful submissions as well.

18. The UT having already set aside the decision we now substitute our own decision allowing Mr Gebersus's appeal.

Signed Date; 19 May 2014



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Mr Justice Green