



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/31622/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
on 7 July 2015**

**Decision and
Promulgated
On 10 July 2015** **Reasons**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ZURAB ZEKELASHVILI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME OFFICE

Respondent

Representation:

For the Appellant: Mr G A Dewar, Advocate, instructed by Quinn Martin & Langan, Solicitors

For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Georgia. His wife and two children are citizens of the United Kingdom. He is subject to removal to Eire, being the state which has agreed to consider his latest asylum claim. He appealed to the First-Tier Tribunal against refusal of leave to remain, arguing that he should not be removed because his children could not reasonably be expected to leave the United Kingdom.

2. First-Tier Tribunal Judge D'Ambrosio dismissed the appellant's appeal for reasons explained in a determination, including three appendices, dated 27th and issued to the parties on 28th November 2014.
3. In the First-Tier Tribunal the appellant put forward a recent change of circumstances. He said that he was estranged from his wife and so his children could not reasonably be expected to leave the UK. A brief statement from his wife was before the Tribunal but she did not attend to give evidence. The Judge found that the claim that the marriage had broken down was false.
4. Mr Dewar did not seek to argue that it is never reasonable to expect UK citizen children to leave the UK, whatever the family circumstances. It was accepted that if the finding stood that there had been no marital breakdown, so did the determination. The question put to the Upper Tribunal was whether the Judge's factual conclusions could stand.
5. Mr Dewar at the outset asked to lead the appellant's wife to adopt a recent statement. He said that she would no doubt be subject to rigorous cross-examination on behalf of the respondent and that the credibility of her evidence was likely to be determinative. He said that the findings of fact reached by the Judge were so plainly wrong that the Upper Tribunal, without further ado, should proceed to hear evidence with a view to correcting them.
6. Mrs O'Brien opposed further evidence being admitted or oral evidence heard prior to submissions on error of law. She said that a foundation had first to be laid before further evidence could be admitted, either to show error or in order to remake the decision.
7. I indicated that error of law had to be identified before further evidence might be entertained. The first question is whether error is there, not whether the appellant might make a better case if given another chance.
8. The grounds of appeal (so far as relevant) are along the following lines. The Judge's conclusion regarding the marital separation was not one he was entitled to reach on the evidence before him, which included witness statements referring to the separation. While it might have been open to the Judge to find that the appellant was an unreliable witness and to disbelieve him, the Judge was "not entitled to go further and conclude that the opposite of what the appellant said must be true". The Judge reached a finding unsupported by the evidence. The Judge took into account the appellant's use of all appeals and representations open to him and his recourse to the Scottish Legal Aid Board. Those were neutral and irrelevant factors from which no adverse inference could be drawn. The findings on the appellant's use of deceitful methods and use of Eire as an intended staging post from which to enter Northern Ireland were accusatory, speculative and had no basis in evidence. The applicant's previous convictions for theft should have been given limited, if any, consideration rather than particular weight.

9. Mr Dewar submitted further as follows. The determination (in particular, at paragraphs 158 to 167 and 169) showed that the Judge's view of whether the family members constituted an intact unit was critical. If his findings on that were not to stand, the conclusions on insurmountable obstacles and on proportionality would fall away. Although the Judge purported to find at paragraph 66 that the appellant left Georgia with the intention of using deceitful methods to enter and remain in the UK, and not to settle in Eire, that was unsupported by any evidence, and was an inference the Judge was not entitled to draw. At paragraph 93 the Judge inferred from the wife's non-attendance that she had been "not prepared to risk imprisonment or other severe penalties which could result from a charge of perjury by her giving false evidence to support the claim that the couple are in a state of irretrievable marital separation". That was an even clearer example of a finding without evidence. The Judge pre-judged the evidence of a witness from whom he had not heard. The Judge ignored the corroboration of the appellant's claim of marital separation from another witness and in his wife's written statement. He gave no weight to any evidence which tended to favour the appellant, contrary to the obligation of anxious scrutiny which required consideration of all factors. While the Judge was entitled in principle not to believe the appellant regarding the marital breakdown, it did not follow that from rejecting evidence that the opposite must be true, and material aspects of corroboration were in the statements and documents. The matter could only be corrected by hearing the wife's evidence to get to the bottom of matters.
10. The Presenting Officer replied thus. The Judge made no error which opened the door to rehearing the evidence, or to further evidence. The case plainly revolved around whether the separation was genuine. Some of what the Judge said might go rather far, but the reasons for finding the appellant not to be a reliable witness, in particular at paragraphs 54 to 64, were properly open to him and decisive of the case. If anything further said was superfluous, that was beside the point. The Judge was entitled to find that the weight to be given to the statement by the appellant's wife was diminished by her non-appearance. There was no error in the determination at least up to that point (paragraph 93). It might go rather far to say that his wife had not appeared due to fear of the consequences of perjury. Mr Dewar disputed the Judge's reasons at paragraph 91 for rejecting the explanations for the wife's non-attendance, but those reasons were logical enough. The explanations offered were feeble. The critical finding that the separation was not genuine was open to the Judge and reached for properly explained reasons. The determination should not be disturbed.
11. I reserved my determination.
12. The opening salvo in the appellant's grounds is that the essential negative conclusions reached by the Judge were not open to him at all. As the grounds and submissions developed, I do not think that point was maintained. It was plainly open to the Judge to find the evidence

unpersuasive including the allegation of marital breakdown. The issue is whether those conclusions are adequately reasoned, or otherwise undermined by legal error.

13. The appellant argues that it does not follow from certain evidence being found unreliable that the opposite must be true. That is a good general principle and a trap of which Judges need to be wary, but I do not think it bears on this particular case. If the evidence that the marriage had broken down was not reliable, it follows that a convenient concoction was being advanced and the marital relation remained genuine.
14. The determination is as thorough and painstaking as the Judge could make it. The critical finding is that the appellant is not a reliable witness. The reasons are to be found at paragraph 53 onwards. They include the previous failed asylum claim by the appellant, dismissed in 2005; absconding in that year from reporting conditions; three charges of theft in 2005 to 2006 and failure to attend trials in 2006 and in 2008; an implausible claimed fear of persecution in Georgia (although the final resolution of that is for the authorities in Eire); failure to proceed with his family to Eire when he had the chance, that having been his original stated intention, with no reasonable explanation; and failure to progress the asylum claim in Eire, also with no reasonable explanation. Those are all reasonable points against the reliability of the appellant. The Judge had the advantage of hearing directly from him before forming his view.
15. The Judge goes on to refer to the appellant's "various manoeuvres to remain in the UK" and makes very specific findings about an intention to return to the UK via Eire. Those further findings may not have been necessary to determine the appeal, but I think they rank above speculation. They are a reasonable inference from the adverse credibility conclusions. They may be forceful statements but I do not think they show that the critical conclusions on credibility are legally erroneous.
16. In a case where the marital breakdown had become the critical issue, the fact that the appellant's wife was prepared to give a statement but did not appear to give oral evidence was a matter calling for explanation and for comment. The reasons given at paragraph 91 for rejecting the explanations for her non-attendance are not particularly strong ones, but nor are they obviously wrong. The fact is that the wife was not there and no very good reason was advanced. The Judge again expressed himself forcibly and perhaps went further than needed on perceived risk of perjury charges, but it followed from his justified findings up to that point that her rather skimpy statement (248 words) of 26 September 2014 did not do much for the appellant's case. That statement says that although the couple had separated she started college recently, and as a result the appellant "moved back in so that he could be there for the children even more". The appellant's statement dated 4 October 2014 said the same thing. The Judge noted that the most recent evidence was that the couple were both living in the family home.

17. In my opinion, the appellant has not shown that the Judge went wrong in law by concluding as he did on the issue of the alleged marital breakdown. He was entitled to reach a negative conclusion. He gave several reasons which are not affected by any error. To find the assertion untrue led inexorably to the conclusion that the opposite was the fact. The Judge may have expressed himself rather forcibly and pursued his observations further than strictly necessary but those observations were logical enough given the primary findings, and better than guesswork.
18. The appellant disagrees with the factual findings but does not show that their making involved the making of any error on a point of law such as to require the determination to be set aside.
19. The determination of the First Tier Tribunal shall stand.

A handwritten signature in black ink, reading "Hugh Macleman". The signature is written in a cursive style with a large, stylized initial 'H'.

Upper Tribunal Judge Macleman
10 July 2015