Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/09317/2012

THE IMMIGRATION ACTS

Heard at North Shields
On 19 August 2013

Determination sent
On 24 October 2013
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Before

UPPER TRIBUNAL JUDGE CLIVE LANE

Between

MR YAHYA SHIMI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. The appellant, Yahya Shimi, was born on 2 January 1990 and is a male citizen of Tunisia. The appellant appealed against a decision of the respondent dated 26 September 2012 to give directions for the appellant's removal to Tunisia and to refuse him leave to enter the United Kingdom. In a determination which is dated 14 November 2012, the First-tier Tribunal dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal. The appeal is brought on Article 8 ECHR grounds only.

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2. The appellant has a history of offending. He entered the United Kingdom in April 2010 and, as Judge Batiste in the First-tier Tribunal noted, he has since then "appeared before the courts with some regularity." He was cautioned for shoplifting in September 2010 and convicted for a bail offence three months later. He was convicted of wounding in April 2011 for which he received a community order. In April 2011, he was sentenced for six offences of theft from a person, receiving an absolute discharge. In October 2011, he was fined for shoplifting, an offence committed whilst he was on bail. In November 2011, he was again convicted of shoplifting and given a community order. Judge Batiste noted that "none of these offences would cause a respondent to instigate deportation proceedings [but] it is fair to say that they demonstrate that the appellant has been a persistent criminal while in the United Kingdom and has convicted both offences of violence and dishonesty." The appellant claimed that his relationship with Samantha Jarvis, to whom he is now married and by whom he now has a child, had changed his way of life. The judge did not accept that this was supported by the evidence [13]. Samantha Jarvis had known from an early stage of her relationship with the appellant of the "precarious nature" of the appellant's immigration status. The judge accepted that the couple were married and living together and were "clearly affectionate towards one another". The appellant speaks good English and the judge accepted that communication between the appellant and Ms Jarvis was not a problem. When Ms Jarvis appeared before Judge Batiste, she was heavily pregnant. She has now given birth to a child. I was also told by the Presenting Officer that the appellant has been summoned to court in respect of a new criminal charge of theft. Obviously, that matter was beyond the contemplation of the judge in the First-tier Tribunal.

3. The parties agree that this is an appeal which turned on the question of proportionality. In [17], the judge wrote:

> "I considered all the factors in the round. I find that the decision of the respondent is proportionate to the public end that is sought to be achieved. In particular I put weight on the fact that the appellant has amassed a considerable criminal record in a short time causing me to place significant weight on the issue of preventing crime and disorder. I also place significant weight on the fact that the unborn child has not established any life in the United Kingdom. The most significant factor however is that I find that it is reasonable in all the circumstances for Samantha Jarvis to relocate to Tunisia, once her child is born. While I accept that she may have a job and adult family in the United Kingdom; is unable presently to speak Arabic; and may find cultural and religious differences these do not mean that it is not reasonable to expect her to live in Tunisia. She will have the considerable support from the appellant's large family who she has indicated she speaks with every week via Skype and gets on with. Given that it is reasonable for Samantha Jarvis and her child to travel with the appellant to Tunisia when the child is born; there will not be a breach of her Article 8 rights as the family unit will be together. In all the circumstances the decision of the respondent does not cause a breach of Article 8. As such, this appeal fails."

4. Somewhat puzzlingly, permission to appeal was sought and granted on the basis that the judge had failed to consider the principles contained in the case of *Chikwamba* 2008 UKHL 40. On the face of the determination, this is not a case in

which the judge found it reasonable for the appellant to return and make an out of country application for entry clearance. He has not even suggested (on my reading of the determination) that Samantha Jarvis should accompany the appellant whilst he remains in Tunisia making such an application; the departure of Samantha Jarvis from the United Kingdom which the judge considered reasonable was apparently to be permanent. The question in this appeal is whether the judge was right to find that the decision of the respondent was, in effect, rendered proportionate because Samantha Jarvis could relocate permanently to Tunisia. Samantha Jarvis (and her child) are British citizens. In **Sanade and Others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC)** the Upper Tribunal stated at [83-84]:

> If the residence right is only afforded to the non-citizen parent where otherwise the child would be forced to leave the European Union, it seems difficult to justify that consequence by reason of the criminal wrongdoing of the parent. It is one thing to justify the exclusion of an EU national from one part of the Union requiring him or her to return to their state of nationality, and quite another to require that person to leave the Union altogether. It seems to us that the Court of Justice was applying the principle of international law that a citizen cannot be expelled from their own state in any circumstances, to citizenship of the European Union and concluding that a measure that required an EU citizen to leave the Union would be contrary to EU law.
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> In Zambrano, there was no suggestion that the children as Belgian citizens, could be expelled from Belgium. Nor, as Union citizens, could they be expelled from the Union as a whole and, had there been a decision made by the Belgian authorities to that effect, it would have been justiciable by the Court of Justice. But the Court went further: the expulsion of their Colombian parents (not citizens of the Union) amounted to the children's constructive expulsion from the Union. The Court was not therefore directly applying Article 20 which is non-derogable but granting rights to non-Union citizens necessary to give effect to the rights of Union citizens. However, if the collateral right of residence afforded to the parents is a narrow one and limited to cases where it is necessary to enable the child to enjoy his or her rights, it may very well be that there is no room for any derogation at all, and our assumptions to the contrary in Omutunde at paragraph 32 (cited at [65] above) should not be regarded as sound in the absence of a decision of the Court of Justice on the point in a case that raised the issue.

5. In the circumstances, I find that the judge has erred in law by concluding that it would be reasonable for Samantha Jarvis, a British citizen, to relocate outside the European Union. Further, the judge was (quite properly) also seeking to assess the circumstances once Ms Jarvis' child had been born. However, he seems to have paid little attention to the fact that Ms Jarvis's child would be a British citizen whose removal would also not be reasonable (see *ZH* (Tanzania) 2011 UKSC 4). Given that the reasonableness of Ms Jarvis moving to live in Tunisia was described by the judge as the main reason why he dismissed the Article 8 ECHR appeal, I find that he has erred in law and that his determination should be set aside. I have remade the decision.

6. Judge Batiste very properly considered in detail the public interest concerned with the appellant's removal. It is also not disputed that the appellant and Ms Jarvis are in a stable marriage and they now have a young child (Amira – date of birth 14 December 2012). Amira is generally in good health although, in August 2013, she was examined at North Tees and Hartlepool NHS Foundation Trust after blood had been observed in her stools. Like Judge Batiste, I was struck by the evident affection of Ms Jarvis for the appellant and her great concern that he might be removed.

7. As regards the public interest, I am aware that the respondent considers that the provisions of Appendix FM of the Immigration Rules provides details of the public interest arising out of the criminal offending of foreign citizens. For example, I note that S-EC.1.1 (suitability – entry clearance) provides that entry clearance to the United Kingdom should be refused on the grounds that the exclusion of an applicant is conducive to the public good if they have been sentenced to a period of imprisonment of at least four years or have been sentenced to a period of imprisonment of less than twelve months where five years have passed since the end of the sentence. Paragraph S-EC1.5 provides:

> The exclusion of the applicant from the UK is conducive to the public good because for example the applicant's conduct (including convictions which do not fall within paragraph S-EC1.4) character, associations and other reasons make it undesirable to grant him entry clearance.

8. Although I do not condone the criminal behaviour of this appellant whatsoever (and I was particularly alarmed that he has, notwithstanding his claims to be a changed character, found himself in court yet again since the First-tier Tribunal hearing) he would not be excluded from entry clearance on public interest grounds since he has not been imprisoned. If Appendix FM provides an indication of the public interest as the respondent submits, then the appellant's criminal offending *per se* would not prevent him from living in the United Kingdom. Further, as Judge Batiste noted, it had been open to the respondent to make a decision to deport the appellant under the Immigration Act 1971 (on the basis that his deportation would be conducive to the public good) but she has not chosen to do so. Those are factors which I need to consider as part of the proportionality exercise.

9. Having already determined that it would not be reasonable for Ms Jarvis and her child to relocate to Tunisia, two possible further scenarios arise. First, the appellant could be removed in consequence of the immigration decision to Tunisia where he could make an out of country application or he could separate permanently from Ms Jarvis and the child to return to Tunisia alone. Although the appellant may be able to apply for entry clearance and escape the exclusion provisions under Appendix FM (see above) it is likely he would struggle to meet the financial requirements of the Immigration Rules. Further the principles enunciated by the House of Lords in *Chikwamba* now have greater force given that the couple now have a child. On the other hand, the appellant's poor immigration history and, in particular, his offending history since he has been in the United Kingdom are strong factors indicating that he should be removed. Ultimately, the Tribunal needs to strike a balance between the

public interest (and here I repeat that the respondent has not sought to remove the appellant on the basis that his removal is conducive to the public good) and the (very likely) permanent break up of this young family. Whilst none of the appellant's offences taken singly are of the greatest seriousness I find that the persistence of his offending in a relatively short period of time renders that offending very serious. Like Judge Batiste, I have no reason at all to accept the appellant's assurances that he is a reformed man. I am aware that, in cases of serious offending, the break up of a family may be the only proper outcome of an appeal such as this (see *Lee* [2011] EWCA Civ 348). Whilst remaining keenly aware of those principles, I have concluded on the particular facts of this appeal that the appellant should be granted a period of Article 8 ECHR leave. I have had regard to his level of offending but also to the fact that he is a caring father of a very young child and a husband of that child's mother who, notwithstanding the appellant's poor conduct, has remained loyal to him. Their life together may only reasonably be pursued in the United Kingdom for the reasons I have stated above. I find that the interference which would be caused to the family lives of Ms Jarvis and Amira is such that the public interest concerned with the appellant's removal is outweighed in this instance, a decision which is informed by the fact that the respondent has not sought to remove the appellant and by the provisions of Appendix FM. The appellant should be aware, however, that his fate lies in his own hands. Should he continue to offend he need not be surprised if the respondent were to take a decision to deport him. The fact that he has succeeded in his appeal on this occasion certainly does not mean that he can expect always to succeed in appeals hereafter. Likewise, if his relationship with Ms Jarvis and Amira founders then his status in this country may again be properly described as precarious.

DECISION

10. The determination of the First-tier Tribunal which is dated 14 November 2012 is set aside. I remade the decision. This appeal is allowed on Article 8 ECHR grounds.

Signed Date 20 October 2014

Upper Tribunal Judge Clive Lane