Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/13636/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 3rd October 2014	**On 20th October 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

KP
(ANONYMITY ORDER MADE)

Appellant

and

ENTRY CLEARANCE OFFICER – TIRANA

Respondent

Representation:

For the Appellant: Mr E Fripp of Counsel instructed by Oliver and Hasani Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

Introduction and Background

1. The Appellant appeals against a determination of Judge of the First-tier Tribunal B A Morris promulgated on 29th April 2014.

2. The Appellant is a female Albanian citizen born 3rd July 1987 who applied for entry clearance to enable her to settle in the United Kingdom with her husband LP (the Sponsor).

3. The application was refused on 10th June 2013. In refusing the application the Respondent relied upon paragraph 320(11) contending that the Appellant had previously contrived in a significant way to frustrate the intention of the Immigration Rules, and that aggravating circumstances applied. In giving reasons for this decision the Respondent pointed out that the Sponsor had obtained British nationality by deception, by claiming to be Kosovan, and it had subsequently been discovered that he was in fact Albanian. When this was discovered the Secretary of State considered whether to take proceedings to deprive the Sponsor of his nationality. The Appellant had applied for settlement in August 2007, and rather than await a decision as to whether the Sponsor would be deprived of his nationality, the Appellant entered the United Kingdom illegally in 2008. She was discovered working illegally on 5th September 2008. She admitted entering the United Kingdom illegally using a false document, and purchasing a counterfeit visa in order to take employment. The Appellant had also obtained NHS services to which she was not entitled. She was removed from the United Kingdom on 11th September 2008 at public expense.

4. In addition the application was refused as the Respondent did not accept that the financial requirements of Appendix FM were satisfied. This was because the Sponsor's income was calculated as being £13,840.84, which was below the required minimum of £18,600 per annum.

5. The appeal was heard by Judge Morris (the judge) on 4th April 2014. After hearing evidence from the Sponsor the judge found that the Respondent had correctly applied paragraph 320(11) and that the financial requirements of Appendix FM were not satisfied. The judge concluded that the Appellant could not satisfy either Appendix FM, or paragraph 276ADE of the Immigration Rules, in relation to family and private life, and did not consider it necessary to consider Article 8 outside the Immigration Rules. The appeal was therefore dismissed.

6. The Appellant was granted permission to appeal and the appeal came before me on 31st July 2014. I found that the judge had not erred in finding that paragraph 320(11) had been applied. I also found that the judge had not misdirected herself in relation to the burden of proof, as had been contended on behalf of the Appellant, nor had she misapplied the principles set out in Devaseelan when considering a previous appeal.

7. I found that the judge had erred in considering the financial requirements of Appendix FM, and had erred in failing to consider Article 8 of the 1950 European Convention on Human Rights outside the rules, and had failed to consider the best interests of a child.

8. Full details of the application for permission, the grant of permission, and my reasons for finding an error of law are contained in my decision dated 4th August 2013, which was promulgated on 8th August 2014.

9. The hearing was adjourned as I decided that I needed to hear further submissions from both representatives in relation to Article 8, and I also wished to hear from both parties as to whether the Upper Tribunal decision MA and SM (Zambrano – EU children outside EU) Iran [2013] UKUT 00380 (IAC) had any relevance to the appeal.

Re-Making the Decision

Submissions

10. Mr Fripp indicated that he did not intend to call further evidence but relied upon the evidence that had been placed before the First-tier Tribunal and a further bundle of documents comprising twenty pages, submitted on behalf of the Appellant. Mr Melvin did not object to this bundle being admitted in evidence.

11. Mr Melvin relied upon his written submissions dated 3rd October 2014 and submitted that the child's British nationality should not be used as a trump card to enable the Appellant to enter the United Kingdom. Mr Melvin also relied upon the decision to refuse entry clearance dated 10th June 2013.

12. Mr Melvin accepted that the best interests of the child had to be considered, but submitted that the appeal under Article 8 of the 1950 Convention should be dismissed.

13. Mr Fripp relied upon his skeleton argument dated 3rd October 2014. In brief summary I was asked to take into account that the Appellant's breach of the immigration law occurred just over six years ago. I was asked to note that the Secretary of State had decided not to instigate proceedings to deprive the Sponsor of his British nationality. Therefore the Sponsor is a British citizen, as is the daughter of the Sponsor and Appellant who was born in Albania on 13th April 2011.

14. I was asked to take into account that the evidence indicated that the Sponsor's income was in excess of £18,600 per annum, and therefore he could adequately maintain his family. The best interests of the child would be served by being with both her parents in the United Kingdom. Mr Fripp relied upon MA and SM and submitted that to refuse entry clearance to the Appellant would be a breach of Article 20 of the Treaty on the Functioning of the European Union. Therefore the Respondent's decision was not in accordance with the law.

15. If I rejected that submission, Mr Fripp submitted that the appeal should be allowed under Article 8 on the basis that the Respondent's decision is disproportionate, taking into account the length of time since the Appellant was removed from the United Kingdom in September 2008, and that the best interests of her British citizen child would be served by living in the United Kingdom with both parents.

16. At the conclusion of oral submissions I reserved my decision.

Findings of Fact

17. The Sponsor was born in Kosovo. He arrived in the United Kingdom in 1998 and made a false claim for asylum. The Sponsor was subsequently granted indefinite leave to remain and thereafter his application for British citizenship was granted.

18. The Sponsor and Appellant married in Albania in August 2007. The Appellant applied for entry clearance and the Sponsor's birth certificate was submitted with this application which showed that he had been born in Albania. Therefore consideration was given as to whether he should be deprived of his British nationality. This caused a delay in making the decision upon the Sponsor's application for entry clearance.

19. Rather than wait for the result of the enquiries to be made, the Sponsor and Appellant decided that the Appellant should enter the United Kingdom illegally, which she did, and having purchased false documentation commenced working illegally. She also received NHS treatment to which she was not entitled.

20. The Appellant was discovered working illegally on 5th September 2008, and shortly after this was removed at public expense.

21. In March 2009 a decision was made not to instigate proceedings to deprive the Sponsor of his British nationality, on the basis that he had arrived in the United Kingdom as a minor.

22. The entry clearance application made by the Appellant in August 2007 was refused, and her subsequent appeal dismissed by way of a determination promulgated on 4th January 2010.

23. In March 2010 the Appellant made a further application for entry clearance as a spouse, which was refused in April 2010, and her appeal dismissed by way of a determination promulgated on 10th December 2010.

24. On 16th April 2013 the Appellant made a further application for entry clearance, the refusal of which is the subject of this appeal.

25. It is a fact that the Sponsor is a British citizen, as is his daughter. The Sponsor has employment, and the evidence submitted, including a letter from his employer, bank statements, and payslips, proves that he earns in excess of £18,600 per annum. There has been no challenge to the fact that the Sponsor and Appellant have a genuine relationship, and that the Sponsor makes trips to Albania to visit the Appellant and their daughter, and his absence from his employment, has held back his opportunities for promotion.

My Conclusions and Reasons

26. The general rule in considering Immigration Rules is that the burden of proof is on the Appellant, and the standard of proof a balance of probability. The burden in relation to paragraph 320(11) is on the respondent.

27. As this is an entry clearance appeal I have considered the circumstances appertaining at the date of refusal, that being 10th June 2013. I am satisfied that this applies to consideration of human rights in an entry clearance appeal, as was confirmed in AS (Somalia) v SSHD [2009] UKHL 32.

28. I have taken into account all the evidence that was before the First-tier Tribunal, together with the further evidence provided to the Upper Tribunal. If a piece of evidence is not specifically referred to, this does not mean that it has not been considered, as it is impractical, and unnecessary to rehearse every individual piece of evidence.

29. This appeal cannot succeed under the Immigration Rules because of the application of paragraph 320(11).

30. I am asked to consider Article 8 outside the rules. Mr Melvin did not submit that this would not be appropriate. The Court of Appeal considered this issue in MM [2014] EWCA Civ 985 and I set out below paragraph 135 of that decision;

> 135. Where the relevant group of IRs (Immigration Rules), upon their proper construction, provide a "complete code" for dealing with a person's Convention Rights in the context of a particular IR or statutory provision, such as in the case of "foreign criminals", then the balancing exercise and the way the various factors are to be taken into account in an individual case must be done in accordance with that code, although references to "exceptional circumstances" in the code will nonetheless entail a proportionality exercise. But if the relevant group of IRs is not such a "complete code" then the proportionality test will be more at large, albeit guided by the Huang tests and UK and Strasbourg case law.

31. The Appellant and Sponsor have a British child, living in Albania with the Appellant. Section 55 of the Borders, Citizenship and Immigration Act 2009 does not apply because the child is not in the United Kingdom, and that section relates to the need to safeguard and promote the welfare of children who are in the United Kingdom. However the Upper Tribunal in Mundeba [2013] UKUT 88 (IAC) decided that the exercise of the duty by an Entry Clearance Officer to assess an application under the Immigration Rules as to whether there are family or other considerations making the child's exclusion undesirable inevitably involves an assessment of what the child's welfare and best interests require. Where an Immigration Decision engages Article 8 rights, due regard must be had to the UN Convention on the Rights of the Child. Therefore the best interests of the child should be a primary consideration.

32. The best interests of the child were not considered by the Respondent in the refusal decision, and have not been considered under the Immigration Rules. It is therefore my view that it is appropriate to consider Article 8 outside the rules.

33. Article 8 was considered, albeit briefly in paragraph 16 of the determination promulgated on 10th December 2010, and therefore I have considered the Devaseelan principles. Paragraphs 37 to 39 of Devaseelan [2003] Imm AR 1 are relevant. In brief summary a previous determination should be a starting point as an authoritative assessment of the Appellant's status at the time it was made. It is not binding upon a subsequent decision-maker and facts happening since the previous determination can always be taken into account.

34. In this case, I take into account that almost four years has passed since the previous determination was promulgated, and that the Appellant and Sponsor now have a child who is a British citizen. I therefore consider that it is appropriate to reassess Article 8 outside the Immigration Rules.

35. I set out below Article 8 of the 1950 Convention;

> 1. Everyone has the right to respect for his private and family life, his home and his correspondence.
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others.

36. In considering Article 8 I adopt the step-by-step approach advocated in Razgar [2004] UKHL 27 which involves answering the following questions;

> (i) Will the proposed removal be an interference by a public authority with the exercise of the applicant's right to respect for his private or (as the case may be) family life?
> (ii) If so, will such interference have consequences of such gravity as potentially to engage the operation of Article 8?
> (iii) If so, is such interference in accordance with the law?
> (iv) If so, is such interference necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others?
> (v) If so, is such interference proportionate to the legitimate public end sought to be achieved?

37. Although Razgar applied to a removal case, I find that the principles are relevant to an entry clearance case. I also accept that the decision in Beoku-Betts [2008] UKHL 39 means that I have to consider the family life of the family, and not only that of the Appellant.

38. This is a case that is concerned with family life as opposed to private life. I am satisfied that the Appellant, Sponsor and their child have established a family life. The Appellant and Sponsor are married, and I am satisfied that they have a genuine and subsisting relationship, and that they wish to live permanently together as a family unit. I am satisfied that the decision to refuse entry clearance is an

interference with that family life, and engages Article 8. The threshold of engagement is not especially high.

39. I then have to consider the third question posed in Razgar, whether the proposed interference is in accordance with the law. I find that it is. This is because the Appellant cannot satisfy the Immigration Rules that relate to entry clearance, and I do not accept Mr Fripp's submission that refusal of entry clearance would be a breach of EU law.

40. I have considered MA and SM and set out below paragraph 44;

> 44. In EU law terms, there is no reason why the decision in Zambrano could not in principle be relied upon by the parent, or other primary carer, of a minor EU national living outside the EU as long as it is the intention of the parent, or primary carer, to accompany the EU national child to his/her country of nationality, in the instant appeals that being the United Kingdom. To conclude otherwise would deny access, without justification, to a whole class of EU citizens to rights they are entitled to by virtue of their citizenship. Mr Deller did not seek to argue to the contrary.

41. As with the Appellants in MA and SM, neither the child, nor the Sponsor have, or intend to, move within the territory of the member states, and therefore the Appellant can place no reliance on EC Directive 2004/38/EC.

42. Article 20 of the Treaty on the Functioning of the European Union (TFEU) provides that every national of a Member State shall be a citizen of the EU, and shall have the right to move and reside freely within the territory of the member states. I set out below Article 20 of the TFEU;

> 1. Citizenship of the Union is hereby established. Every person holding the nationality of a Member State shall be a citizen of the Union. Citizenship of the Union shall be additional to and not replace national citizenship.
>
> 2. Citizens of the Union shall enjoy the rights and be subject to the duties provided for in the Treaties. They shall have, inter alia:
>
> (a) the right to move and reside freely within the territory of the Member State;
>
> (b) …
>
> (c) …
>
> (d) …
>
> These rights shall be exercised in accordance with the conditions and limits defined by the Treaties and by the measures adopted thereunder.

43. I set out below paragraph 45 of Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09;

> 45. Accordingly, the answer to the questions referred is that Article 20 TFEU is to be interpreted as meaning that it precludes a Member State from refusing a third country national upon whom his minor children, who are European Union citizens, are dependent, a right of residence in the Member State of residence and nationality of those children, and from refusing to grant a work permit to that third country national, in so far as such decisions deprive those children of the genuine enjoyment of the substance of the rights attaching to the status of European Union citizen.

44. Applying the above principles to this appeal, I find that the circumstances of the Appellant are more in line with those of the second Appellant rather than the first Appellant in MA and SM. I conclude that refusal to admit the Appellant to the United Kingdom would not deprive a child of the genuine enjoyment of the substance of the rights associated with her status as an EU citizen. The Sponsor in the United Kingdom would be able to look after the child. He may need to alter his working hours to arrange for care of the child, but as was pointed out in MA and SM in paragraph 56, even if the Sponsor cannot be as economically active as he would wish because of care responsibilities, this would not be sufficient to support a conclusion that the child would be denied the genuine enjoyment of EU citizenship rights, nor would this be the case even if the Sponsor were required to stop working altogether. The Tribunal in paragraph 56 of MA and SM stated;

> The right of residence is a right to reside in the territory of the EU. It is not a right to any particular quality of life or to any particular standard of living (see Dereci at paragraph 68, and Harrison at paragraph 67).

45. I therefore conclude that the refusal of entry clearance would not lead to a breach of Article 20 of the TFEU.

46. I then have to consider the fourth and fifth questions posed in Razgar, whether the interference with family life is necessary for one of the reasons set out in Article 8(2), and whether the interference is proportionate to the legitimate public end sought to be achieved.

47. In making a proportionality assessment under Article 8, the best interests of the child must be a primary consideration which means that they must be considered first, although they can be outweighed by the cumulative effect of other considerations. As held in ZH (Tanzania) [2011] UKSC 4, the best interests of a child broadly means the well-being of a child, and a consideration of those best interests will involve asking whether it is reasonable to expect the child to live in another country. Although nationality is not a "trump card" it is of particular importance in assessing the best interests of any child.

48. The Upper Tribunal decided in MK India [2011] UKUT 00475 that the best interests of a child must be addressed first as a distinct inquiry, and factors relating to the public interest in the maintenance of effective immigration control must not form part of the best interests of the child consideration.

49. The Upper Tribunal decided in Azimi-Moayed [2013] UKUT 00197 that as a starting point it is in the best interests of children to be with both their parents. It is generally in the interests of children to have both stability and continuity of social and educational provision, and the benefit of growing up in the cultural norms of the society to which they belong.

50. In this case, I have no hesitation in finding that the best interests of the child would be to be brought up by both parents. I find that it would be in the best interests of the child to be brought up in the United Kingdom where the Sponsor can provide adequate financial support and accommodation. I am satisfied that the best interests of the child would be served by being in the United Kingdom rather than being in Albania.

51. Having considered the best interests of the child, I must go on to consider whether there are any countervailing considerations. I take into account section 117B of the Nationality, Immigration and Asylum Act 2002. This states that the maintenance of effective immigration control is in the public interest. It is in the public interest that a person seeking to enter the United Kingdom is able to speak English, and that they are financially independent. Little weight should be given to a relationship formed with a qualifying partner if that relationship is established by a person at a time when the person is in the United Kingdom unlawfully.

52. The Appellant can speak English. Her application under the Immigration Rules was not refused on that basis. I am satisfied that the Sponsor is in employment, and has an income in excess of £18,600 per year, and he has provided specified documentation to prove that.

53. The relationship between the Appellant and Sponsor and the relationship between the Sponsor and his daughter, was formed while the Appellant and daughter were in Albania.

54. I take into account the very serious breaches of immigration law by both the Sponsor and Appellant. Those breaches carry significant weight.

55. However I do take into account that it is now just over six years since the Appellant was removed from the United Kingdom. The fact that the child in this appeal is a British citizen is not a "trump card", but it is an important point. I also attach significant weight to the fact that if the Appellant was granted entry clearance, there would be no further claim on public funds, as the Sponsor is in a position to adequately financially maintain his family.

56. If entry clearance is refused, the consequence will be either that the child is unable to live in the United Kingdom, a country of which she is a citizen, or she will be able to live in the United Kingdom with the Sponsor, and she will be permanently separated from her mother, the Appellant.

57. The assessment of proportionality involves a balancing exercise. I have set out the factors that favour entry clearance being granted, and the factors that go against the

Appellant, those factors being the breach of immigration law committed over six years ago.

58. My conclusion is that the best interests of the child in being with both parents, and being able to live in the country of which she is a national, and being adequately financially maintained and accommodated without recourse to public funds, outweighs the behaviour of the Appellant and Sponsor in breaching immigration law in 2008. For that reason I conclude that the appeal should be allowed on Article 8 grounds.

Decision

The determination of the First-tier Tribunal contained an error of law and was set aside. I substitute a fresh decision.

The appeal is dismissed under the Immigration Rules.

The appeal is allowed on human rights grounds in relation to Article 8 of the 1950 Convention.

Anonymity

Because this appeal involved the consideration of the best interests of a minor, I make an anonymity direction under rule 14 of The Tribunal Procedure (Upper Tribunal) Rules 2008. This order is to remain in place unless or until this Tribunal, or any other appropriate Court, directs otherwise. No report of these proceedings shall directly or indirectly identify the Appellant or any member of her family. Failure to comply with this direction could amount to a contempt of court.

Signed Date 9th October 2014

Deputy Upper Tribunal Judge M A Hall

FEE AWARD

The appeal has been allowed under Article 8 of the 1950 Convention. This is because I have considered evidence that was not available to the Respondent when the decision was made. There is therefore no fee award.

Signed Date 9th October 2014

Deputy Upper Tribunal Judge M A Hall