Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: OA/04988/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Determination issued**
On 7th January 2015	**On 12th January 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

LABINOT TAHIRI

Appellant

and

ENTRY CLEARANCE OFFICER, KOSOVO

Respondent

For the Appellant: Mr E MacKay, of McGlashan MacKay, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kosovo. He appeals against a determination by First-tier Tribunal Judge Watters, dismissing his appeal against refusal of entry clearance as a spouse. His wife is originally from Kosovo but now a British citizen, as are the two children of the marriage. The appellant conceded that he could not meet the financial requirements of the Immigration Rules. The judge found no good reason to look beyond the requirements of the Rules.

2. The grounds of appeal are that the judge:

> … left out of account that these British children cannot be denied the benefits of their citizenship of the European Union and … there were the same obstacles to family life continuing outwith the UK that are identified at paragraphs 106-113 of *Ogundimu* [2013] UKUT 00060.

3. The appellant's "bundle 2" in the First-tier Tribunal comprised copies of nine cases dealing with the interaction of the Immigration Rules and Article 8 of the ECHR. It does not appear that the judge's attention was drawn to any particular case or passage. *Ogundimu* is not one of the nine cases.

4. Mr MacKay opened his submission by producing a copy of *Ogundimu* and referring to paragraphs 106 to 113:

> 106. We finally, therefore, turn to the requirements of paragraph 399(b)(ii) of the rule; whether there are insurmountable obstacles to family life with JD continuing outside the United Kingdom.
>
> 107. In her refusal letter the Secretary of State fails to pay any regard to the circumstances of TS when considering this issue. TS is a nine year old British citizen (and therefore a citizen of the European Union). She is the daughter of JD. The fact that her mother, JD, is her primary carer is corroborated by Ms Best's statement, and we accept that this is so.
>
> 108. In Sanade and others (British children - Zambrano – Dereci) [2012] UKUT 48 (IAC) the Upper Tribunal [Blake P and UTJ Jordan] asked the following question of the Secretary of State (recorded at paragraph 93 of the decision):
>
> "Does the respondent agree that in a case where a non-national parent is being removed and claims it is a violation of that person's human rights to be separated from a child with whom he presently enjoys family life as an engaged parent, that a consequence of the CJEU's judgment is that it is not open to the respondent to submit that an interference can be avoided because it is reasonable to expect the child (and presumably any other parent/carer who is not facing deportation/removal) to join the appellant in the country of origin? If not why not?"
>
> 109. Mr Devereux, at that time the Assistant Director UKBA and Head of European Operation Policy, responded as follows:
>
> "We do accept, however, that in a case where a third country national is unable to claim a right to reside on the basis set out above it will not logically be possible, when assessing the compatibility of their removal or deportation with the ECHR to argue that any interference with Article 8 rights could be avoided by the family unit moving to a country which is outside of the EU".
>
> 110. Having considered the Secretary of State's response the Tribunal concluded (paragraph 95):
>
> "This means that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or to submit that it would be reasonable for them to do so…"
>
> 111. The Tribunal further clarified, when looking at the particulars facts of the case before it, that:
>
> "…as British citizens, Mrs Sanade and her children are citizens of the European Union and as such entitled to reside in the Union. The respondent properly accepts that they cannot be required to leave the Union as a matter of law…"
>
> 112. In the case of Izuazu [2013] UKUT 45 (IAC) the Secretary of State has confirmed that the response continues to apply, subject to a clarification that it only extends to the British citizen

> spouse or partner where there is in addition a British citizen child. This approach is consistent with the recent decisions of the Court of Appeal in DH (Jamaica) [2012] EWCA Civ 1736, and of the CJEU in O, S -v- Maahanmuuttovirasto [C -356/11 and 357/11: 6 December 2012].
>
> 113. Thus, in this appeal, TS cannot be required to leave the European Union to join the appellant in Africa. She needs her mother in order to exercise her residence rights in the Union. To require her mother to join the appellant in Nigeria (a country with which she has no ties of any sort and has never visited) is either to require the child to leave the European Union, or the mother to leave the child. In the latter eventuality there is no evidence of anyone else able to adequately care for the child and so the first issue would be reopened. It is certainly unreasonable to expect either TS or JD to relocate to Nigeria. In our judgment the obstacles to the mother relocating when she has to look after her young child in the United Kingdom are insurmountable, whatever the term means.

5. Mr MacKay submitted further as follows. The judge firstly went wrong by considering at paragraph 8 whether the appellant might qualify under Section EX of the Rules on the basis of insurmountable obstacles to family life continuing outside the UK. That provision does not apply to an out of country appeal. As a result, the judge misdirected himself that he did not require to undertake a *Razgar* analysis. He should have gone on to a full consideration outside the Rules. The error was material and the decision should be remade. On the authority of *Ogundimu,* it was not open to the Tribunal to conclude that interference with family life could be avoided by relocation to Kosovo. It was not necessary to consider whether that was a reasonable option. The children could simply not be denied of their rights as citizens of the EU and of the UK. Even if there were a criterion of reasonability, there was nothing to justify depriving the children of the benefits of their citizenship. A decision should be substituted in favour the appellant.

6. Mrs O'Brien replied along the following lines. Paragraph EX is not a freestanding provision and does not apply to applications made from outside the UK, so the judge misdirected himself in that respect. It is not clear what submissions the judge had on either side on the point in the First-tier Tribunal, at a time it may not have been so well understood. However, the appellant's essential complaint was about the judge's conclusion that there were no arguably good grounds for granting leave to remain outside the Rules. To succeed an appellant had to put forward something of substance. His only point recorded in the determination was that the application by its date was a near miss in relation to the major amendments to the Rules in 2012. It is well-established that a near miss is no good reason for allowing an appeal under Article 8. In- and out- of country applications are governed by different Rules and principles. *Ogundimu* was an in-country case. The family unit in this instance has never lived together, always apart. The wife although a UK citizen is also originally from Kosovo. The couple met when she was living and working there. She elected to return to the UK when pregnant with their first child. She and the appellant chose to develop their family life by way of her and the children residing here and the appellant in Kosovo, with visits each way, since 2010. The application fell short of the financial requirements by a significant margin. There had been no significant submissions by which the judge would have been entitled to allow the appeal outwith the Rules. The appellant was wrong now to assert that the Rules fall away

wherever there are UK citizen children. On a step-by-step proportionality analysis the outcome would be the same.

7. Mr MacKay in response said that the appellant's case had been under Article 8 of the ECHR only. There had been sufficient material for the judge to be satisfied that it required a full *Razgar* analysis. As a matter of EU law the children could not be required to leave the jurisdiction. It is axiomatic that it is in the best interests of children to reside with both parents. The issue could be reconciled only by allowing the appellant entry to the UK. If that implied a wholesale exception to the Rules, so be it. The weight to be given to the citizen rights of the children was so heavy as to outweigh other considerations. The appellant speaks good English, had a good job in Kosovo and would have good economic prospects here. That diminished the public interest in enforcing the Rules. If the appellant were here, the public interest as now set out in part 5A of the 2002 Act would not require his removal.

8. On that last and again novel point, Mrs O'Brien made the counter-observation that part 5A at section 117B(3) sets out the public interest in the financial independence of persons seeking to enter or remain in the UK, and that matter is quantified by the Rules.

9. Both representatives advised that so far as they are aware there is no reported decision of the Upper Tribunal or of any Court dealing specifically with the scope of Article 8 of the ECHR to permit admission of a parent to the UK where citizen children are resident and where the provisions of the Immigration Rules cannot be met.

10. I reserved my determination.

11. Mr MacKay's primary submission was that a parent of a UK citizen child must be permitted entry to the UK. That would be an easy principle to state and to apply. If that is the law, it should by now be readily identifiable in statute, the Rules or the case law. There is no such authority. I think the proposition goes much too far.

12. The first case in the appellant's bundle of authorities in the First-tier Tribunal was *MM* [2013] EWHC 1900 (Admin), which was reversed after the date of the hearing in the First-tier Tribunal: [2014] EWCA Civ 985. The Court of Appeal held that the financial requirements governing entry of non-EEA citizen spouses to the UK were not a disproportionate interference with Article 8 rights. The Court recognised that the financial requirements did constitute a significant interference with Article 8 rights, but found that the Rules struck a fair balance with which the Court was not entitled to interfere.

13. *Ogundimu* was a different case, and involved the removal of one of the parents of a British citizen child. There is no question in this case of the appellant's wife and children being required to leave the UK or the EU. The practical effect of the adverse decision is that family life may either continue as it has been to date, split between the two countries, or may be carried on in Kosovo, by way of election not compulsion.

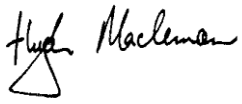
14. If the question were one of insurmountable obstacles, broadly construed as the reasonability of relocation, there is nothing to suggest that the family could not readily live in Kosovo. The appellant's wife has lived and worked there before. There is no evidence to suggest that the best interests of the children would be significantly compromised by their parents bringing them up in Kosovo, notwithstanding that they would lose advantages deriving from their citizenship. (Although not mentioned, it seems likely they are also of Kosovan nationality.) As to the reasonability of relocating, this family is at the end of the spectrum where there is no significant difficulty.

15. I do not think that any realistic challenge was or could be made to the ECO's decision on the basis of the particular circumstances of the case. The only scope lay in the wider proposition that the Rule itself is inherently disproportionate. That challenge was not addressed in the First-tier Tribunal.

16. As the Presenting Officer pointed out, the shortfall in the financial requirements is significant. Wife and children depend entirely on UK state benefits. The Rules for entry of spouses contemplate cases which also involve children, in which respect specific additional financial requirements apply. Rather than being a case which calls for attention outside the Rules, or which exhibits compelling circumstances not sufficiently recognised under the Rules, this case is exactly of the type which the Rules seek to govern.

17. The appellant made no coherent case in the First-tier Tribunal for success outside the Rules, or for the Rules to be set aside. His grounds of appeal to the Upper Tribunal show nothing which would entitle or require the Upper Tribunal to set the decision aside. The determination of the First-tier Tribunal shall stand.

18. No anonymity direction has been requested or made.



8 January 2015
Upper Tribunal Judge Macleman