Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/20346/2018 (P)

THE IMMIGRATION ACTS

Decision Under Rule 34
Without a Hearing
25th September 2020

Decision & Reasons Promulgated
On 29th September 2020

Before

UPPER TRIBUNAL JUDGE COKER

Between

MARSALA [R]

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DETERMINATION AND REASONS

1. FtT Judge Dunipace dismissed Ms [R]'s appeal against the refusal of her human rights claim for reasons set out in a decision promulgated on 1st November 2019. Permission to appeal was granted by FtT judge Ford on 31st March 2020. Directions for the further conduct of the appeal were sent on 7th July 2020 and, in the circumstances surrounding COVID 19, provision was made for the question of whether there was an error of law and if so whether the decision of the FtT Judge should be set aside to be determined on the papers.

2. The respondent complied with directions; the appellant and her legal representatives did not. There was no application to extend time by the appellant or her legal representatives. The respondent has expressed her consent to the decision on error of law being taken on the papers.

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3. I am satisfied that the submissions made on behalf of the respondent together with the papers before me[1] are sufficient to enable me to be able to take a decision on whether there is an error of law in the decision of the FtT and if so whether the decision should be set aside, on the papers and without hearing oral submissions.

Background

4. Ms [R], an Albanian citizen, first arrived in the UK as a visitor on the 16th of June 2015 with a visit visa valid until 14 November 2015. She left the UK and returned to Albania on the 27th of June 2015. On 21 August 2015 she returned to the UK as a visitor along with her son, also an Albanian citizen born in April 2003, who had a visit visa valid until the 27th of January 2016 and her daughter, an Albanian citizen born in August 2013, who had a similar visit visa. Neither she nor her two children left the UK on the expiry of the visit visas. On 15 January 2018 she made an application for leave to remain on the basis of family life with her partner with her son and daughter as her dependants.

5. That application was refused by the Secretary of State for reasons set out in a decision dated the 19th of September 2018. Miss [R] exercised her statutory right of appeal. She was informed by letter from the first-tier tribunal on 12 October 2018 that the relevant documents for the two children had been omitted and that if they were not submitted by the 19th of October 2018 the tribunal would deem that there was no valid appeal lodged by them. Those documents were not submitted and the only appeal before the first-tier tribunal was that of Ms [R]. It was agreed before the first-tier tribunal that although there was no appeal lodged by the two children the appeal should in effect deal with the position of Ms [R] and the two children because the two children were her dependants.

6. It was agreed before the first tier Tribunal judge that the appellant and her partner, who has indefinite leave to remain in the UK and is Kosovan, that she meets the criteria as laid down in the immigration rules relating to suitability, eligibility, relationship, financial requirements and the sponsor's English language requirement. It was not accepted by the respondent that there were insurmountable obstacles to the family relocating to Albania or that there were very significant obstacles to the appellant's integration into Albania. The two children were not British citizens and have not lived continuously in the UK for seven years. The older child was a child of her marriage which, the appellant states, was a forced marriage and the younger child was the child of the appellant and her partner as evidenced by a DNA report.

Error of law

7. Judge Ford, who granted permission to appeal, admirably condensed 6 pages of grounds of appeal to 2 points: that it was arguable that the tribunal erred in failing to apply the 'Chikwamba' principle and not recognising that to require the appellant and her two children to return to Albania to make entry

[1] (a) the respondent's bundle; (b) the bundle filed on behalf of the appellant received by the Tribunal on 19th July 2018 and skeleton argument dated 6th August 2019; (c) the decision of FtT Judge Dunipace; (d) the application for permission to appeal with two sets of grounds; and (e) the grant of permission to appeal.

clearance applications does not serve the public interest given that the requirements of appendix FM are otherwise met and secondly failing to adequately consider the best interests of the minor children and the impact on them of the appellant's removal.

8. The first tier Tribunal judge does not address, in terms, the so-called 'Chikwamba' principle. Nevertheless the judge specifically considers the potential disruption of family life and that the family as a whole could return to Albania. The judge specifically considers the employment opportunities available, the failure of the appellant's partner to make any enquiries as to employment opportunities for him specifically in Albania and considers in particular that he himself has visited and maintains links in Albania. The older child's father is in Albania and there is no question but that the appellant's partner would be able to return or go to Albania. It is not submitted that the family would be separated for a long period of time. That the requirements of appendix FM are met is a matter that is placed in the balance in considering whether the decision is disproportionate. In this instance the judge weighed the public interest of the maintenance of immigration control where the appellant had entered the UK, remained beyond her permitted lawful leave for some considerable time before making an application for leave to remain. The judge specifically addressed the evidence that was put before him as to the potential difficulties the appellant might meet in Albania and reached conclusions that were plainly open to him that she would not in her particular circumstances have difficulties. The skeleton argument that was before the first-tier tribunal placed considerable weight on those issues which have not been pursued in the appeal to the upper tribunal.

9. The appellant does not fulfil section 117B of the 2002 act. Although references is made to Chikwamba, the facts of this case are not the. It was not submitted that it was not possible for her partner to go to Albania, nor was it submitted that the family would be separated for some considerable time. Although the appellant may meet appendix FM, the judge reached the conclusion that there were not insurmountable obstacles to her return; she does not meet the relevant immigration Rules. In so far as the impact upon the children is concerned, the judge took account of the requirements of section 55. There does not appear to have been anything in the documents that were before the first-tier tribunal to suggest that an absence for a limited period of time would be detrimental to the younger child. There is nothing so far as can be seen, in the papers before the first-tier tribunal that would indicate whether the older child is suffering from loss of contact with his father and any other family members in Albania. The judge took a decision on the basis of the evidence in front of him which did not indicate that the children would have difficulties in re-establishing themselves in Albania or that the family would have difficulties living together in Albania. That the appellant may succeed in an application for entry clearance was a factor which the judge took into account, but it is not, in the circumstances of the evidence that was before the first tier Tribunal judge a matter that inevitably leads to a conclusion that the appeal should be allowed.

10. The judge considered the evidence that was before him which has been recorded in the decision the subject of this appeal. It is not suggested that there was other evidence which the judge failed to take into account or that the judge has incorrectly recorded evidence which was before him. It may be that another judge may have placed differential weight on different elements of the evidence, but the decision reached by the judge was a decision that was open to him on that evidence. It was not perverse or unreasonable and is not infected by an error of law.

11. There is no error of law by the first-tier tribunal judge in dismissing the appellants appeal.

Conclusions:

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

I do not set aside the decision; the decision of the first-tier tribunal dismissing the appeal stands.

Jane Coker
Upper Tribunal Judge Coker
Date 25th September 2020