



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: OA/10097/2013
OA/10098/2013

THE IMMIGRATION ACTS

Heard at Field House
On 10th June 2014

Determination Promulgated
On 14th July 2014

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

MARIGLEN ALIAJ
LIGERSA ALIAJ

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr A Mills of Counsel instructed by Kilby Jones Solicitors LLP
For the Respondent: Ms A Holmes, Home Office Presenting Officer

DETERMINATION AND REASONS
EX TEMPORE JUDGMENT

1. The first Appellant appeals with permission a decision of the First tier Tribunal promulgated on 14 March 2014, in which Judge Wiseman dismissed his appeal, brought on Article 8 grounds, against a refusal of entry clearance as a spouse. Linked to his case is that of his minor daughter. Judge Wiseman allowed her appeal on Article 8 grounds on the basis that her best interest determined that she should be able to reside with her sponsoring mother. The Respondent appeals with permission that decision. For ease of reference I refer to the parties as they were known at the First Tier. The representatives each adopted the grounds of their respective applications, Mr Mills having re-iterated the points therein in the form of a skeleton argument.
2. I find in each appeal that there no material error of law is established. I will deal with the position of the minor child first, bearing in mind her minority so that the decision in respect of her case impacts on that of the First Appellant, her father.
3. The Respondent's grounds complain, it having been conceded that her application could not succeed under the Immigration Rules, that the judge had failed to identify compelling circumstances in her situation justifying a decision allowing her appeal on Article 8 grounds outside of the Immigration Rules, or as alternatively expressed under the wider jurisdiction of Article 8 ECHR.
4. The judge found that the sponsoring mother who gave evidence before him was in all salient matters credible, and accepted her entire account, so that the background that led to her giving birth to this child in Albania rather than in the UK where she had and continues to have permanent settlement is rehearsed in the decision and is not been contested in these grounds.
5. The judge took into account the best interests arising from this Appellant's relationship with her half-sibling, a British citizen almost 14 years of age, and resident in the United Kingdom, and who, the judge found, could not reasonably be expected to relocate to Albania. In considering the Section 55 obligations in respect of that child the judge has remarked on the closeness of the relationship between him and the Second Appellant, and it is quite clear, reading the decision as a whole, that the judge found that it was in the best interests of both of these children that they should be united, able to live as a family with their mother in the UK when she is here and in Albania when she is there.
6. The judge noted the very difficult position of the mother having a 14 year old British child in education here in the United Kingdom, and her partner in Albania. The mother's need to visit Albania is self evident, and reflected by the Respondent's assertion that she can maintain her relationship with her partner by such visits, her need to spend time here follows from the need to maintain the family relationship between her and her 14 year old son here
7. The problems the immigration status of the Albanian infant Appellant caused for the mother and for Albanian infant Appellant herself, as the mother necessarily travels backwards and forwards to Albania in order to maintain those family relationships,

are self evident and do not require detailed analysis. It is in that overall context that the final conclusion in respect of proportionality so far as this minor Appellant is concerned, must be viewed.

8. Whilst the judge did not state in great detail all of the circumstances surrounding the minor Appellant, the compelling circumstances that arise in this case can be succinctly expressed as being the age of this Appellant. In the decision the judge notes the Second Appellant's date of birth in June 2011. Rather than the Judge's reasons being deficient for a lack of analysis as the grounds assert it is the respondent's grounds that fail to realise that that means that when this application was made in January 2013 she was just over 18 months old, and by the date of decision of 11th April 2013 she was not quite 2 years old. By dint of her age her reliance or dependence upon her mother is extremely significant. I am satisfied that the fact of her age is quite clearly a compelling circumstance.
9. In short I am satisfied that in the context of the facts of this case the judge's consideration of her circumstances including her age, relationship with her mother, relationship with her sibling and relationship between her sibling and her mother, meant that the determination allowing her appeal against the refusal of her entry clearance is sustainable and far from being even arguably perverse are unassailable. The judge has done enough to explain why he found the second Appellant's circumstances to be compelling and why those circumstances made the decision disproportionate. The grounds of the application, and as argued before me today, reveal no material error.
10. Turning to the appeal of the First Appellant, an adult Albanian male, the father of the first Appellant and bearing in mind the position in respect of the Second Appellant, I have considered the grounds and submissions made by Counsel, Mr Mills, and I shall deal with them for convenience in the order in which they are set out in the grounds.
11. The first point challenges the judge on the basis of his failure to consider the jurisprudence of **Boultif**, **Üner**, **Sanade**, and similar cases, concerning expulsion and the various dicta therein as to the consideration of Article 8 and the balancing exercise. Firstly, I am satisfied that the judge failing to refer to expulsion cases is not a material error. Mr Mills argues that the relevance of jurisprudence is not determined by whether they are expulsion or out of country cases. That is to ignore that the cases themselves very clearly talks about the difference between out of country and in country applications. Paragraph 48 in **Boultif** for example sets out particularly that the issues concerned are in connection with expulsion cases, and **Sanade** at paragraph 55, to which I was referred, also again expressly refers to the fact of the exposition relating to an in-country position.
12. Mr Mills argues that the context of this case is that the decision has led to the splitting up of the family. I find that misconceived, because the splitting up of the family does not arise in the context of an out of country cases. The family is living apart. The decision of course is the Appellants and the Sponsor's in terms of where

they decide they wish to found their family life, but it is subject to domestic law. This family life as between the First Appellant and his partner has been enjoyed in the context of a relationship conducted between two countries. I have not been taken to anything in terms of the expulsion cases in any event which could be shown to be determinative so as to give rise to a material error of law in this decision. I invited Mr Mills to clarify the error of approach that he sought to draw from the jurisprudence and he told me that the cases showed that the judge's approach to the criminal convictions was flawed for failure to take account of the period of time that has passed since his criminal activity. That I find is not something which assists him because in this case the judge is quite clear that the criminal activity referred to took place in 2009, and there is just no basis for inferring that the judge was not aware of the passage of time since then. Further Mr Mills asserts that the judge should have counted positively in the balance the absence of criminal convictions in the intervening period.

13. The difficulty with that submission is that the judge was not addressed specifically on the issue of conduct since the commission of the criminal offence. There was no evidence as to the First Appellant's conduct since that time. In any event the judgement does not reveal any adverse inference as to the First Appellant's conduct during that time apart from, of course, the apparent overstay/illegal entry when the Appellant came to the United Kingdom and spent some fifteen months living here illegally, following which the judge notes that he left the country in order to go to see his family. There is no evidence, for example, that he left as a result of trying to regularise his position. So there is nothing in the judgment which would go to show that the judge took into account matters that he should not have taken into account or has drawn any unsustainable adverse inference from evidence, or even the absence of evidence. It was up to the First Appellant of course to put forward his case and if he wanted to put forward evidence of his own rehabilitation or usefulness in society, then he had the opportunity to do that. The judge had to make the decision on the basis of the evidence that was before him. So in the round I find no error in the judge's approach to the First Appellant's conviction.
14. In connection with the judge's approach to the best interests of the children, Mr Mills prayed in aid the finding that the British child of the Sponsor was in the United Kingdom and could not reasonably be expected to relocate to Albania. Reading the decision in the round I find, although not perhaps as clearly expressed as it could be, that that is the obvious inference that the judge has drawn. The judge reminds himself that even if the parents can decide where the children in the family should live the child cannot reasonably be expected to relocate to Albania. However contrary to the grounds I am satisfied that the judge did not assess the best interests of John in the context of the poor immigration history or the criminality of the First Appellant. It is quite clear that the judge considered the position of John prior to the position of the First Appellant and the conclusions in respect of John are not predicated on the findings about the criminality or status of the first Appellant.
15. Turning to the question of the error regarding finances, I find that the grounds in that regard are without merit. It is quite clear from the judge's consideration that the

matters which weighed against the First Appellant and which were found to be determinative were his criminal history and his poor prior immigration status, and that those were found to outweigh the practical difficulties that arose as a result of this family having a family life split across two countries. That position is not significantly affected by the judge's decision that the baby should be allowed to travel back and forth with the mother.

16. Throughout the judge has reminded himself that this is an application which falls to be considered outside of the Rules because it is an application which cannot succeed within the Rules, and in that context the burden is on the Appellants to show that there are exceptionally, compelling circumstances that result in an unduly harsh position so as to make disproportionate a refusal to grant outside of those Rules.
17. As Counsel has recognised, it is not enough to show a near miss in the context of the requirements of the financial parts of the Immigration Rules. The judge was bound to make his decision in respect of the financial position on the evidence as it was at the date of decision, and post decision evidence is only relevant to the point that it could be established as being in existence prior or as at the date of decision.
18. In any event the judge finds that whilst the financial requirements of the Rules have not been met there would in fact be no recourse to additional public funds in the event that the First Appellant did arrive in the United Kingdom, but then went on. note that was not enough, in the circumstances of this case to show that nonetheless the Appellants should be granted entry clearance on Article 8 grounds. The judge concluding at paragraph 80 that a combination of all of the factors renders his exclusion from the United Kingdom entirely proportionate, so allowing for the financial and family matters referred to in the preceding paragraphs. In reaching that conclusion I am satisfied that the judge has correctly self-directed and that his decision is sustainable on the facts. For all of those reasons I find that there is no material error of law in either of these decisions.

Signed

Date

Deputy Upper Tribunal Judge Davidge