



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/22639/2014

THE IMMIGRATION ACTS

Heard at Field House
On 03 September 2015

Decision & Reasons Promulgated
On 16 September 2015

Before

UPPER TRIBUNAL JUDGE BLUM

Between

FLORA MUCAJ
(ANONYMITY ORDER NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Kerr, counsel, instructed by Karis Law Solicitors (counsel
however withdrew his representation during the hearing)
For the Respondent: Mr Jarvis, Senior Home Office Presenting Officer

DECISION AND REASONS

Background

1. This is a re-made decision following the setting aside of an appeal decision by Judge of the First-tier Tribunal Seelhoff who, on 27/01/2015, allowed the appeal of Ms Flora Mucaj, a 40 year old national of Kosovo, against a decision

of the appellant to refuse to grant her further leave to remain on the basis of her relationship with her British citizen husband and British citizen child.

2. The Appellant first sought leave to enter the UK in August 2010 as a visitor. That application was refused, as was a further application made in March 2011. She then unlawfully entered the UK later the same month. She made an application for leave to remain on 15 February 2013 on the basis of her Article 8 relationship with her partner, who she later married on 15 May 2014, and their child, both of who are British citizens. This application was refused and an appealable removal decision was made on 16 May 2014. The Respondent was not satisfied the Appellant met the requirements of the immigration rules or that her removal would constitute a disproportionate interference with her Article 8 rights and those of her family.
3. In allowing the appeal the First-tier Tribunal Judge placed reliance on a published policy in respect of the 10-year route for settlement applications made by individuals on the basis of parental relationships with British children (**"Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes November 2014"**). The Judge also indicated that, as a solicitor in practice, and based on his own experience, he was aware that the Respondent applied the policy in accordance with an extract the Judge relied on in his determination and, absent criminal conduct, he had not seen the parent of a British child refused leave to remain by the Home Office in the last year and a half. The Judge did not consider it was open to the appellant to argue that the parent of a British citizen should be removed in circumstances where the parents had not been found guilty of criminal conduct. Having found the respondent enjoyed family life with her husband and son, and in the absence of any contrary submission from the Presenting Officer that it was reasonable for the respondent to leave the UK, the Judge allowed the appeal on Article 8 grounds.
4. The Respondent's Grounds of Appeal to the Upper Tribunal contended that the Judge failed to apply her policy in its entirety and that there was no compulsion on the child to leave the UK as his father remained here, and that any decision by the family to relocate to the respondent's home country could in the circumstances be regarded as reasonable. The appellant further submitted that, in making reference to his own experience as a solicitor, the Judge went beyond his remit as an independent judge and that the reference to his experience of the policy was not supported by details of those other applications.
5. Having considered the representations by the parties at a hearing on 22 July 2015 I was satisfied the First-tier Tribunal Judge materially erred in law.
6. The relevant part of the Secretary of State's policy was 11.2.3. This read, in material part:

'Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British Citizen child where the effect of that decision would be to force that British child to

leave the EU, regardless of the age of that child. This reflects the European Court of Justice judgment in Zambrano.

...

Where a decision to refuse the application would require a parent or primary carer to return to a country **outside the EU**, the case must always be assessed on the basis that it would be unreasonable to expect a British Citizen child to leave the EU with that parent or primary carer.

In such cases it will usually be appropriate to grant leave to the parent or primary carer, to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

- criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;
- a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision.'

7. It is apparent from the terms of the policy that it may be appropriate for the Secretary of State to refuse to grant leave where there is another parent with whom the child could stay and the applicant has, *inter alia*, engaged in criminality or has a 'very poor immigration history'.
8. It was accepted by Mr Kerr, who represented the Appellant at the hearing before me on 22 July 2015, that, apart from a brief reference to the Appellant's immigration history, the Judge did not give any further consideration to the nature of her immigration history. In applying the policy it was incumbent on the Judge to have considered whether the Appellant did indeed have a 'very poor immigration history'. I additionally found it inappropriate for the Judge to have referred to his own experience of the Respondent's application of her policy in circumstances where the Judge only provided a limited extract of that policy, where no mention was made by him of the 'very poor immigration history' aspect of the policy, and where it was impossible to have considered

the particular details of the applications with which the Judge was involved in his capacity as a solicitor.

9. Mr Kerr requested an adjournment of the hearing to enable further written and oral evidence to be adduced in relation to the claim, both in terms of Appendix FM and in terms of any 'free-standing' Article 8 claim outside the immigration rules. I granted the adjournment application and I reheard the appeal on 03 September 2015.

The rehearing

10. For the rehearing the Appellant provided a bundle of documents containing, *inter alia*, amended statements from her and her partner (Gentjan Hyseni), his passport, their marriage certificate, the birth certificate of their son (Leo), a letter from Salusbury Primary School, a notification of discharge in respect of the Appellant's admission to St Mary's hospital on 07 July 2011 following a miscarriage, a letter from London Pubs confirming the partner's employment and supporting payslips, an English language certificate relating to the Appellant and a number of photographs. I was also provided with a skeleton argument by Mr Kerr.
11. As a preliminary matter Mr Jarvis sought to amend the Reasons For Refusal Letter to include, as a further reason for refusal under the suitability (S-LTR) requirements, reference to the Appellant's immigration history. This point had not been taken either in the initial decision, or before the First-tier Tribunal, or in the Grounds of Appeal to the Upper Tribunal. The application was not however opposed by Mr Kerr, subject to the existence of any authority precluding the raising of such grounds at this late stage. Given that the Appellant's immigration history had already been identified and relied on in the Reasons For Refusal Letter, I gave permission to Mr Jarvis to accordingly amend the Reasons For Refusal Letter.
12. The Appellant's partner, Mr Gentjan Hyseni, signed and adopted his amended statement. In this document he indicated that he had lived in the United Kingdom since 1998 and gave details of his employment history. He claimed his current employment as a second chef was £26,000 and that, with bonuses in respect of which he was entitled to receive, his annual income was nearer a total of £30,000. He met the Appellant whilst on holiday in Albania and their son, Leo, was born on 20 Aug 2012. Their son was due to commence nursery on 16 September 2015. The partner was in a serious relationship with the Appellant and he believed their entire life was based in the United Kingdom. It was not therefore possible to relocate outside the United Kingdom.
13. In examination-in-chief the partner explained that if the Appellant returned to Albania and he had to look after their son he would have to give up his full-time job. He would then be unable to pay their rent of £1,200 a month or buy clothes or food. Nor would he be able to help the Appellant with any future legal fees relating to any entry clearance application. His son received 15 hours free child care time a week from the government. The partner had asked friends

if they could help look after his son but they had their own families or jobs. If his son went to Albania he would lose his place at nursery if he failed to regularly attend. He may also encounter difficulties in speaking and understanding English if he had to remain outside the United Kingdom for any significant period.

14. In cross-examination the partner denied being from Albania and said he came from Kosovo. Neither he nor the Appellant had any family in the United Kingdom. The partner had made inquiries about childcare provision in his area but it was expensive. It would cost at least £1,000 a month as a minimum. The partner could obtain vouchers from his employer leading to a 20% discount in child care costs. The partner had asked his friends whether they could provide childcare but the friends were either too busy or were not bothered about it. The partner denied knowing that the Appellant intended to enter the United Kingdom illegally. He knew she was going to enter 'one way or another'. When asked whether he expected her to enter the United Kingdom illegally the partner answered, "you could say that."
15. The partner said the Appellant paid an agent 3,000 Euros in Brussels to assist her entry. He gave her the money because she needed to live in Belgium and that money obviously helped her to come here. Her 2nd entry clearance application, which was made in Paris, took about 3 weeks to a month to process. The Appellant's intention was to meet her partner in the United Kingdom so they could get to know each other better and then she would return.
16. In re-examination the partner was asked why his son's birth certificate indicated he came from Albania. The partner again confirmed he came from Kosovo and explained that, when the birth was registered, the registrar did not have Kosovo listed on his computer and so they went with Albania instead. The partner said his place of birth, Peqin, was a small village in Mitrovica.
17. The Appellant signed and adopted her statement, amending it as she was born in Kukes but her family lived in Durres. She first met her partner in the summer of 2008 when he was holidaying in Albania and their relationship commenced about a year later. She took advice about applying to stay in the United Kingdom after she entered in March 2011 but did not apply straight away because she became pregnant soon after her arrival and miscarried on 7 July 2011, and because she was advised to first learn English and obtain an English language test, which she did in December 2012. When refused her entry clearance application in Tirana in 2010 she was aware that people could pay £7,000 to corrupt staff to obtain a visa. She did not want to be involved in this activity but also felt it was impossible to obtain a visa lawfully and therefore chose to enter without permission. Her partner would not be able to look after their child because he worked 50 hours a week and often had long shifts into the night.

18. In examination-in-chief the Appellant said her partner was born in Mitrovica. At this point Mr Kerr indicated that, as a result of professional embarrassment, he felt he had to withdraw his representation. There then followed a discussion between the representatives as to whether to adjourn the hearing to enable the Appellant to obtain fresh representation. The sponsor indicated that the Appellant was emotional and he himself was taken by surprise by the withdrawal, but said that he was likely to represent himself if the appeal hearing was adjourned. I heard from the Appellant. She agreed with her partner and said they did not have the means to hire another lawyer. She said she was not emotionally able to continue.
19. Given the indication from the Appellant and her partner that they were not likely to be legally represented at any adjourned hearing I saw no utility in adjourning the hearing for that purpose. I indicated to the Appellant that I would put the appeal hearing back in the list to enable her to compose herself. At 11:25 am I adjourned the hearing. The partner remained in the hearing room while I heard another appeal. The hearing re-commenced at 11:50.
20. I first satisfied myself that the Appellant felt able to proceed with the hearing. In the absence of any legal representative I asked the Appellant a number of questions in order to clarify her evidence. She explained that her intention at the time of her visitor application in 2011 was to come to the United Kingdom to spend time with her husband and to regularise her stay. She feared that her parents would try to get her engaged to another person if she had returned to Albania. She believed that if she spent time with her partner her parents would accept her choice. She intended to enter the United Kingdom legally. When asked what was preventing her returning to Albania with her son and making an entry clearance application the Appellant said she was not on good terms with her family and would have no support. Such a move would interrupt her son's life in the United Kingdom. She had not previously mentioned the problems with her family because she did not want to speak about her private life. She had told her husband not to speak about her private life in detail. She feared her brothers as they had rejected her. In their opinion she had dishonoured the family. Her brothers worked in Tirana, where the embassy was, and it would be easy for them to find her. She was worried her son may lose his nursery place if he accompanied her to Albania and the absence from the United Kingdom may affect his English.
21. In cross-examination the Appellant confirmed that her partner was born in Mitrovica. She did not know why his place of birth was recorded as Albania in their son's birth certificate because, at the time of the registration of the birth, her English was poor. When asked about her entry clearance application in 2011, the Appellant said if it was granted it would have made it easier for her to attempt to then extend her visa. When challenged about the late disclosure of the difficulties with her family the Appellant said she had been reluctant to use this as an excuse to remain in the United Kingdom. The Appellant denied using an agent to help her gain entry to the United Kingdom in 2011. On the Belgian

border she paid 300 Euros to obtain an ID card. She obtained the funds from a female friend. Other than this, she paid no money to anyone to get her into the United Kingdom. She did not tell her partner she was going to try to enter the United Kingdom illegally. The Appellant was aware that her partner spoke to some friends about possible childcare. They were unable to help because of work and other social commitments. Her partner had no family in Kosovo and she did not think he had any family elsewhere. Her application in 2010 took about a month to process.

22. In his submissions Mr Jarvis stated that the Appellant fell foul of the Suitability requirements in S-LTR.1.6. and 2.2. Under 1.6. The Appellant's presence was not conducive because her immigration history made it undesirable for her to remain in the United Kingdom. She had engaged in deliberate behaviour designed to breach immigration control. If she had obtained entry clearance as a visitor she always intended to remain in the United Kingdom. Mr Jarvis submitted that the obtaining of an ID card was serious, although he accepted that there was no evidence as to how, where, or when such an ID had been used. There was no tension between S-LTR.1.6. and E-LTRP.2.2. If I accepted his submissions relating to the Suitability grounds the Appellant could not avail herself of EX.1. and there would have to be consideration outside of the immigration rules. However, if I found that the refusal under S-LTR.1.6. was not made out, Mr Jarvis accepted, based on the Appendix FM 1.0 Family Life (as a Partner or Parent) and Private Life: 10-Year Routes of November 2014 and an absence of instruction to him on the Guidance, that it would be unreasonable for the child to leave the United Kingdom. Mr Jarvis then made submissions in relation to the broader Article 8 assessment with reference to the factors identified in sections 117A and B of the Nationality, Immigration and Asylum Act 2002.
23. The Appellant submitted that she wished to remain in the United Kingdom with her partner and their child. She believed she would not be issued a visa if she returned to Albania. She was not a person of bad character. She was a good person. Nothing bad would come to the United Kingdom from her. She wanted a happy life and wanted what was best for her son.

Findings

24. I allowed Mr Jarvis to amend the basis of the refusal decision to include reference to the suitability requirements, even though it was sought at the hearing and had not previously been raised at any stage, because there was no objection from Mr Kerr and because the Appellant's immigration history had already been relied on in the Reasons For Refusal Letter, albeit in a different context.
25. S-LTR.1.6. reads,

‘The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall

within paragraphs S-LTR.1.3 to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.'

26. Refusal under this provision is mandatory. It is for the Respondent to prove, on the balance of probabilities, that the Appellant's presence is not conducive to the public good such that it is undesirable for her to remain in the United Kingdom.
27. Mr Jarvis submitted that the Appellant sought to enter the United Kingdom as a visitor when she had no intention of leaving had her application been granted, that she then entered illegally, that she delayed her regularisation application, and that she had previously obtained a false ID. He submitted these were serious factors.
28. In assessing whether the amended decision properly refused the application under the Suitability requirements I have considered the whole of the evidence before me. There were several inconsistencies between the evidence from the Appellant and that of her partner. The partner said the Appellant paid 3,000 Euros to an agent to assist her entry to the United Kingdom, but the Appellant claimed she only paid 300 Euros to someone to obtain an ID card in Belgium. The partner said it was the Appellant's intention, when she made her second entry clearance application from Paris, to get to know each other and she would then return. The Appellant indicated that she wished to legally enter the United Kingdom and, once in the United Kingdom, intended to apply for further leave to remain. There was additionally a material omission in the Appellant's evidence relating to her reasons for not wishing to return to Albania. At the hearing she claimed her family would try to make her marry someone else and that, by refusing to do so and marrying her partner, she had brought shame on her family. There was however no previous mention by the Appellant of this reason for not wishing to return to Albania despite the fact that she has been legally represented. Nor was there any mention of this reason by her partner. The Appellant sought to explain this omission by stating that she did not like talking of her family. I am not however satisfied this is a credible explanation given the fact that the Appellant was legally represented and the centrality to the appeal of the reasonableness of her return to Albania.
29. Although I hold these inconsistencies and omission against the Appellant and her partner in terms of their general credibility, in light of the following assessment, I do not find that, by and of themselves, they render the Appellant's presence as being not conducive to the public good.
30. The Appellant made a visitor application from Tirana in 2010. Her evidence, consistently given with that of her partner, was that this application was to enable them to get to know each other better and that she intended to return after the visit. There was no further challenge from the Presenting Officer to the explanation offered for this visitor application. In these circumstances, and in light of the fact that the relationship between the Appellant and her partner had only relatively recently commenced, I am prepared to accept that the Appellant

did intend to enter the United Kingdom to get to better know the man who would become her partner while retaining the intention to return to Albania.

31. The Appellant admitted that, if granted entry clearance in 2011, she wished to extend her visa after entering the United Kingdom. It was not clear to me whether the Appellant realised she would, as a result of the immigration rules, be unable to extend her visitor entry clearance after entering the United Kingdom in order to remain with her partner. She gave the strong impression during her evidence that she believed she would be entering the United Kingdom entirely legally as a visitor and that she did not practice any intentional deception in her visitor application. There certainly is no evidence before me that the Appellant did use any intentional deception in her application in the sense that she mislead the British High Commission as to the basis for her entry to the United Kingdom.
32. The Appellant explained that she did not immediately seek to regularise her status after entering the United Kingdom because, on advice, she was told to obtain an English language certificate, and that she had miscarried. I have seen evidence, identified at paragraph 10 of this decision, both of the English language certificate obtained by the Appellant in 2012 and of her miscarriage in July 2011. I find it inherently credible that someone who had undergone a miscarriage would be emotionally upset and that this may have inhibited her from making an earlier application. I also find inherently plausible her explanation that she was advised to obtain some evidence of her proficiency in English before making an application for leave to remain. I additionally note that her application was made within two years of her entry to the United Kingdom. Having holistic regard to the circumstances of her regularisation application I do not find the delay significantly adds to the Respondent's view that her presence is not conducive to the public good. I am reinforced in this conclusion by reference to the fact that the Appellant voluntarily sought to regularise her status, and that she has been fully compliant with the immigration rules and all conditions imposed on her. There is no suggestion that she used any alias in any application to the Respondent or that she worked illegally.
33. The Appellant claimed she obtained an identity card, presumably not in her identity, while in Belgium. The Appellant did not say that she used this identity card to enter the United Kingdom, or that it was ever presented to immigration officers. Mr Jarvis did not explore whether this card was used at all in order to facilitate the Appellant's entry into France from Belgium. In these circumstances I do not find that the obtaining of an identity card in itself renders the Appellant's presence not conducive to the public good.
34. I am satisfied, having considered the Appellant's illegal entry into the United Kingdom, that there is a lack of any aggravating features such as to render her presence not conducive to the public good under the Suitability requirements. There is no suggestion that the Appellant ever sought to obtain public funds in respect of which she was not entitled, or that she ever used an alias in the

United Kingdom. There is no evidence that she worked illegally in the United Kingdom. Nor am I satisfied, in light of my findings in paragraphs 30 & 31 above, that the Appellant ever intended to deceive the British High Commission in respect of her application to enter the United Kingdom in either 2010 or 2011. Since submitting her application she has observed the conditions imposed on her. Having holistic regard to these factors I am not satisfied the amended refusal under S-LTR.1.6. is made out.

35. Mr Jarvis identified S-LTR. 2.2. (in respect of the provision of false information or a failure to disclose material facts in relation to an application) as being potentially applicable in respect of the partner's place of birth, and possible nationality. As Mr Jarvis however accepted there was no inconsistency between the Appellant's evidence and that of her partner relating to his origins, and his explanation as to why his son's birth certificate had his nationality as Albanian was not challenged. In these circumstances there is no basis, on the evidence before the Tribunal, to find that S-LTR. 2.2. was made out.
36. In light of the above findings I am not satisfied that the Appellant has a 'very poor immigration history'. In these circumstances, as was accepted by Mr Jarvis, the Appellant appears to fall within the terms of the Respondent's stated policy identified at paragraph 6 of this determination. The Appellant's conduct has not, on my finding, given rise to considerations of such weight as to justify separation of mother from young child. Although she entered the United Kingdom illegally I am satisfied the Appellant has not repeatedly and deliberately breached the immigration rules. The Respondent's own policy indicates that it is not reasonable, absent criminality or a very poor immigration history, to expect a British national child to leave the United Kingdom. I am further satisfied that, as a result of the shift work and long hours of his father's employment, and the absence of any other family or individual who could reasonably provide child care, the child would have to leave the United Kingdom. I therefore allow the appeal on the basis that the Appellant meets the requirement for leave to remain as a partner under R-LTRP.1.1(d), EX.1 having been made out in respect of the Appellant's relationship with her British national child.

Decision:

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I remake that decision allowing the Appellant's appeal.



Signed:
Upper Tribunal Judge Blum

15 September 2015
Date: