



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/02416/2013

THE IMMIGRATION ACTS

Heard at Field House
On 5 November 2013

Determination Promulgated
On 14 November 2013

Before

THE HON MR JUSTICE CRANSTON
UPPER TRIBUNAL JUDGE MOULDEN

Between

MR JULIO STERMILLA
(No Anonymity Direction Made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Lams of counsel instructed by Scudmores solicitors

For the Respondent: Ms Z Kiss a Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. This is the determination of the Tribunal. The appellant is a citizen of Albania who was born on 6 May 1990. He has been given permission to appeal the determination of First-Tier Tribunal Judge M R Oliver ("the FTTJ") who dismissed his appeal against the respondent's decision of 16 January 2013 to remove him from the UK following his claim to remain here on human rights grounds.
2. The appellant arrived in the UK illegally on 29 November 2007 hidden in the back of a lorry. He was not detected until 28 December 2012 when he was

arrested on suspicion of handling stolen goods and illegal entry. He was detained but then granted temporary release. There was no prosecution.

3. The appellant's solicitors wrote two letters to the respondent in January 2013 asking that he be allowed to remain in the UK on Article 8 human rights grounds. He claimed to have been in a long-term relationship with his partner, Ms Valentina Lipovica for three and a half years and to have lived with her since 2010. The respondent concluded that the appellant did not qualify for leave to remain under the provisions of Article 8 set out in Appendix FM to the Immigration Rules on the basis of private or family life. There were no exceptional circumstances. The application was rejected with a right of appeal.
4. The appellant appealed and the appeal was heard by the FTTJ on 21 March 2013. Both parties were represented, the appellant by Mr Lams who appears before us. The judge heard oral evidence from the appellant, his partner and her mother and sisters.
5. The FTTJ found that the appellant was an economic migrant with no regard for the immigration rules. His credibility was damaged. Whilst his relationship with his partner was probably genuine he concluded that it had not "yet reached a depth which engaged considerations of family life". The appellant did not qualify under the suitability requirements of Appendix FM because of his breach of the immigration rules and his lack of status in the UK. His partner could return to Albania with him if he wished to make an application from abroad. If it came to the question of proportionality then it would be a proportionate interference with the human rights of the appellant and his partner to remove him from the UK. The FTTJ dismissed the appeal on human rights grounds.
6. The appellant applied for permission to appeal which was granted by a judge in the First-Tier Tribunal. There was a Rule 24 response from the respondent dated 28 May 2013 on which she continues to rely. The appeal to the Upper Tribunal came before Deputy Upper Tribunal Judge Woodcraft ("the DUTJ") on 20 June 2013. He found that the FTTJ did not err in law and upheld the decision to dismiss the appellant's appeal.
7. The appellant applied for permission to appeal to the Court of Appeal. The application was considered by Upper Tribunal Judge King who was of the view that the DUTJ had erred in law and that his decision should be set aside under Rule 43 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Notice of the proposal that the determination of the DUTJ should be set aside was sent to the parties and their representatives on 20 August 2013 requiring a response within 14 days. Subsequently, on 23 September 2013 Upper Tribunal Judge King set aside the decision of the DUTJ. He gave directions and ordered that the appeal against the decision of the FTTJ be reheard by the Upper Tribunal in ordered to consider whether he erred in law and if so whether his decision should be set aside and remade.

8. The appellant's solicitors have resubmitted the bundle which was before the FTTJ. They have also submitted a supplementary bundle containing a further witness statement from the appellant's partner's mother and other documents which were not before the FTTJ. On the morning of the hearing Mr Lams submitted extracts from the UKBA Operational Guidance Note dated 30 April 2013 and the COIS report on Albania dated 29 March 2012. These were not before the FTTJ. They do not need to be considered unless we set aside the decision of the FTTJ. Mr Lams also submitted a skeleton argument.
9. Mr Lams relied on the original grounds of appeal and his skeleton argument. There are four grounds of appeal all of which are said to identify errors of law. The first is that the FTTJ failed to make sufficient findings of fact about the relationship between the appellant and his partner and in particular the period during which they cohabited. It is argued that this is crucial to the issues of whether they were in a "genuine and subsisting relationship" and whether the relationship amounted to a family life. In the alternative it is argued that the FTTJ implicitly accepted the appellant's account of the period of cohabitation and that the finding that the relationship was not have a sufficient depth to engage considerations of family life was irrational. Finally, that the judge failed to consider whether family life arose with the other members of the appellant's partner's family.
10. We find that in relation to the first ground the FTTJ erred in law. His findings as to the relationship between the appellant and his partner are unclear. Whilst accepting that their relationship "is probably perfectly genuine" there is no finding as to the length of the relationship and a lack of clarity as to what is meant by a relationship of "a depth which engages considerations of family life". It is not clear whether this involves duration, durability or other factors. Whilst he does deal with the genuine element of "a genuine and subsisting relationship" in Section EX he does not address the question of whether the relationship is subsisting. Findings as to the duration of the relationship between the appellant and his partner and whether the relationship was subsisting were needed but we cannot find them either in terms or by implication.
11. The second ground argues that the FTTJ applied an incorrect test. This was not whether the appellant "would not qualify under the suitability requirements of appendix FM because of his breach of the immigration rules and lack of status in the United Kingdom". The correct test should have been whether the appellant came within the exception in Section EX to Appendix FM. The FTTJ failed to consider this.
12. We find that the FTTJ erred in this way. The correct test was whether the appellant could bring himself within the exception in Section EX to Appendix FM. This is within the part of Appendix FM which deals with eligibility for indefinite leave to remain as a partner. The FTTJ appears to have had in mind the provisions as to suitability for leave to remain in Section S-LTR. It has not been suggested that the appellant falls foul of these which relate to matters

such as being the subject of a deportation order, having a conviction which results a sentence of imprisonment above the minimum duration, being a persistent offender, bad conduct or character or failure to attend an interview or provide specified information.

13. The third ground submits that the FTTJ did not make clear what test he was applying in his consideration of Article 8 proportionality. He should have applied a test of reasonableness rather than insurmountable obstacles. Had he done so it would not have been open to him on the evidence to come to the conclusion that it would be reasonable to expect the appellant to return to Albania and to make an entry clearance application from there.
14. We find that this ground does establish an error of law. In dealing with Article 8 outside the Immigration Rules in paragraph 11 of his determination the FTTJ did not say that he was applying a test of whether there were insurmountable obstacles in considering whether the appellant's partner should be expected to return to Albania. However, he did not say what test he was applying and dealt only with whether the appellant's partner could return with him in order for him to make an entry clearance application to return to the UK, not the position if it was necessary for her to remain with him in Albania on a longer term or permanent basis.
15. The fourth ground argues that the judge erred in failing to apply the concession made by the respondent in Sanade and others (British children - Zambrano - Dereci) India [2012] UKUT 48 (IAC) that where the appellant's partner was a British citizen and therefore an EU citizen it would not be possible to require her to relocate outside the EU or reasonable to expect her to do so.
16. We find that this ground also establishes an error of law. The chronology and skeleton argument before the FTTJ raised the issue which he did not deal with.
17. Having found that the FTTJ erred in law we set aside his decision which we now remake. We admit and consider the new evidence submitted by the appellant's representatives to which we have referred. The only additional witness statement is that from the appellant's partner's mother dated 30 October 2013. She did not attend the hearing and whilst we were told that there might be health reasons there was no medical or other evidence to support this. There was no application to call other witnesses and Mr Lams accepted that his submissions covered all that he wished to say in relation to the question of error of law and the remaking of the decision.
18. There has been no attack on the FTTJ's findings of fact except where it is argued that further findings should have but were not made. We take his findings of fact as our starting point.
19. We find that the appellant met his partner, who is a British citizen, sometime in mid 2009. They started living together in her mother's home in Hampstead

in early 2010. The accommodation was, as the appellant admits, overcrowded, and he moved out from time to time. Subsequently the appellant and his partner rented a flat in Denmark Hill and moved in together in January 2013. They are now living there. The FTTJ found that their relationship was probably genuine. We find that it is genuine and subsisting.

20. The appellant's partner is an ethnic Albanian who came to this country from Kosovo when she was seven years old. She is now British citizen. She and the appellant are engaged to be married but have not yet married. Before she moved in with the appellant she lived with her mother and five siblings. There are four sisters and two brothers. She is the eldest and the sisters are aged 21, 19 and 18. The two youngest sisters appear to be twins and one of them has cerebral palsy. There are two younger brothers. All the children, except for the appellant's partner, are living together in Hampstead. Their father is not living with them and their mother's evidence is that there has been a long history of domestic violence and that he was sentenced to a term of imprisonment because of violence towards her and the children. There is some confirmation of the allegations of domestic violence in a letter from the mother's solicitors dated 10 November 2012 which refers to a possible application for a non-molestation order.
21. The appellant's partner met him whilst she was working at a souvenir shop in the West End of London. She still works there part-time although her hours of work and pay are not clear. We accept that the sister who suffers from cerebral palsy requires considerable personal care some of which cannot or should not be provided by her younger brothers. In the absence of oral evidence from the mother and either further witness statements or evidence from the appellant's partner and the sisters who attended the hearing before us we do not accept that the appellant's partner provides her sister with care every day or that there are good reasons why the other two adult sisters could not assist their mother to do so. The appellant's partner is working part-time and living on the other side of London. Her sisters may be in continuing education, as Mr Lams suggested, but we have no evidence about this and, unlike the appellant's partner, they are living in the same household as their sister who needs the care. Both are young adults.
22. The appellant has said that he applied for asylum after he arrived in this country in November 2007 but did not pursue the claim. There is no documentary evidence to support this and we do not accept that he made a claim for asylum. We find that he entered the country illegally and remained here knowing full well that he had no right to be here. He also worked illegally washing cars. He did not obtain a National Insurance number, has not paid tax or National Insurance contributions and has worked for "cash in hand" in the hope that he would remain undetected. He admitted that if he had not been detected he would have gone on living in this country illegally.
23. We do not accept that the appellant was prevented from returning to Albania through any genuine fear of what might happen to him there. We find that,

contrary to the suggestion made by the respondent, he did not make a mistake as to his partner's date of birth. He has not been charged with or convicted of any offence whilst in this country. Whilst we accept that the appellant's family in Albania may well be displeased with his choice of partner and that she was not the person of their choosing we do not accept that they would not accommodate or assist the appellant and his partner were they to return to Albania. It is not clear exactly what the appellant means by the statement that his parents have "effectively disowned" him. The appellant has spent more of his life in Albania than he has in the UK, including his formative years.

24. The appellant and his partner are both young and in good health. He managed to find work, albeit illegally, and survive in this country without having any family or support when he arrived. Clearly English is not his first language and at the hearing before the FTTJ he still preferred to give evidence through an interpreter. If he returns to Albania will not be a strange country, he will be speaking his first language and his family will probably help him. It is important that they have no children, together or separately.
25. The appellant's partner comes from Kosovo, not Albania, but they are both ethnic Albanians and both speak the same language. There is no evidence before us to suggest that they will have any difficulties with different dialects. She has no family in Albania and all her large family and her friends are in the UK. Neither the appellant nor his partner have said anything about any religious difficulties.
26. The Operational Guidance Note on Albania shows that violence against women is "very prevalent" in Albania, particularly in the North East. There is societal discrimination against women who, if they need it, are not likely to obtain protection from the authorities. However, the appellant's partner would not be going to Albania as a female child, a single woman, a woman who has been subjected to familial or spousal violence in that country or a woman who is at risk because of trafficking or for some other reason. She would be going with and be protected by the appellant who knows the country. There is no suggestion that he has ill treated her in any way.
27. The question of whether the appellant can succeed on Article 8 human rights grounds under the Immigration Rules is governed by Appendix FM. The appellant cannot meet the requirements for leave to remain as a partner because he has been in the UK in breach of immigration laws unless paragraph EX1 applies. The relevant provision of paragraph EX1 is that; "(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK". We have found that there is a genuine and subsisting relationship with a British citizen which leaves the question of whether there are insurmountable obstacles to family life with his partner continuing outside the UK.

28. The appellant's partner has said that if there was no other way she would be prepared to go back to Albania with the appellant "in order to bring him back" which we take to mean whilst he makes an application for entry clearance and settlement. Clearly this does not mean that she is willing to go and live in Albania either for a longer period or permanently. However, it is an indication that she does not think that there are considerations which would prevent her from going to that country at all. We find that there are no insurmountable obstacles to family life between the appellant and his partner continuing outside the UK. They have no children whose best interests need to be considered. There are no serious threats to their personal safety. The appellant knows the country well and whilst his partner does not they are both of Albanian ethnicity and speak the language. Both have already shown an ability to acclimatise to a new country and a new culture, albeit that the appellant's partner did so at a young age. If the appellant's partner goes and lives with him in Albania she can keep in touch with her family by modern methods of communication and, as a British citizen, there is nothing to prevent her from visiting them as often as she wishes and can afford.

29. In the light of our findings of fact we also conclude that the appellant has not established that there are exceptional circumstances as defined in paragraph 353B of the Immigration Rules. Whilst he has not been convicted of any criminal offence he has not complied with any conditions attached to any grant of leave to enter or remain because he never had any leave of any kind. He arrived in 2007 but has never been here legally.

30. We do not consider that Sanade is authority for the proposition that because the appellant's partner is a British citizen and in the circumstances of this case the respondent's concession means that it is not possible to require the appellant to relocate outside the EU. The proposition is encapsulated in paragraph 5 of the summary prepared by the author of the determination in the following terms; "Case C-34/09 Ruiz Zambrano now makes it clear that where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, as a matter of EU law it is not possible to require the family as a unit to relocate outside of the European Union or for the Secretary of State to submit that it would be reasonable for them to do so."

31. This summary is derived from paragraphs 93 to 95 which state;

93. Finally, we note that a further question on which we asked for the respondent's assistance was in these terms:

"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?"

94. To this Mr Devereux replied on 24 November 2011:

"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".

95. We shall take this helpful submission into account when we consider the application of Article 8 to each appellant's case. We agree with it. 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. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with the family life is to be justified, it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

32. Taking together the question asked of the respondent and her response we read her concession as applying to an individual who would be separated from a child with whom he or she presently enjoys family life as an engaged parent and that child's other parent or carer. The conclusion of the Tribunal in paragraph 95 relates to a child with a remaining spouse, not a remaining spouse where there is no child. The facts of the appeal before us are very different. There are no children.

33. We find that there is a lack of current authority providing clear guidance as to whether there should be any consideration of Article 8 human rights grounds outside the provisions of the current Immigration Rules and if so whether this is a one step test involving consideration of exceptional circumstances under or independently of paragraph 353B of the Immigration Rules or a two step test involving consideration of Article 8 jurisprudence as it evolved before the coming into effect of the new Immigration Rules.

34. MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192 was a deportation case which this appeal is not. However, we find that the principles addressed provide sufficient indication, particularly in paragraph 46, that we should carry out a two-stage process and consider Article 8 jurisprudence outside the new Immigration Rules.

35. Applying Razgar, R (on the Application of) v. Secretary of State for the Home Department [2004] UKHL 27 principles we find that the proposed removal of the appellant would be an interference by a public authority with the exercise of his and his partner's right to respect for their private and family lives. The interference would have consequences of such gravity as potentially to engage the operation of Article 8. The interference would be in accordance with the law. It would be 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. The issue turns on whether such interference would be proportionate to the legitimate public end sought to be achieved. It is for the respondent to establish that the interference is proportionate to the standard of the balance of probabilities.
36. Whilst the appellant has a private life in this country which includes his relationship with his partner's family his only true family life is with his partner. If we were considering only the proportionality of the interference with his Article 8 human rights in the context of our findings of fact including the fact that he entered the country illegally and has never had any right to be here we would unhesitatingly come to the conclusion that his removal would be a proportionate interference. However, we must also consider his partner's Article 8 human rights. In this context the test is not whether there are insurmountable obstacles to her going to live with the appellant in Albania but whether, in the light of what is said in VW (Uganda) v Secretary of State for the Home Department [2009] EWCA Civ 5 (paragraph 19) on a balanced assessment she can reasonably be expected to do so in the light of all the material facts.
37. In the light of all the material facts which we have found and for the reasons we have already given in relation to the question of whether there are insurmountable obstacles to family life continuing outside the UK we go further and find that the appellants partner can reasonably be expected to go and live with him in Albania or, indeed, should they choose anywhere else outside the UK and the EU.
38. We have not been asked to anonymise this determination and can see no good reason to do so.
39. Having set aside the decision of the FTTJ we substitute our decision and dismiss the appellant's appeal.

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Signed
Upper Tribunal Judge Moulden

Date 9 November 2013