



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/20666/2016

THE IMMIGRATION ACTS

**Heard at Field House
On 26 September 2018**

**Determination
Promulgated
On 10 December 2018**

Before

UPPER TRIBUNAL JUDGE CONWAY

Between

**MEKAIL [K]
(No anonymity order made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Harding of Counsel

For the Respondent: Mr Lindsay, Home Office Presenting Officer

DECISION AND REASONS

- 1.** The appellant is a citizen of Albania born in 1979. He appealed against a decision of the respondent made on 17 August 2016 to refuse his application for leave to remain on human rights grounds.
- 2.** The respondent noted a long immigration history. In summary, since his first arrival in 1999 he has been removed on six occasions. He has used

nine false identities and four nationalities as well as false documents. He has seven convictions for nineteen offences including failure to surrender to custody, taking a motor vehicle without consent, driving without insurance, burglary and possessing a listed false instrument. Some of the car crimes were repeated. His last conviction was in 2007. An asylum claim made in 2010 was refused and dismissed on appeal in 2011.

- 3.** The respondent concluded that the appellant did not satisfy the suitability requirements of the Immigration Rules for leave to remain on the basis of his relationship with his partner, Ms [B] and his children as his presence in the UK was not considered to be conducive to the public good given his criminal and immigration history.
- 4.** Also, it was not accepted that he has sole responsibility for his children or that they normally live with him and not their mother; nor that he has a significant involvement in their daily life. Further, there would not be insurmountable obstacles to maintaining a relationship with his children from overseas by way of modern means of communication.
- 5.** Moreover, he did not meet the suitability requirements under the private life provisions in paragraph 276ADE because of his convictions and immigration history; he had not shown that he would face very significant obstacles to integration in Albania.
- 6.** Finally, there were no exceptional circumstances to warrant a grant of leave to remain outside the Rules given his criminal and immigration history.
- 7.** He appealed.

First-tier Hearing

- 8.** Following a hearing at Hatton Cross on 11 January 2018 Judge of the First-tier Tribunal Bowler dismissed the appeal.
- 9.** Her findings are at paragraph [47] ff. In summary, the appellant has a very poor immigration history having repeatedly and deliberately breached the Immigration Rules. He has never been granted any leave in the UK. He has been removed from the UK six times in some twelve years. He has used nine false identities and four nationalities as well as false documents.
- 10.** He has received seven convictions for nineteen offences including failure to surrender to custody, taking a motor vehicle without consent, driving without insurance, violent disorder, burglary and possessing a listed false instrument. Some of the car related crimes were repeated.
- 11.** Whilst he has not been convicted since 2007 the judge concluded that S-LTR 1.6 (presence of the applicant in the UK is not conducive to the public

good because the conduct (including convictions which do not fall within the other suitability paragraphs), character, associations or other reasons make it undesirable to allow him to remain in the UK) applies.

- 12.** The judge then went on to consider the family situation.
- 13.** She found that the appellant's partner had come from Kosovo and was granted refugee status. She is now a British citizen. The appellant is father to three children born in 2007, 2010 and 2014. His partner also has a daughter born in 2004 from a different relationship. All the children are British citizens.
- 14.** The judge concluded that there was family life which engaged Article 8 between the appellant and his partner. Also, that he has a genuine and subsisting relationship with his children and step-daughter such that the relationship engaged Article 8.
- 15.** Continuing her analysis the judge found that in respect of the relationship between the appellant and his partner such could reasonably be enjoyed in Albania; there was no language issue; she has been to Albania without problems.
- 16.** The judge also noted that they had entered and continued the relationship when he did not have leave, a fact known to his partner.
- 17.** The judge then advanced to consider what was agreed to be the crux of the case, namely, the relationship between the appellant and the children each of whom is a "*qualifying child*" (section 117D of the Nationality, Immigration and Asylum Act 2002). The issue was the reasonableness of expecting them to leave the UK.
- 18.** She set out the relevant guidance from the Immigration Directorate Instruction – Family Migration – Appendix FM, Section 1.0 (B) "*Family Life as a Partner or Parent and Private Life, 10 Year Routes*".
- 19.** She then found as follows: the children's mother has been the primary carer throughout. As for the best interests of the children she gave weight to the fact that the children are British citizens; she took as the starting point that it is in the best interests of children to remain with both parents. The children have always lived in the UK and have not travelled to Albania; the eldest daughter (the step-daughter) can speak Albanian although the other children do not; none of the children have learning difficulties or special educational needs.
- 20.** The judge went on to find that as both parents speak Albanian there was no reason why the children if they went to Albania could not learn the language, particularly as the three youngest who are aged 10, 7 and 3, are at early stages in their education.

- 21.** The appellant has family in Albania; there is little evidence of a close relationship between the children and their parents with extended family in the UK. In any event contact could be maintained from abroad.
- 22.** There are no health difficulties; they would be able to access education and health services in Albania.
- 23.** The judge next went on particularly to consider the situation of the oldest child aged 13. She found that the child is not at a crucial stage in education as she has not started public exams, although it would inevitably be disruptive to move her at this stage to another education system. The other children being at earlier stages in their education a move in schools would be significantly less disruptive.
- 24.** Drawing these findings together the judge concluded that in respect of the oldest child whilst given her age, her lack of previous contact with Albania and her British citizenship such would indicate that her best interests would be to remain in the UK, in the absence of evidence to show “*deleterious*” effects for her in going to Albania and her ability to speak Albanian, there are factors which mean it is not overwhelmingly in her best interests to remain in the UK.
- 25.** As for the 7 and 10 year old and given their status and lack of ability to speak Albanian, their best interests lie in staying in the UK.
- 26.** For the 3 year old, however, his British citizen status was not enough to show his best interests are to stay in the UK, he is focussed on his parents and is young enough to learn Albanian and quickly integrate into the Albanian education system.
- 27.** The judge then turned to consider the wider public interest. She found that the appellant and his partner are reliant on state benefits; he would be able to get work in Albania, there was no reason why they would be destitute; family there could help them to adjust. The judge, finally, noted the appellant’s woeful immigration history, criminal convictions, history of misrepresentation and deceit and continuing lack of credibility or contrition, as well as his lack of financial independence.
- 28.** She concluded that it would not be unreasonable for the children to leave the UK.
- 29.** The appellant sought permission to appeal which was refused on 1 June 2018 but was granted on 16 August 2018 on reapplication to the Upper Tribunal.

Error of Law Hearing

- 30.** At the error of law hearing before me Mr Harding made the following points. He emphasised that it was not the appellant’s case that the judge

should have excluded from her consideration that the appellant had repeatedly shown disregard for the UK immigration law and criminal law. However, the judge misunderstood the IDI when she stated (at [77]) that where an applicant has a criminal history or a poor immigration history the “*general approach that a British child must not be expected to leave the EU does not automatically apply*”. Such was incorrect. The IDI states it may be appropriate to refuse to grant leave to a parent in such circumstances. The error was material as it underpins her approach to the reasonableness question.

- 31.** Second, the judge’s reference to an absence of evidence to show “*deleterious*” effects to the oldest child going to Albania was the wrong approach. The correct test was reasonableness.
- 32.** Third, it was contradictory for the judge having found that it is in the best interests of the three older children to remain in the UK to later find that it would be reasonable for them to leave the UK based on the father’s conduct. Such amounts to blaming the children for the father’s conduct.
- 33.** Fourth, the judge gave inadequate weight to the fact that all the children are British citizens.
- 34.** Finally, the finding that the step-daughter is not at a crucial stage in her education because she had not started her exams was irrational given her other findings.
- 35.** Mr Harding asked me, were I to find error of law, to remit the case for further evidence to be led.
- 36.** Mr Lindsay’s response was that “*reasonableness*” is a fact sensitive, free standing balancing exercise and such is what the judge undertook. The criticisms of some of the language used in the decision amounted to no more than disagreement. It had been appropriate in her consideration of the proportionality test. She was entitled to find for the reasons she gave that the public interest trumped the children’s best interests.
- 37.** I reserved my decision.

Consideration

- 38.** I do not find merit in Mr Harding’s submissions.
- 39.** On the first point the judge correctly (at [76]) referred to the terms of the IDI, specifically:

“... 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 ...

... 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 an alternative primary carer in the UK ...

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. [judge's underlining]

- 40.** At [77] the judge went on to state that the “*appellant does have a criminal history and therefore on its terms the policy states that it may be appropriate to refuse to grant leave.*” Whilst the wording in the next sentence: “*I refer to the underlined words above which make it clear that where an appellant has a criminal history or a very poor immigration history the general approach that a British child must not be expected to leave the EU does not automatically apply*” might have been better expressed, it is clear from the immediately preceding sentence and her later analysis of his immigration and criminal history, that the judge was aware that that aspect of the guidance concerned the parent, not the British child.
- 41.** Nor do I find merit in the second ground, namely, that in referring to an absence of evidence in respect of the oldest child to “*... show deleterious effects for her going to Albania*” such was the wrong approach. It is clear that the judge had in mind the reasonableness test throughout her analysis e.g. [80], [81], [82], [104], [110] and that she was finding for the reasons she gave that the absence of harm or damage to the child going to Albania meant it was reasonable for her to do so.
- 42.** On the third point, namely, that having found it was in the best interests of the older children to remain in the UK it was irrational for the judge to later find that it would be reasonable to leave the UK and that such approach can only have been on the basis of the father’s criminality and immigration history and that such approach is contrary to authority, I disagree. In ***MA (Pakistan) and Others*** [2016] EWCA Civ 705 the Court separated two issues: the best interests of the children and whether it is reasonable to expect them to leave the UK. When considering the best interests of the children, the conduct of the parents is irrelevant. However, when considering the issue of reasonableness, wider public interest factors may be weighed in the balance, including the conduct and immigration status of the parent. There is nothing intrinsically illogical in the notion that, while the children’s best interests are for them to stay, it is not unreasonable to expect them to go.

- 43.** In this case the judge clearly dealt with the children’s best interests in great detail as a separate matter before going on to consider reasonableness.
- 44.** Subsequently, in **KO (Nigeria) & Ors v SSHD [2018] UKSC 53** it was held that “*reasonableness*” does not require a balancing exercise in which the best interests of the child may be outweighed by the public interest in deportation, made all the weightier by the bad behaviour of the parent. Section 117B(6) is a stand alone provision in which the focus is purely the effect upon the child, who, as indicated, should not be blamed for the conduct of its parent.
- 45.** However, reasonableness must be assessed in context. Lord Carnworth puts it this way at [18]:

“[I]t seems to me inevitably relevant in both contexts [para 276ADE(1)(iv) and s117B(6) which both posit a situation where ‘it would not be reasonable’ to expect a child to leave the UK] to consider where the parents, apart from the relevant provision, are expected to be, since it will normally be reasonable for the child to be with them. To that extent the record of the parents may become indirectly material, if it leads to their ceasing to have a right to remain here and having to leave. It is only if, even on that hypothesis, it would not be reasonable for the child to leave that the provision may give the parents a right to remain.”

- 46.** Thus, the extent of the misconduct does not come directly onto the balance, but it is equally clear that the father’s record is “*indirectly material,*” because he is expected to be leaving; it is normally reasonable for children to be with their parents; and the assessment is to be made “*in the real world in which the children find themselves*” [18,19]. Whilst the judge did not have the benefit of **KO**, I can see no material error in her approach.
- 47.** As for not giving adequate weight to the fact the children are British citizens, on the contrary she clearly had such in mind (e.g. at [82], [94] and [101]) but found that nonetheless for the reasons she gave it was reasonable for them to leave. Such were conclusions open to her on the evidence as was the finding that the oldest child was not at a critical stage in her education.
- 48.** In summary, I consider that the grounds amount to a disagreement with the conclusion that the appellant’s case for remaining in the UK has not been made out. The judge gave ample reasons in support of that conclusion in particular [3-13], [49-50], [71], [105], [108-110]. She properly dealt with best interests first. She could not exclude from her consideration the facts of the appellant’s criminality and utter and repeated disregard for immigration law. That the appellant in the wording of the IDI has a “*very poor immigration history such as where the person*

has repeatedly and deliberately breached the Immigration Rules” is indisputable. On the judge’s findings of the appellant’s immigration history and criminality, (per the IDI) it was “appropriate to refuse to grant leave where the conduct of the parent... gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent... in the UK...”

49. The children and their mother can, of course, choose not to leave. The judge found the children could stay with their mother. As the judge noted (at [78]) the mother has been the primary carer throughout *“including the numerous periods after the appellant has been removed and while he has been detained whether in prison or in immigration detention.”* There was no evidence before the judge that these separations had adversely affected the children.

50. In ***Sanade and others (British children-Zambrano-Derici) [2012] UKUT 48*** a Presidential panel stated at #5 of the headnote:

“Case C—34/09 Ruiz Zambrano now makes it clear that where the child or 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.”

This was a concession made in the course of proceedings by the respondent who accepted that *“it will not logically be possible to argue”* that it would be reasonable to expect a British child to move to a country outside the EU in order for the family unit to remain intact.

51. In ***VM (Jamaica) [2017] EWCA Civ 255*** the respondent resiled from the concession. Sales LJ went on to explain that ***Case C-356/11 Derici*** rather than ***Zambrano*** was applicable in the instant case, in which the children could remain in the UK with their British mother if she chose to stay here rather than follow her husband to Jamaica:

“Rather than a legal impossibility of remaining in the UK, the family would face a difficult practical choice whether to separate (with the mother and children remaining in the UK, in which case there would be no infringement of their EU citizenship rights) or to leave and go to Jamaica as a family unit...”

52. The decision of the judge in that regard, which is unchallenged, was one that was open to her on the evidence.

Notice of Decision

53. The decision of the First-tier Tribunal shows no material error of law and that decision dismissing the appeal shall stand.

54. No anonymity order made.

Signed

Date 10 December 2018

Upper Tribunal Judge Conway