Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/00199/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 November 2020	**On 17 March 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

VALBONA VALTERI
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Foot, Counsel instructed by Oliver & Hasani Solicitors
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal by a female citizen of Albania against a decision of the First-tier Tribunal dismissing her appeal against a decision of the respondent on 3 December 2019 refusing her application for leave to remain in the United Kingdom as the spouse of a man who is her husband and a naturalised British citizen.

2. The appellant's husband entered the United Kingdom in 1999 when he was 16 years old. He claimed, untruthfully, that he was from Kosovo and sought asylum. In fact he was from Albania and clearly did not need asylum for the reasons relied upon. On the basis of his false claim to be from Kosovo he was given exceptional leave to remain and in due course, in his case on 5 July 2005, became a naturalised British

citizen. He was given a British passport recording his place of birth as Prizren in Kosovo.

3. The appellant and her husband have had a close relationship for some time. The appellant first applied for entry clearance as a fiancée in 2011 but the application was refused. The Secretary of State decided that the appellant had relied on a "false document", namely her husband's passport. It was a genuine document but had been obtained improperly and gave false information about his place of birth. That decision was not appealed.

4. The appellant married her husband in Albania in July 2012 and again applied for entry clearance. She was found unsuitable and the application was refused. She appealed on Article 8 grounds and the First-tier Tribunal found there were no obstacles to family life being enjoyed in Albania.

5. The appellant applied again for entry clearance. This application was refused on 1 April 2014 on suitability grounds. There was an appeal and the appeal was allowed by the First-tier Tribunal but the decision was set aside by the Upper Tribunal and the First-tier Tribunal dismissed the appeal when it was reheard.

6. The appellant gave birth to a son, who I identify as "A", in October 2015 in Albania.

7. The appellant and A arrived in the United Kingdom in April 2019. They each had visas permitting their entry into the United States of America and they were given transit leave to enter the United Kingdom for one day. However they did not continue their journey to the United States but met up with the appellant's husband and the child's father and on 15 October 2019 the appellant applied for leave to remain as the wife of her husband relying particularly on Article 8 of the European Convention on Human Rights. The application was refused as indicated on 3 December 2019 and the appellant appealed that decision.

8. The First-tier Tribunal Judge noted that the Secretary of State accepted that it was a genuine and subsisting relationship and that the financial requirements were met but not the suitability requirements. The material factor relied on was the appellant's false representation that she intended to transit through the United Kingdom on her way to the United States of America. Her "English language certificate" was out of date and she was an overstayer. The Secretary of State considered the Rules and found there were no obstacles to family life continuing in Albania where there was a large extended family and that it would not be unreasonable for the son to leave the United Kingdom with his mother because he had spent his entire life in Albania until April 2019. The Secretary of State did not accept there were very substantial obstacles to integration on return.

9. The case came before the First-tier Tribunal Judge.

10. The appellant gave evidence to the First-tier Tribunal. Much of the evidence was uncontroversial. It was accepted that the appellant and her husband have large families in Albania and the appellant and the child A had lived with the appellant's mother-in-law. The sponsor would visit them as often as he was able. The appellant is a university graduate and has a good work record. At the time of the hearing she was pregnant (I am told that the child was born safely and is now about 5 months

old) and the sponsor had lived mainly in the United Kingdom for over twenty years. He was in stable employment in the building trade. They wanted to live together as a family in the United Kingdom where they would have a better life and in Albania.

11. The judge noted that much was made of the fact that the child A is a British citizen and entitled to reside in the United Kingdom and the appellant is his carer. His father is in full-time work and could not look after a small child without making drastic changes in his lifestyle. It was argued the child cannot reasonably be expected to leave the United Kingdom and it would be disproportionate to expect the appellant's husband to relocate in Albania having built a life for himself in the United Kingdom.

12. The judge then recorded the submissions in outline referring directly to Ms Foot's skeleton argument which he said were "annexed to the record".

13. The skeleton argument is indeed with the papers. It is dated 16 March 2020 and runs to 32 paragraphs. Several points are outlined there contesting that the application should not have been refused under the Rules. Section 117C(6) of the Nationality, Immigration and Asylum Act 2002 is set out in full and the word "reasonableness" is emboldened and there is reference to the decision of the Supreme Court in **KO (Nigeria) v SSHD [2018] UKSC 53**. The point is made very firmly that, according to statute, where a person is not liable to deportation the public interest does not require that person's removal where there is a genuine and subsisting parental relationship with a qualifying child and "it would not be reasonable to expect the child to leave the United Kingdom" and a reference to **KO** refers to paragraph 15 of the judgment of Lord Carnwath which emphasises that reasonableness is to be determined in accordance with the best interests of the child and not with regard to the dubious or worse behaviour of the child's parents.

14. The skeleton argument then makes the point that the reasonableness test is echoed under Appendix FM of HC 395 at EX.1.

15. There is then a section under the heading "submissions" and this begins with the subheading "unreasonable to require Appellant's son to leave the UK". It refers to the child being a British citizen and that it would not, in the contention of the appellant, be reasonable to expect A to leave the UK.

16. Having referred to the skeleton argument, although not expressly to much of its contents, the judge gave his findings and reasons. The judge was satisfied the appellant had made a false representation when she obtained a transit visa and the appellant clearly failed to disclose a material fact in an earlier application, namely that her husband's nationality had been obtained by a false representation.

17. The judge found that the appellant's circumstances did not meet the requirements of the Rules and then looked at Article 8 of the European Convention on Human Rights. Again the terms of Section 117B(6) were set out. The judge found that the appellant and her husband would obtain work in Albania if they return there to live and would be able to "maintain themselves and their child (soon to be children) to a satisfactory standard."

18. At paragraph 37 the judge directed himself that the "focus" in Ms Foot's submissions were on Section 117B(6) and the judge accepted that there was a genuine and subsisting parental relationship with A who is a British citizen and therefore a qualifying child. The judge found that the best interest of children is a primary consideration but not determinative in all cases. I set out below the last three paragraphs of the Decision and Reasons. The judge said:

> "40. The reality here is that he was born in Albania and raised with his extended Albanian family. All of his cultural connection is with Albania. He has been in the UK for only a very short time. Whilst the decision in Mundeba (s.55 and para 297(i) (f)) Democratic Republic of Congo [2013] UKUT 00088 (IAC) is an entry clearance case reference is made to the importance to be attributed to continuity of residence.
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> 41. There was no suggestion that he would not have access to education or healthcare provision in Albania. He is only 4 years old. His relationship with his father has hitherto been conducted remotely. His focus is on his mother who has always been his primary carer. If she is to be removed then I find it is in his best interests to go with her.
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> 42. Looking at the evidence before me in the round and having regard to those matters to which I am directed by primary legislation to have regard I find the refusal decision to be proportionate to the legitimate aim already identified. I therefore dismiss the appeal with reference on human rights grounds."

19. What the judge did not do is decide unequivocally and expressly if it would not be reasonable to expect the child A to leave the United Kingdom. As might be expected, Ms Foot spotted that and had rather a lot to say on the subject.

20. The point is set out in the grounds. Ground 2 complains that the judge was unduly concerned with the "suitability requirements" where the statute makes it plain that if the removal of a qualifying child is unreasonable there is no public interest in removing the mother.

21. Ground 3 said there was a misdirection on the suitability requirements. The refusal related to a previous application and finally EX.1(a) under the Rules was not considered.

22. Setting aside the rights of the child (and I appreciate this is really what the case is all about) this is an appeal which must be dismissed on human rights grounds. Even if there were any merit in the contention that the appellant's conduct had not been correctly defined for the purposes of the Rules she was clearly involved in a cynical attempt to evade immigration control and the discretionary and broad-based balancing of rights in a human rights exercise would satisfy me beyond any shadow of doubt that there is a strong public interest in refusing her application because of her misbehaviour and any disappointment and inconvenience to her is proportionate to the need to enforce the Rules. It is proportionate to the need to give proper effect to immigration control.

23. I agree with Mr Melvin that the finding that the conduct of the appellant was not in accordance with the suitability requirements in her manipulative attempt to gain entry by misusing a transit visa pretending to be on her way to the United States of America was clearly open to the First-tier Tribunal.

24. Ms Foot's main point is that one thing the judge had to decide, which is whether a child's removal would be reasonable, was not decided.

25. The Judge got slightly close with a finding about the child's best interests but that is a different test. The decision was that the best interests of the child lay in returning with the mother but that does not mean it would not be unreasonable for the child to go with the mother.

26. Mr Melvin argued that when the determination is read with care, although there is plainly not a finding specifically on the point, the judge *must* have had reasonableness in mind. That was clearly what the appellant's case was about and the judge clearly appreciated this because there were two references to the relevant Rule. Although the Decision and Reasons would have been enhanced hugely by a direct answer to the point, I should infer that the judge, in reaching the conclusion that he did and making general reference to being "directed by primary legislation" which he had set out twice, the judge had decided that removal was reasonable and the decision should be considered accordingly.

27. This is an unattractive argument. This case concerning the welfare of the child was about reasonableness and it should have been decided overtly but on reflection I find Mr Melvin is actually right. Where the decision can only make sense if removal is "reasonable" and the judge had set out the necessary legal test and has decided that in terms the decision is in accordance with the necessary legal test and has indicated the evidence that the child has only been in the United Kingdom for a short time and has been looked after properly in Albania I am satisfied the judge did in fact apply the right test and there is no error in this decision.

28. I also note that I confirmed with Ms Foot that there is nothing in the evidence from the appellant that was before the First-tier Tribunal Judge to suggest that life in Albania was going to be particularly arduous or the child had any particular needs that were not going to be met there. The thrust of the evidence was all about how they wanted to be in the United Kingdom and together there which is, at one level perfectly laudable and understandable, it is not possible for everyone who wants to do that to be able to and there has been disregard for the Rules in this case.

29. There was no application to adduce further evidence before me and, although it was not necessary, the Notice of Hearing reminded the appellant, and indeed the respondent, of the importance of doing that. If I had had to remake the decision I would have had no hesitation in saying that the removal is reasonable but for the reasons I have given I have decided that the Decision and Reasons is sound. To decide otherwise I would have to conclude that when the judge had identified the statutory test with some care he had ignored in making his decision. I am not persuaded that is the case.

30. It follows that I find no material error of law and I dismiss this appeal.

Notice of Decision

The appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 15 March 2021