



Upper Tribunal

(Immigration and Asylum Chamber)

Appeal number: HU/15365/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC

Decision & Reason Promulgated

On 1 July 2021

On 21 October 2021

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

AZ

(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION AND REASONS (V)

For the appellant: Mr M Schwenk of Counsel, instructed by Greater Manchester Immigration Aid Unit

For the Respondent: Mr C Bates, Senior Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face-to-face hearing was not held

because it was not practicable, and all issues could be determined in a remote hearing. At the conclusion of the hearing, I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. The appellant, who is a national of Kosovo with date of birth given as 29.1.88, has appealed with permission to the Upper Tribunal against the decision of the First-tier Tribunal promulgated 14.2.20 (Judge Durance), dismissing on all grounds his appeal against the decision of the Secretary of State, dated 3.9.19, to refuse his application made on 3.5.19 for leave to remain in the UK on the basis of family life with his partner, child and stepchild (child of his partner).
2. Permission to appeal was refused by the First-tier Tribunal on 25.8.20. However, when the application was renewed to the Upper Tribunal, Upper Tribunal Judge Owens granted permission on 25.9.20, on the basis that the decision discloses numerous arguable errors of law.
  - a. It was considered arguable that the judge failed to properly assess the best interests of the children who have refugee status when finding at [40] of the decision that they can be separated from their primary carer and mother.
  - b. Judge Owens also considered it arguable that the judge erred in finding that the children are living in a 'split household' when the evidence was that their mother is the primary carer and her former partner is not willing for the children to live with him on a full-time basis.
  - c. It was also considered arguable that the judge provided inadequate reasons for finding no insurmountable obstacles for the partner to relocate to Kosovo with the appellant.
  - d. Arguably, the judge failed to adequately assess whether the appellant has family life with his children.
  - e. Arguably, the finding at [32] that the appellant's partner has attempted to 'smear' her ex-husband in divorce proceedings was not grounded in evidence and is irrational.
3. The respondent's Rule 24 reply, dated 14.10.20, argues that the decision of Judge Durance is sustainable. It is submitted that the judge gave full and proper consideration to the appellant's circumstances and the different relationships the children have, considering in the alternative the position whether the partner were to remain in the UK or leave with the appellant. Adequate reasons for finding that the appellant would not face significant obstacles to his integration in Kosovo were set out at [38] of the decision.

4. This matter was previously listed before me on 21.5.21 but had to be adjourned because the interpreter did not properly understand the appellant's Kosovan Albanian dialect.
5. The appellant was previously unrepresented. However, he has recently instructed the Greater Manchester Immigration Aid Unit. By email sent as recently as 25.6.21 they sought to adduce further evidence pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. I did not consider that evidence as, at this stage, I am only concerned with the evidence that was before the First-tier Tribunal. Mr Schwenk explained that whilst none of the three children were qualifying children for the purposes of s117B(6) at the date of the decision, the youngest child is now a British citizen. That is a matter I cannot take into consideration when assessing whether there was an error of law in the decision of the First-tier Tribunal.
6. I have carefully considered the decision of the First-tier Tribunal in the light of the oral and written submissions and the grounds of application for permission to appeal to the Upper Tribunal.
7. The relevant background is that the appellant came to the UK in 2014 as an illegal entrant, found by the judge to be no more than an economic migrant, and established a relationship with his current partner KS in September 2017, in the full knowledge by both parties of his unlawful and precarious immigration status. KS has refugee status from Syria. She and the appellant have a child together, born in March 2019. However, KS was previously married and has two daughters with AM, also a Syrian refugee, who has regular access to his daughters, twice a month and they live with him during school holidays.
8. The grounds are poorly drafted and difficult to follow. However, one of the grounds of appeal complains that the judge made an unjustified finding at [32] that the appellant's partner (KS) had attempted to smear her former husband (AM) in the divorce proceedings. However, it was open to the judge to find both the appellant and his partner lacking credibility and to prefer the evidence of the ex-husband to the appellant's partner. The divorce proceeding documents were put to her and the ex-husband was also asked about her account. The fact that the decree nisi was granted on the grounds of adultery and unreasonable behaviour does not undermine the judge's conclusion. Whilst Mr Schwenk submitted that this adverse finding infected the other credibility findings and the conclusion that KS was an unreliable witness, I bear in mind that the matter of concern to the judge was not the reason for the divorce but the extent of contact between the ex-husband and his two children, as to which KS and AM differed. In summary, I am satisfied that the judge's observation about a 'smear' discloses no error of law and even if it did, it was not a matter material to the outcome of the appeal.
9. It is also a complaint that there were some factual errors in the decision, such that the child D was born in the UK. However, I am satisfied that none of these errors

were material to the outcome of the appeal and I note that Mr Schwenk did not pursue this matter with any vigour.

10. Although the judge considered insurmountable obstacles to family life continuing outside the UK, I am not persuaded by Mr Schwenk's argument that EX1(b) of Appendix FM applied, an argument not raised in the grounds. Whilst the judge has used the term 'partner', I do not accept the submission that this was an acknowledgement by the judge that EX1(b) applied. In any event, GEN 1.2 provides that 'partner' means a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application. As the couple began cohabiting in September 2017, they had not been living together for at least two years prior to the date of application in May 2019. Contrary to Mr Schwenk's argument, the appellant cannot rely on GEN 1.9 in relation to the date of application. As Mr Schwenk accepted, the appellant cannot rely on EX1(a) in respect of any of the children as none of them is a qualifying child. It follows that the judge was correct to conclude at [37] that neither EX1 nor EX2 applied.
11. The appellant could not meet the Rules for leave to remain either with a partner or any of the children. At [39], the judge also considered the test under GEN 3.2, whether exceptional circumstances exist which would render refusal of leave to remain a breach of article 8 ECHR "because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose article 8 rights it is evidence from that information would be affected by a decision to refuse the application." The reasons are set out in the balance sheet approach under [40] of the decision.
12. However, one of the difficulties with the decision is that, whilst the two children of the appellant's partner (KS) have regular contact with their father and they live with him during summer and other holidays, the finding at [35] that the children effectively live in a 'split household' between KS and AM and, therefore, that he could or should become their primary carer whilst KS and the youngest child accompany the appellant to Kosovo, is not sustainable. Whilst the judge found that AM had no difficulties looking after his children, it does not necessarily follow that the care is split between the two parents so that either of them could be the primary carer. Further, there was no evidence that he is willing to care for the children full-time whilst their mother and half-sibling leaves for Kosovo. Neither does this conclusion take any adequate account of the best interests of the children in continuing family life together with their mother and half-sibling(s) with whom they have lived in a family unit for a considerable period.
13. I am satisfied, therefore, that there was an error of law in the decision of the First-tier Tribunal. In this regard, I note that at [7] of the decision, the respondent's Presenting Officer conceded that the argument that the entire family could relocate to Kosovo was a "less attractive" argument rather than for the appellant

to return to Kosovo to make entry clearance application from there. However, for the error identified above to be material to the outcome of the appeal, the appellant also has to demonstrate that there was an error of law in the judge's assessment of the alternative scenario, that it would not be unduly harsh or disproportionate for the appellant to return alone to Kosovo and make application for entry clearance from there as a fiancé (the parties are not validly married).

14. For the cogent reasons set out in the decision, including the lack of evidence to the contrary, the judge rejected the submission that KS would be unable to work in the UK so as earn an income sufficient to meet the Appendix FM threshold for entry clearance. In assessment of the Chikwamba principle, after considering Chen and Ekinici, the judge considered but rejected as without evidential foundation and speculative the claim that an entry clearance application would be bound to fail. In submitting that if the appellant would be unlikely to succeed in an entry clearance application it would be disproportionate to remove him, Mr Schwenk referred me to Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 00129 (IAC), whether that appellant argued that re-entry from Pakistan would not be possible because she would be unable to satisfy the financial eligibility requirements for entry as a partner, contending that her appeal should be allowed because the consequence of her removal will be permanent, or at least long-term, exclusion from the UK. In that case, the respondent conceded that there were insurmountable obstacles to family life continuing outside the UK and that it would not be reasonable or proportionate for the appellant's family unit to be indefinitely separated. However, the Upper Tribunal found that the partner in the UK would be able to work and increase his income to meet the financial threshold, so that the appellant did not succeed on that argument. Further, at [90] of that decision the Upper Tribunal stated, "... an appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the 2002 Act including section 117B(1), which stipulates that "the maintenance of effective immigration controls is in the public interest". Reliance on *Chikwamba* does not obviate the need to do this." Similarly, in the present case the judge noted the failure of the appellant to discharge the evidential burden to show that his partner could not find suitable employment with an income sufficient to meet the financial threshold of Appendix FM for the appellant to be able to re-enter within 4-9 months. In the premises, the argument raised by Mr Schwenk does not assist the appellant.
15. In considering the appellant's relationship with his own child, born in March 2019, the judge considered the best interests under s 55 but concluded that, given her very young age, being under 1 year of age, the temporary separation from the

appellant would not have any lasting impact. This was a conclusion open to the judge and adequately reasoned.

16. Although it is suggested that the judge failed to determine whether there was family life between the appellant and KS's children with AM it is clear from a reading of the decision that the judge proceeded on the basis that there was such family life, but in the circumstances where he is not the father of the two older children, who spent considerable time with their biological father. I am satisfied that the judge specifically considered the appellant's relationship with the two children of his partner and her ex-husband but provided cogent reasoning, including the extent of their relationship with their father, to conclude that the appellant's short-time removal would not "contravene their best interests." At [41] the judge also accepted that the best interests of all three children was a significant factor in the proportionality balancing exercise, stating that this "created a greater momentum" to the appellant's positive case. However, for the reasons cogently set out, the judge concluded that those best interests did not go as far as to trump or override the public interest in the appellant's removal. I am satisfied that this was a finding open to the judge on the evidence and cannot be described as perverse or irrational.
17. At [27] and elsewhere the judge addressed the public interest considerations set out in s117B of the 2002 Act. It is clear that a careful balancing exercise was conducted. Despite the error identified above as to the proportionality of KS and their young child accompanying the appellant to Kosovo, the alternative of a temporary separation whilst the appellant sought entry clearance from outside the UK was properly considered and adequately and cogently reasoned. The conclusion was open to the judge on the evidence, so that the dismissal of the appeal was justified.
18. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal so that it must be set aside.

## **Decision**

The appeal of the appellant to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands and the appeal remains dismissed.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 1 July 2021

### **Anonymity Direction**

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

*“Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.”*

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 1 July 2021