Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/50357/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 17 July 2014	**On 4th Aug 2014**

Before

DESIGNATED JUDGE MURRAY

Between

ALBERT ABDULLAI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Lams, Counsel for Kilby Jones Solicitors, London
For the Respondent: Mr Deller, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is citizen of Kosovo born on 13 September 1981. He appealed against the decision of the respondent dated 19 November 2013 relating to a fresh application made by the appellant for asylum and/or human rights. His asylum and human rights claims had already been considered and refused by an Adjudicator on 8 February 2002. Further submissions were made by him and refused on 20 February 2013. There was no right of appeal but on 3 April 2013 the appellant challenged the Secretary of State's decision of 20 February 2013 and made an application for judicial review which was refused. On 23 September 2013 it was agreed that the respondent would reconsider the decision of 20 February 2013 in accordance with both paragraph 395c and 353b of the Immigration Rules and if the appellant's case still fell for refusal any decision would attract a right of appeal. The application was refused on

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19 November 2013 and Judge of the First-tier Tribunal Handley heard an appeal of this decision which was promulgated on 23 April 2014. He allowed the appeal in respect of the Immigration Rules and on human rights grounds.

2. An application for permission to appeal was made on behalf of the respondent. Permission to appeal was granted by Designated Judge of the First-tier Tribunal Foudy on 29 May 2014. The grounds of application state that the judge failed to consider the claim fully, gave undue weight to the extent of the appellant's ties to Kosovo and failed to give adequate reasons for concluding that there were exceptional circumstances warranting consideration of the human rights claim outside the rules. The grounds state that the judge made a material misdirection in law by not properly dealing with the guidance contained in Ogundimu (Nigeria) [2013] UKUT 00060 (IAC) and he failed to give reasons or adequate reasons for findings on a material matter as he did not consider whether there are compelling circumstances not sufficiently recognised under the Rules with reference to Nagre v Secretary of State for the Home Department [2013] EWHC 720 (Admin). The permission states that it is arguable that the assessment of the appellant's ties to Kosovo fell short of the guidance contained in the said case of Ogundimu and that this amounts to an error of law.

The Hearing

3. The Presenting Officer submitted that the Immigration Rules form a complete code when dealing with public interest in a proportionality assessment and if the Immigration Rules are met, removal would be a breach of an appellant's family and private life. He first of all referred to paragraph 276ADE of the Rules and the appellant's private life. He submitted that the judge allowed the appeal but if I accept that the Rules are a complete code, this decision must be wrong.

4. He submitted that the judge found that the appellant had no ties to Kosovo where he comes from. He referred me to the cases of Ogundimu (Nigeria) [2013] UKUT 00060 (IAC) and Green [2013] UKUT 00254 (IAC).

5. In Ogundimu the head note states "When considering whether a person has no ties to his country this must involve a rounded assessment of all the relevant circumstances and should not be limited to "social, cultural and family" circumstances." The Presenting Officer submitted that Judge Handley states that there is no evidence of the appellant's family being killed in 1999 in Kosovo but refers to the original asylum refusal letter expressing sympathy in relation to this. He submitted that the passing of the appellant's nuclear family is a significant factor but this only relates to his family ties in Kosovo. Paragraph 276ADE (vi) states that "no ties" must include social, cultural or family ties with the country to which he would have to go, if required to leave the UK. He submitted that the judge should have adopted a more rounded approach. He submitted that what the judge has done is state that because his family members have been

killed that is the end of his connection to Kosovo but the judge has not taken into account the fact that the appellant was in Kosovo until he was 18 years of age and has knowledge of the social norms there. He submitted that the judge did not fully explore this matter and has had made too narrow a finding.

6. He submitted that the appellant was 18 years old when he came to the UK and he has been in the United Kingdom for around 15 years. He submitted that he accepts that existing ties erode because of absence but the judge has not considered whether the appellant's connection to that country has snapped altogether. He submitted that paragraph 276ADE (vi) does not mention any period of time. He submitted that paragraph 276ADE (iii) states that the appellant has to have lived continuously in the United Kingdom for at least 20 years and the terms of this sub-paragraph cannot be met. He submitted that it has to be considered that the appellant was just short of being an adult when he left Kosovo and although his family connections have diminished since 1999 his cultural connections still remain.

7. The Presenting Officer then went on to deal with Ground 2 – that the judge has considered Article 8 in the alternative but has not made a finding as to whether there are good and arguable grounds for granting leave to remain outside the Immigration Rules.

8. Counsel for the appellant submitted that in the permission only one ground is referred to and this particular issue is not mentioned. The Presenting Officer referred to the case of Ferrer (2012) UKUT00304 (IAC), submitting that partial grant are undesirable and this was not a partial grant although the second ground was not referred to in the permission. He submitted that the grant in this claim is a general grant of permission and all the grounds should be considered. I noted the objection by Counsel but agreed with the Presenting Officer that all the grounds should be considered.

9. The Presenting Officer submitted that on its face this claim cannot succeed under paragraph 276 or Appendix FM and that the Secretary of State's intention in the new Rules is that they form a complete code. Private and family life is covered by these Rules and if the terms of the Rules cannot be met, only in extreme cases can the claim be considered outside the Rules, under Article 8 of ECHR. He submitted that it is not clear what is meant by "exceptional circumstances" or what justifies success under Article 8.

10. In 2013 a judicial review application was refused relating to this appellant, with no right of appeal. The determination makes it clear that Judge Handley was aware of this and the Presenting Officer submitted that even if the appellant's relationship is as strong as Judge Handley finds it is, the claim under Appendix FM cannot succeed. He submitted that the judge has not explained why he is entitled to consider the claim under Article 8 of ECHR and that the appellant's ties to Kosovo have not been adequately

addressed. He submitted that there are no exceptional circumstances and the judge has not given proper reasons for considering the claim outside the Rules. This is an error of law.

11. Counsel for the appellant submitted that the case of Ogundimu is good law and this is what the Secretary of State is relying on in her grounds. He submitted that the judge dealt properly with the "no ties" test and there is no error of law. Only if the judge has misunderstood the case can his dealings with the "no ties" situation be an error of law. What the Secretary of State is objecting to is not enough for there to be an error of law. All the Secretary of State has done is take a different view from that of the judge. I was referred to the appellant's skeleton argument and was asked to give this weight.

12. Counsel then referred to paragraph 48 of the determination in which the judge refers to the case of Ogundimu. The judge states that the appellant does not have any continuing connection to life in Kosovo, in any real sense. Counsel submitted that at paragraph 123 of the case of Ogundimu this is exactly what is said. "Ties" mean a continued connection to life in that country, ie something that ties a claimant to his or her country of origin. He submitted that the respondent has not challenged the basis of the facts which the judge considered. The judge accepts that the appellant's family was killed in 1999 and he has an absence of family in Kosovo. The respondent states that the judge has not considered the other factors but she has not been able to point to any connection the appellant has with Kosovo. The appellant has lost contact with everyone there. He left in 1999 because of the war and has had no further connection to life in that country.

13. Counsel submitted that the judge is mindful of the correct test. I was referred to the said case of Green at paragraph 31. This states that where the Immigration Rules do not reflect the law, it is the law as laid down in primary legislation that must be followed. This paragraph refers to a failure to direct the attention of the decision maker to the solidity of the ties, as opposed to their mere existence. He submitted that the Secretary of State's view appears to be based on the law pre-Ogundimu. The only link the appellant has to Kosovo is the very remote link of having once lived there.

14. I was referred to paragraph 125 of Ogundimu which lists the requirements for there to be ties and refers to the quality of the relationships the person has with friends and family members in his own country. He submitted that the appellant has no-one in Kosovo and so there are no relationships to consider. He submitted that when the respondent states that the appellant has cultural affinity to Kosovo and states that the judge has not analysed this properly, he is not pointing out an error of law, he is purely disagreeing with the judge's opinion.

15. With regard to Ground 2 Counsel pointed me to paragraph 49 of Judge Handley's determination. This states "In the alternative I have considered

Article 8 outside the Immigration Rules. It has been held that the Immigration Rules are a complete code but if I am wrong in my approach under the Rules in the alternative I find that there are exceptional factors in this case warranting consideration outside the Rules. I remind myself that exceptionality is not a legal test and that exceptional means circumstances in which refusal would result in unjustifiably harsh consequences upon the individual such that refusal of the application would not be proportionate. That is likely to be the case only very rarely." Counsel submitted that the judge was entitled to deal with the claim in this way. What the judge has done is allow the claim under the Rules finding that paragraph 276ADE (vi) has been satisfied but he has then gone on to consider the case outside the Rules, under Article 8 of ECHR. Counsel submitted that the judge's approach is impeccable. He submitted that where the judge has allowed the claim under Article 8 he must have found good grounds and I was asked to carefully consider paragraph 49 of his determination.

16. I was then referred to paragraph 50 of the determination and Step 5 of Razgar [2004] UKHL 27. Counsel submitted that the judge has made sustainable findings and has correctly identified the correct legal test relating to both grounds. He submitted that the judge has given weight to the Secretary of State's immigration policy, has considered the facts of the case and has made a judgment he was entitled to make.

17. Counsel then referred to the long delay by the Home Office on the appellant's legacy application made in 2007. The decision was not made until 2013.

18. I was asked to support the decision in Judge Handley's determination.

19. I asked the Presenting Officer if he wanted to comment on the delay by the Home Office on the legacy application. He accepted that there was a delay of around 6 years. He accepted that the appellant's life with his girlfriend continued during that delay and his private and family life in the United Kingdom became stronger. Ties were formed and he accepted that the judge acknowledges this. He submitted that the relationship is relevant but submitted that this is not sufficient for the appellant's claim to succeed, when the appellant's immigration history is considered along with the facts of the case. He submitted that this matter does not alter the appellant's appeal and the claim cannot succeed under paragraph 276ADE (vi).

Determination

20. The meaning of "no ties" relates not only to family members the appellant has in Kosovo but also to social and cultural connections. The appellant has lived in the United Kingdom for 14 years. The judge accepted his evidence that he no longer has any connection to life in Kosovo. A rounded assessment has to be made of all the appellant's circumstances. I have to consider the solidity of the ties as opposed to their mere existence (the

said case of Green). At paragraph 48 of Judge Handley's determination he refers to the case of Ogundimu and I find that he applied the test set out therein. Because the judge believed that the appellant's family had all been killed by the Serbs and based on the facts of the case, the judge found that paragraph 276ADE (vi) had been satisfied. He gave adequate reasons for this finding. There is no error of law in the determination relating to the appellant's ties to Kosovo and the judge's finding is that the appellant has no connection with Kosovo now. I find that the respondent is merely disagreeing with the judge's decision.

21. With regard to whether the judge should have considered Article 8 outside the Rules, he did not need to consider this as he found that the terms of the Rules had been satisfied, but in the alternative he has assessed proportionality and argued the case under Article 8 of ECHR, finding in favour of the appellant. This is explained by him at paragraph 49. Based on the case of MM (Lebanon) (2013) EWHC 1900 (Admin) the judge has to find that there are exceptional circumstances for there to be a claim outside the Rules. I accept the judge's reasoning as to why there are exceptional circumstances based on the facts of the case and again find that the respondent's objection is based on a disagreement and not an error of law.

22. Based on what was before the judge I find that he was entitled to come to the conclusion that he did and that he was correct to allow the appellant's application under the Immigration Rules and on human rights grounds.

DECISION

23. There is no material error of law in the judge's determination.

24. The determination allowing the appeal under the Immigration Rules and on human rights issues therefore stands.

25. No anonymity direction has been made.

Signed Date

Designated Judge Murray
Judge of the Upper Tribunal