Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/05828/2017
HU/06094/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9th October 2018	**On 8th November 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

MIRSIDA [L]
[I A]
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Mr B Lams, instructed by Oak Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellants are both Albanian nationals, a mother and son. They appealed to the First-tier Tribunal against a decision of the Secretary of State dated 7th February 2017 to refuse their applications for leave to remain in the United Kingdom on the basis of their human rights. First-tier

Tribunal Judge Greasley dismissed the appeals in a decision promulgated on 23rd May 2018. The Appellant now appeals to this Tribunal with permission granted by First-tier Tribunal Judge Lambert on 23rd August 2018.

2. The background to this appeal is that the first Appellant claimed to have entered the UK on 8th October 2013 illegally. The second Appellant, her child, was born in the UK on 6th September 2014. The first Appellant's partner had been granted discretionary leave to remain in the UK in 2011 for a period of three years. He was granted a further three year period of discretionary leave in December 2014. The Appellant applied for leave to remain in the UK on 20th August 2015. Her partner made an application for indefinite leave to remain on 8th January 2018.

3. The Secretary of State refused the application on the basis that the Appellants did not meet the requirements of the Immigration Rules as the first Appellant's partner was not British or settled in the UK. It was not accepted that there were very significant obstacles to the Appellants' integration in Albania and there were no exceptional circumstances to justify a grant of leave to remain under Article 8 of the European Convention on Human Rights.

4. The First-tier Tribunal Judge dismissed the appeal finding that the Appellants did not meet the requirements of the Immigration Rules, that there were no insurmountable obstacles to the family continuing their family life outside of the UK, and that the decision is proportionate under Article 8.

The Grounds of Appeal

5. The Grounds of Appeal contend that the First-tier Tribunal Judge failed to make findings on the Appellants' claim that their removal would be in breach of paragraph 276ADE(1)(vi). It is contended that the Appellants' case put at the hearing was that the first Appellant's partner's application for indefinite leave to remain had been pending since January 2018 and was to be decided within six months i.e. by July 2018 and that the judge failed to consider the submission that (as at the date of the hearing) the Appellant would return to Albania with two children out of wedlock. It is contended that the judge failed to consider whether the Appellant had established that there would be "very significant obstacles" to her integration in Albania without her partner. It is contended that that issue went to the heart of the case and is accordingly a material error of law. It is contended that as a consequence of this mistake the judge failed to consider or make findings on the proportionality of the Appellant and children remaining in the UK pending the resolution of the partner's indefinite leave to remain application. It is further contended that the judge erred at paragraph 28 in failing to consider or make relevant findings on the Appellant's case that she would be stigmatised for having children outside of wedlock and faced hostility from her family. It is argued that the judge's observation that this account lacked supporting

evidence is not a reasoned finding on the oral evidence provided. It is further contended that the judge's observation that the Appellant did not claim protection on arrival must be seen in the light of the fact that she did not have any children at that time and had not met her partner at that time.

6. At the hearing before me Mr Lams submitted that the judge did not engage with the arguments put forward that the Appellant would be ostracised by her family if she were to return to Albania with her children. He contended that the judge failed to consider paragraph 276ADE(1)(vi) in the decision. He pointed out that this issue had been raised in the skeleton argument and it had been considered in the reasons for refusal letter. He contended that there is no overlap between EX.1 which was considered by the judge and relates to the family life continuing in Albania, and 276ADE(1)(vi) which relates to the Appellant's reintegration in Albania.

7. Mr Lams referred to paragraph 3 of the Appellant's witness statement and submitted that it was a significant part of the Appellant's case that she would be going home to Albania in circumstances where she had children born outside of wedlock and where she had not undertaken an arranged marriage and would be ostracised by her own family. He contended that there is support for the Appellant's position in the case of **TD and AD (Trafficked women) CG [2016] UKUT 00092 (IAC)** where the Tribunal highlighted that one of the factors relevant to potential persecution of a trafficked woman was whether there was an illegitimate child. He referred to paragraph 49 of the decision in **TD** where the Tribunal considered the evidence of an expert which states that mothers of illegitimate children are not well received in social groups and found it difficult to work long hours to make the money needed to cover living expenses. He submitted that illegitimate children can bring particular dishonoured families and can lead to honour killings.

8. Mr Lams submitted that it is clear from paragraph 6 of the skeleton argument which was before the First-tier Tribunal that the Appellant's partner would remain in the UK whilst his application for indefinite leave to remain was being decided. He contended that otherwise his leave to remain under Section 3C would have lapsed. The Appellant's partner would have to remain in the UK to Sponsor an application for entry clearance. He contended that the judge erred in failing to take that into account.

9. Mr Lams referred to paragraph 24 of the First-tier Tribunal decision where the judge found that there was "no credible evidence" before the Tribunal to indicate support for the assertion that the Appellant and her partner and children would be unable to relocate to Albania. At paragraph 25 the judge found that the Appellant's partner would be able to secure similar employment in Albania. At paragraph 20 the judge found that there were no insurmountable obstacles for the Appellant and her partner and children to be required to leave the UK. Whilst Mr Lams accepted that this

was a consideration relevant to EX.1 of Appendix FM, he suggested that otherwise there was a failure to look at the factual situation of the Appellant returning to Albania on her own with the child.

10. Mr Lams referred to the fact that there had been an application for adjournment which had been refused. He contended that it was unfortunate in hindsight that the case had not been adjourned so that the factual scenario could have been considered properly by the First-tier Tribunal. He contended that there is an implication in the witness statement from the Appellant's partner that he was not intending to go to Albania for example where he said at paragraph 2;

> "There is no reason I should not now be granted settlement in the United Kingdom. Once I have been granted settlement my children will be eligible to be registered as British citizens and [the first Appellant's] case will clearly fall within EX.1 of Appendix FM of the Immigration Rules".

He also pointed out that in her witness statement the first Appellant said that there was little provision in Albania for single mothers and that she would be ostracised by her family. In his submission the judge should have accepted that it would be disproportionate for the Appellant's partner to have abandoned his application for indefinite leave to remain in order to go with her to Albania and whilst there was the prospect of the children being entitled to register as British citizens. Mr Lams submitted that this error was material despite the current change of circumstances whereby the Appellant's partner has now been granted indefinite leave to remain.

11. In his submissions Mr Tufan submitted that the crux of the application to the Upper Tribunal is that the judge did not consider paragraph 276ADE(1)(vi). However he pointed out that at the stage when the First-tier Tribunal was dealing with the appeal the Appellant's partner did not have indefinite leave to remain and the children were not entitled to register as British citizens. He pointed out that 276ADE(1)(vi) was mentioned in the skeleton argument at paragraphs 1 and 12 but that the rest of the skeleton argument looks at Article 8 and the best interests of the children. He submitted that the skeleton argument must be looked at in the context of the witness statements which do not raise significant issues in relation to 276ADE. In fact he pointed out that at paragraph 2 of the witness statement the first Appellant highlighted that in the reasons for refusal letter the Secretary of State had mistakenly said that she was a national of Algeria and she said

> "In response to this I respectfully submit that whilst the Secretary of State may be correct in claiming I do not meet the requirements of paragraph 276ADE of the Immigration Rules I am not a national of Algeria, neither have I lived in the United Kingdom all my life".

In his submission that amounts to a tacit acceptance that the first Appellant does not meet the requirements of paragraph 276ADE. In these

circumstances he submitted that the judge had no reason to go into paragraph 276ADE. In any event he submitted that paragraph 20 of the decision amounts to an implied consideration of paragraph 276ADE. He pointed out that at paragraph 21 the judge was critical of the Appellant's immigration history and the findings at paragraphs 24 and 25 in his submission were relevant to the issue of paragraph 276ADE and consideration of whether there were very significant obstacles to the first Appellant's reintegration in Albania. Mr Tufan relied on the case of **Agyarko v SSHD [2017] UKSC 11** and referred to paragraph 25 of the Court of Appeal decision. He pointed out that in this case the judge could not be criticised for reaching the conclusion on the basis of the facts at the date of the hearing. He pointed out that any new issues arising could form the basis for a fresh application to the Secretary of State.

12. In reply Mr Lams referred to the grant of permission to appeal which points out that at paragraph 25 and in other paragraphs of the decision the judge solely contemplates return to Albania with the Appellant's partner but had not contemplated return without her partner and had not considered arguments as to the Appellant's vulnerability as a single parent. He rejected the submission made by Mr Tufan that the skeleton argument in the First-tier Tribunal largely put forward asylum grounds. He relied also on paragraph 6 of the skeleton argument pointing out that the Appellant's partner would not be able to gain employment in Albania. In his submission the cumulative points had been made out as to why it would not be reasonable for the Appellant's partner to relocate to Albania.

Error of Law

13. I accept Mr Tufan's submission that the judge was required to deal with the circumstances at the date of the hearing. The Appellant had applied for an adjournment in advance of the hearing and that application had been refused as the Tribunal decided that it could not adjourn the hearing to a date which may be years into the future to await a separate outcome which was not guaranteed (letter from the Tribunal of 3rd May 2018). There is no indication that that application was renewed in the First-tier Tribunal at the hearing in the First-tier Tribunal. In any event there is no challenge in the Grounds of Appeal to the decision not to adjourn the hearing. At that stage there was no guarantee as to when the Appellant's partners' decision on his application would be made and the grant of any adjournment for an indefinite period would not have been appropriate.

14. At paragraph 13 the judge noted that the Appellant said in oral evidence that she had travelled to the UK illegally to meet a friend and had never applied for status and that she had "effectively fled from Albania and the prospect of having to marry there against her free choice". Accordingly, the observation by the judge at paragraph 28 that the Appellant did not make a claim for international protection when first arriving in the UK was in my view open to him on the basis of this oral evidence.

15. It is clear from the decision that the judge was aware that the Appellant's partner was waiting for an application for the determination of his application for settlement as noted at paragraph 14 and elsewhere. The judge noted at paragraph 16 that the Appellant's partner accepted that he had entered into a relationship with the Appellant when he knew that she had unresolved immigration status in the UK and when he had only been granted a period of discretionary leave [26]. The judge was clearly aware that the Appellant had two children born in the UK on 6th September 2014 and 14th March 2017.

16. The judge noted at paragraph 17 that in oral evidence the Appellant's partner said;

> "He had travelled to Albania in May and October 2015 where he had seen friends would had (sic) relocated from Macedonia to Albania. He stated that he could not live in Macedonia which was unsafe and nor did he feel he could relocate to Albania as he had invested too much time in the United Kingdom".

17. The Appellant's partner also accepted that although his son had been born before he made an application for leave to remain in September 2014 he had indicated in the application that he was single with no dependants [17].

18. The Grounds of Appeal contend that the judge failed to consider whether the first Appellant and the second Appellant met the requirements of paragraph 276ADE(1)(vi) which states as follows;

> **"Requirements to be met by an applicant for leave to remain on the grounds of private life**
>
> 276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:
>
> …
>
> (vi) subject to sub-paragraph (2), is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK."

19. At paragraph 20 the judge said *"I have considered the important exception provisions in relation to paragraph EX.1 and conclude that there are no insurmountable obstacles were the Appellant and his partner and children to be required to leave the United Kingdom*". The judge accepted that the Appellant and her partner have made it clear that they would prefer to stay in the UK which offers better employment opportunities and that they have both chosen effectively to remain in the UK. The judge noted that they both accepted that they were each aware of the others unresolved immigration status and did so at the time when the Appellant

became pregnant in December 2013. The judge considered that the Appellant had demonstrated a *"wholly cavalier attitude and a blatant disregard for proper immigration control in the United Kingdom."* [21]

20. The judge went on to undertake an assessment in accordance with the guidance in **Razgar** finding that the Appellant and her partner and children had established family life in the United Kingdom. The judge was aware that the Appellant's partner was awaiting a decision in relation to indefinite leave to remain [23]. The judge noted that a grant of indefinite leave to remain cannot be guaranteed and took into account that the Appellant and her partner appeared to have made a *"joint lifestyle decision to ignore the others wholly unresolved immigration status by having two young children whom they now seek to rely upon in pursuit of Article 8 grounds justifying an imperative need to remain in the United Kingdom."* [23]

21. The judge found at paragraph 24 that there was no credible evidence to support the assertion that the Appellant and her partner and children will be unable to relocate to Albania. The judge took into account that the partner had returned to Albania on two previous occasions in May and October 2015 where he stayed with friends who themselves had also relocated to Albania from Macedonia. The judge found that the Appellant's partner would be able to secure employment and said the fact that he may not earn an equivalent salary in Albania does not *"give rise to insurmountable obstacles or very significant difficulties"* [25]. The judge found that both the Appellants along with the younger child would be able to return to Albania as a complete family unit along with the Appellant's partner.

22. At the time of the hearing the first Appellant's partner did not have a resolution to his application for indefinite leave to remain. In these circumstances the judge considered the appeal on the basis that the family could travel to Albania together. I do not accept Mr Lams' suggestion that it is implicit in the witness statement of the Appellant's partner that he would not go to Albania because he had an application for indefinite leave to remain pending. I cannot accept that it can be assumed as suggested by Mr Lams that anyone who has an application for indefinite leave to remain in the UK would not leave the UK or that anyone who has been granted indefinite leave to remain in the UK would not leave or could not be expected to leave the UK.

23. In his witness statement the Appellant's partner said that he would not receive any assistance from the Appellant's family and might experience outright hostility from them. However he did not specify why he could not or would not live in Albania. In fact the judge recorded in his oral evidence at paragraph 17 as considered at paragraph 24 that the partner had been to Albania on two previous occasions and had stayed with friends who had relocated from Macedonia to Albania. The reason he put forward in oral evidence for not going to Albania was that he had invested too much time

in the United Kingdom. This falls far short of amounting to very significant difficulties for her refusal to go to Albania.

24. In her witness statement the Appellant said that if she were forced to return to Albania she would not receive any support from her family because she would have brought shame on them for giving to birth to a child outside of wedlock. However it is clear that the judge had issues with the Appellant's credibility in this regard noting that the Appellant had not claimed asylum when she arrived in the UK despite claiming that she fled because of a fear of an arranged marriage. The judge also considered that the first Appellant's credibility was damaged by her blatant disregard for proper immigration control [21]. The judge also considered that there was no supporting evidence to suggest that the first Appellant's family had disowned her or that they disapproved of her giving birth outside of wedlock [28].

25. The judge found that the Appellant's partner had not being candid with the immigration authorities as to having a partner and child in the UK when he made an application for leave to remain in 2014 [26]. It is clear also that the judge took into account that the Appellant and her partner made a joint lifestyle decision to ignore the other's wholly unresolved immigration status by having two children [23].

26. In these circumstances I consider it was open to the judge to find that he did not accept the Appellant's claims that she would be ostracised by her family. In any event the Secretary of State suggested that there was nothing to prevent the Appellant and her partner relocating in living elsewhere in Albania. The Appellant has failed to put forward any reason why she and her partner could not live elsewhere in Albania. The judge clearly made findings that that would be reasonable at paragraphs 24 and 25.

27. In my view it is clear that in making these findings the judge considered that there were no insurmountable obstacles to the family returning in accordance with EX.1. I accept that the judge did not make specific reference to paragraph 276ADE (1)(vi). However in my view the references to 'very significant difficulties' at paragraphs 25 and 20 along with the findings at paragraph 24 are in my view sufficient to indicate that the judge had in mind this provision when considering the evidence.

28. Accordingly I find that the judge has in fact considered the factors relevant to an assessment as to whether there would be very significant difficulties for the Appellant returning to Albania. The judge clearly contemplated that the Appellant's partner would be able to accompany her there. This was a conclusion open to the judge on the basis of the evidence. I do not accept that the judge made any error in failing to specifically consider whether the Appellant would face very significant difficulties returning alone given that this was not specifically pleaded in the evidence before the judge.

Notice of Decision

The decision of the First-tier Tribunal Judge does not contain a material error of law. The decision of the First-tier Tribunal shall stand.

No anonymity direction is made.

The appeals have been dismissed and there can be no fee award.

Signed Date: 30th October 2018

Deputy Upper Tribunal Judge Grimes