Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/49379/2013

THE IMMIGRATION ACTS

Heard at Field House
On 18 July 2014

Oral Determination
Promulgated
On 30 July 2014

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

SABRI KRASNIQI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Harding, Counsel instructed by Marsh & Partners Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Kosovo who appeals against the determination of First-tier Tribunal Judge L K Gibbs promulgated on 25 April 2014 in which she dismissed the appellant's appeal against the decision of the Secretary of State to refuse his claim

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under the provisions of paragraph 276ADE with reference to paragraphs 353B and s. 55 of the Borders, Citizenship and Immigration Act 2009. The facts of the case can be relatively swiftly stated.

2. The appellant is a citizen of Kosovo. He was born on 3 June 1981. He married a British citizen, Elma Mata, in Kosovo on 11 August 2010. The couple have a son who was born in the United Kingdom on 30 July 2012. He applied in 2010 for a visit visa to visit his wife but this was refused. It can safely be said that he had no intention of remaining merely as a temporary visitor and that it was at all times, as his subsequent activities demonstrate, his intention to settle in the United Kingdom. Having failed in his application for a visit visa in 2010, he took the law into his own hands and, after his child was born in July 2012, he himself entered the United Kingdom, unlawfully, on 15 December 2012 and then applied on 26 February 2013 for leave to remain on the basis of his marriage and because he had a child. In addition, he claimed to have a fear of returning to Kosovo. The latter point was swiftly dealt with by his Counsel at the opening of the First-tier Tribunal hearing when Mr O'Callaghan, who then appeared on behalf of the appellant, withdrew any suggestion that this claim raised any Article 3 issues. In other words the claim that he had previously advanced that he was objectively at risk of harm, was not one which was well-founded.

3. The child born on 30 July 2012 is now 20 months old. He has a step-sister, the result of a former relationship of the appellant's wife, who is 4 years of age. Both children are British citizens. The judge in paragraph 24 of the determination expressly referred to the words of Lady Hale in the case of **ZH (Tanzania) [2011] 2 AC 166; [2011] UKSC 4** to the effect that although a British citizen child is not a trump card, it is a matter of particular importance in assessing the best interests of any child. I have no reason at all to doubt that the judge took that into account, as she professed to do by reference to that passage of the judgment of Lady Hale. These are the bald facts. The appellant seeks to avoid complying with the requirements of the Immigration Rules. The application that he has made is an attempt to circumvent the maintenance provisions of the Immigration Rules. Those maintenance provisions are now said to be lawful and they are designed to prevent a recourse to public funds in circumstances where the net result is that the taxpayer has to fund the arrival of the applicant.

4. The particularly unsatisfactory circumstances of this case are that, as the judge found, the appellant and his wife are not currently living together. She lives in Ilford whilst the appellant lives in Streatham. They do not live together, it was said by Ms Mata, because were they to do so, she would lose her benefits. So it is one of those features of this case that both the appellant and his wife are well aware of the need to rely upon benefits as the means by which they are able to live in the United Kingdom.

5. It is a matter of some interest as to whether the appellant's wife has links with Kosovo. It is slightly muddled by the fact that although her parents had originally advanced a claim on the basis that they were citizens of Kosovo, they have since retracted that case and have conceded that they were Albanian citizens. It follows

from this that the appellant's wife is herself an Albanian citizen rather than a Kosovan. However the couple speak Albanian and the wife has certainly been to Kosovo because it is accepted this is where she married the appellant on 11 August 2010. Since the child was born on 30 July 2012 in the United Kingdom, it raises an issue as to where the child was conceived. The appellant says that he entered the United Kingdom only on 15 December 2012 and consequently could not have been present in the United Kingdom when the child was conceived towards the end of 2011, probably in October or November. When I asked Mr Harding to take instructions from Ms Mata as to whether she was in Kosovo when the child was conceived or whether the father was in the United Kingdom in October or November 2011 contrary to his instructions, she told Mr Harding on instructions that the child was conceived by a specimen of the appellant's sperm being sent by post to the United Kingdom from which the appellant's spouse fertilised herself without medical help. I am not going to decide this case on the basis of any findings in relation to that statement because I have not heard evidence from Ms Mata nor do I intend to do so. However it does not exclude the possibility that the appellant's wife as a British citizen was able to travel to Kosovo, had she chosen to do so, at the end of 2011.

6. The nub of the appeal is that it is said on behalf of the appellant that the requirements of the Immigration Rules should not be seen as being applied in this case because the consequences of an application of the maintenance requirements of the Rules would lead to an unlawful interference with the right of the British child now aged 20 months to enjoy the fruits of British nationality or alternatively the fruits of living with her father, the appellant, in the United Kingdom. The judge dealt with the balance that had to be struck in paragraphs 24 onwards of the determination. Having set out the requirements of the Immigration Rules, she went on to consider whether EX1 applied and, in particular, whether there were insurmountable obstacles to family life continuing outside the United Kingdom. She properly analysed that the focus of this assessment was the impact upon the children.

7. In paragraph 25 it is said that she placed significant weight on the fact that the children are British but that she had to consider the wider facts of this appeal including the ages of the children and their ties here. She acknowledged that in moving out of the United Kingdom both children would lose the advantages of growing up in the United Kingdom but she correctly pointed out that the children were very young. Indeed in paragraph 26 she properly described them as being too young to have social links here and that they should properly be regarded as two children growing up in a household where their parents speak Albanian to one another. That is of course something that would be replicated were they to go either to Albania or Kosovo as would be the likely destination in this case. The judge however took into account the fact that the children's relatives live in the United Kingdom but she also placed weight on the fact that the appellant's wife was born in Albania and that her family were originally Albanian nationals themselves. Accordingly, the judge, correctly in my judgment, identified the children's cultural heritage as a mixture of British and Albanian and Kosovan and therefore the

circumstances were very different from those in **ZH (Tanzania)** to which she paid considerable regard in the determination.

8. Most importantly she accepted that the best interests of both of the children were to remain with their mother and that in the circumstances of this case that this also meant that they should be with the appellant as the father of the little boy aged 20 months. In that regard she took into account the circumstances in Kosovo. The appellant's own evidence was that he had succeeded in business in Kosovo and that he was able to accumulate a sum in excess of £6,000 in order to come to the United Kingdom. She also took into account that the evidence of the appellant had been equivocal in seeking to minimise the links that he had with Kosovo and the family members that he had in order to enhance his claim. She regarded the appellant wholly rationally as having reasonable prospects of future financial success.

9. The determination was entirely reasonable based on the circumstances as I have set out above. The judge then went on, once again properly, to look at the case of **Gulshan (Article 8 – new rules – correct approach) [2013] UKUT 640 (IAC)** amongst other cases dealing with the correct approach to Article 8. I have no doubt whatsoever that she applied the right test in dealing with the case in that way.

10. The essence of the applicant's case is that the law as a combination of Article 8 and the Immigration Rules should permit the applicant to enter the United Kingdom. But that principle is subject to the proviso that he was required to satisfy the requirements of the Immigration Rules as a spouse. If the couple decided to marry and to have a child as they did, they had no right to expect that they would be able to achieve what they seek to achieve, that is, having the appellant join the family in the United Kingdom unless he also complied with the Immigration Rules. The choice they had was a simple one. They either had to meet the Immigration Rules or they might chose to remain as a family in Kosovo or indeed in Albania if that is where they chose to settle where they could be together. There were advantages in both of those situations. There was the advantage of the child being brought up in the United Kingdom but without a father present unless he complied with the requirements of the Immigration Rules or there was the option of the entire family moving to Kosovo where they could live, where there were prospects of work, where there had been evidence provided that the appellant had been able to live comfortably and where he had family members. Those were the two options that were available to them and they are still available to them. What is not an option, in my judgment, is that Article 8 imposes the outcome that the appellant and his wife can determine - because they have a son who is a United Kingdom citizen - the place where they wish and would prefer to settle, that is, the United Kingdom. That in my judgment is not an alternative or an option which must be imposed as a result of the application of Article 8 and/or the operation of s. 55 and a consideration of the best interests of the children.

11. In those circumstances I am quite satisfied that the judge reached the correct conclusion and was entirely correct in saying that the appeal of the appellant should be dismissed.

DECISION

The Judge made no error on a point of law and the original determination of the appeal shall stand.

ANDREW JORDAN
UPPER TRIBUNAL JUDGE