Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: OA/09400/2013
OA/09410/2013

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 14th July 2014	**On 12th Aug 2014**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

(1) MRS SUZANA SHALA
(2) MASTER EDUARD SHALA
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

ENTRY CLEARANCE OFFICER, WARSAW

Respondent

Representation:

For the Appellants: Mr Julian Wells (Counsel)
For the Respondent: Ms L Kenny (HOPO)

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Fox, promulgated on 16th April 2014, following a hearing at Hatton Cross on 8th April 2014. In the determination, the judge dismissed the appeals of Mrs

Suzana Shala, and her child Master Eduard Shala. The Appellants applied for, and were subsequently granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

The Appellants

2. The Appellants are a mother and child. Both are nationals of Kosovo. The First Appellant was born on 26th February 1986 and the Second Appellant was born on 4th July 2009. They applied to join the Sponsor, Mr Endri Shala, as the wife and child respectively of the Sponsor.

3. The ECO rejected the applications because he was not satisfied that the First Appellant met the financial requirements of the Immigration Rules. There was an absence of personal and business bank statements for a period of twelve consecutive months, and an absence of proof of national insurance contributions.

The Judge's Findings

4. At the hearing before the original judge, it transpired that the Sponsor had employed an agent to organise the entry clearance applications of his wife and child, and his details were given on the application forms of both applicants. When, however, the Respondent Entry Clearance Officer set out to require further information in the form of personal and business bank statements as well as proof of national insurance contributions, the request was made, not of the agent expressly employed by the Sponsor for this purpose, but of the First Appellant, in consequence of which the First Appellant was unable to submit the same.

5. However, "all the documents are now present as evidence at page 29 of the Appellants' bundle at paragraphs 14 to 19 of the Sponsor's witness statement" (para 18). The effect of the refusal by the Entry Clearance Officer was that now,

> "The Sponsor travels to Kosovo regularly though their prolonged separation is undesirable. A fresh application may be futile if the Appellants have no right to enter and the Respondent now accepts that the required documents exist so the Appellants are entitled to enter the UK therefore any interference is disproportionate." (para 19)

6. In making his findings, the judge observed that the Appellant's representative had "ultimately conceded that the Appellant cannot succeed under the Immigration Rules" (para 21). Therefore, regard had now to be given to Article 8 ECHR.

7. In this respect, the judge concluded that "the available evidence demonstrates that family life exists between the Sponsor and the Appellants" (para 23). However, it was well-established that the Respondent is not required to respect the Appellant's country of choice. The Sponsor had made a conscious decision to separate from the

Appellants and the Respondent's decisions did not interfere with the private arrangement. Therefore, the appeals had to be dismissed.

Grounds of Application

8. The grounds of application broadly make the following points. First, the judge failed to identify which documents were missing and whether any information or document which was missing fell under the ECO's evidential flexibility policy.

9. Secondly, although the judge considered Article 8 ECHR (from paras 21 to para 24), the judge was wrong to conclude that interference was justified by the public authority on the grounds of economic wellbeing of the country or the maintenance of effective immigration control because the Appellant's husband actually contributes to the UK economy and the Appellants do not have any adverse criminal history that necessitates their exclusion under immigration control. Third, the judge failed to consider Section 55 of BCIA 2009 in terms of the best interests of the child.

10. On 19th May 2014, permission to appeal was granted on the basis that the judge had arguably failed to give proper consideration to Article 8 or to Section 55 BCIA 2009 in that this was a case where the child was separated from the British citizen father in the United Kingdom. Article 8 was sparsely dealt with and arguably inadequate.

Submissions

11. At the hearing before me on 14th July 2014, Mr Wells, appearing on behalf of the Appellants, submitted that the judge had failed to deal with Article 8 in a proper and systematic fashion but had simply adopted the position that Parliament was entitled to past legislation that circumscribed private and family life rights in the manner that it did. There was no consideration, for example, of the fact that the Sponsor met the maintenance requirements.

12. There was no consideration of the fact that both of the Appellant's children were British citizens. The second child was born after the application was made. If the children were British citizens then Section 55 BCIA directly fed into the assessment of Article 8 considerations. At paragraph 22 of the determination, the judge refers to **Razgar**, but does so in the context of the Respondent being "afforded a margin of appreciation in the administration of this," which is plainly inadequate as an application of the "**Razgar** principles." This is especially so given that at paragraph 23, the judge accepts that family life exists between the Sponsor and the Appellants.

13. Indeed, the Sponsor's marriage with the First Appellant took place after his settlement in the UK. Therefore, it cannot be said that there was a conscious decision on the part of the parties to separate by the Sponsor

coming to the UK and leaving Kosovo behind in a manner that was a matter of choice.

14. Finally, Mr Wells submitted that the Appellant's representative was wrong at the hearing to have conceded that the Immigration Rules did not apply in a way as to benefit the Appellants.

15. The whole issue was whether the Appellant could produce the documents that had been requested. The requests had not been made of the Appellant or the Sponsor, but of the agent, whose sole purpose was simply to assist in making the actual application.

16. However, the email address provided on the application form was that of the Sponsor, not the agent, and therefore the email request should have been made not of the agent, but of the Sponsor, who would have been able to provide the necessary documents.

17. There was a document verification report but this had not been shown to the Sponsor or the Appellants.

18. For her part, Miss Kenny submitted that there was no error of law. The Appellants should make a fresh application. It had been conceded by their Counsel that the Appellant could not meet the Immigration Rules. Article 8 was their only hope. However, Article 8 cannot be used to circumvent the Immigration Rules.

19. In reply, Mr Wells submitted that the judge's findings were inadequate at every level as far as Article 8 was concerned. He gave simply no consideration to the fact that the children were British citizens. He was wrong to say that there had been a voluntary choice to leave Kosovo to come to the UK when the marriage took place after the Sponsor had already come to the UK. The email address provided on the application form had not been used by the Respondent or her officers. The documentation which was in issue was readily available and was actually provided before the judge once the Sponsor had found out what had gone wrong.

Error of Law

20. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law (see Section 12(1) of **TCEA [2007]**) such that I should set aside this decision and re-make the decision. The most important reason is that the consideration of Article 8 has been inadequate. The **Razgar** principles have not been properly followed. The essence of **Razgar** is not that there is a "margin of appreciation" afforded to the Respondent.

21. The most significant factor in the application of the **Razgar** principles to this case would have been the British citizen status of the two children which was simply not considered by the judge.

Re-Making the Decision

22. I have re-made the decision on the basis of the findings of the original judge, the evidence before him, and the submissions that I have heard today. I am allowing this appeal for the following reasons.

23. First, the request in relation to the missing documents, in the form of the most basic documents, such as even the sponsorship undertaking, was not made to the Sponsor, whose name appeared on the application form, together with his email details. It was made to the agent who had simply filed the application.

24. If the contact information existed on the application form, there was no reason why the request could not have been made to both parties. If only a single party was to be contacted, it had surely to be the Sponsor, whose email details were given on the application form.

25. Second, once it had become clear to the Sponsor that the necessary documentation had not been forwarded, it was then subsequently disclosed by the Sponsor, because it plainly existed, and it was considered by the judge who observed that, "all the documents are now present as evidence at page 29 of the Appellants' bundle ..." (para 18). On this basis, the Appellants would have succeeded under the Immigration Rules.

26. Third, and in any event, the Appellants would have succeeded under Article 8 ECHR. The judge accepted that family life existed between the Sponsor and the Appellants (para 23). But he was wrong then to go on to say that "the Respondent is not required to respect the Appellants' country of choice" (para 23). That was the beginning of the assessment. It was not the end of the assessment.

27. What was crucial was the existence of the British citizen children who have a constitutional right to come to the country of their nationality, in circumstances where their sponsoring father was in a position to maintain and support them and where their "best interests" under Section 55 BCIA clearly indicated their physical residence with their father at their young age, so that they could look to both parents for everything that young children look to their parents in a normal family life. The Sponsor is a contributing member of society, who works and pays taxes and there were no factors that militated against him. Neither, were there factors that militated against the Appellants themselves, because none of them had criminal records.

28. In short, if the **Razgar** principles were to be applied correctly, then Lord Bingham's tabulation (at para 17) meant the following. First, the proposed decision interfered with the exercise of the Appellants' right to respect for their private and family life. Second, the interference had consequences of such gravity as to potentially engage the operation of Article 8. This is clear from the evidence before the judge (at para 19) that the Sponsor now has to travel to Kosovo regularly because "their prolonged separation

is undesirable." Third, the decision may have been in accordance with the law in that the necessary information was not submitted timeously to the Respondent. However, in coming to this conclusion, allowance must be made for the fact that the request was not made of the Sponsor. Fourth, the interference is not necessary in a democratic society in the interests of the protection of the rights and freedoms of others or the economic wellbeing of the country. The Sponsor contributes to the economy. The Appellants do not have any criminal records and are not in any way undesirable. Finally, the interference is disproportionate to the legitimate public end that is sought to be achieved. The judge had recorded the submission that "a fresh application may be futile if the Appellants have a right to enter and the Respondent now accepts that the required documents exist ..." (para 19).

29. In these circumstances, the appeal is allowed under Article 8.

Decision

30. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. I re-make the decision as follows. This appeal is allowed.

31. No anonymity order is made.

Signed Date

Deputy Upper Tribunal Judge Juss 11th August 2014