Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/26737/2014
IA/26746/2014
IA/26741/2014

THE IMMIGRATION ACTS

Heard at Manchester Piccadilly
On 6 May 2015

Determination Promulgated
On 19 May 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE BIRRELL

Between

MS ZENITA DILAVERI
KLEVIS DIAVERI
MS EMILIA DILAVERI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Neville, Counsel instructed by J D Spicer Zeb Solicitors
For the Respondent: Ms C Johnstone, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge D J Dickinson promulgated on 13 October 2014 which allowed the Appellant's appeal and held that it was disproportionate and unlawful under Article 8 of the European Convention on Human Rights to remove them to Albania.

Background

3. The first Appellant was born on 9 October 1983 and is the mother of the second and third Appellants who were born on 2 July 20120 and 26 October 2007. They are all nationals of Albania.

4. The first Appellant came to the United Kingdom in April 2006 to join her husband. An application was made for leave to remain on 28.2.2008 and refused on 1.6.2008 with a limited right of appeal. A notice of liability to deportation was served. A further application for leave to remain was made on 10.7.2008 and refused on 19.2.2010 with a right of appeal. The Appellant appealed the decision and her appeal was dismissed on 27.5.2010 and permission to appeal was refused. An application for leave to remain was made on 28.6.2013 and refused on 22.7.2013 with no right of appeal. A Pre Action Protocol was received dated 30.7.2013 and this was followed by additional evidence and submissions.

5. On 5 June 204 the Secretary of State maintained the refusal of the Appellants applications. The refusal letter took into account the best interests of the children and gave a number of reasons:

   (a) The first Appellant did not meet the requirements of Appendix FM as a parent as the children were not British Citizens.

   (b) EX.1 did not apply as the children were not British citizens or settled in the United Kingdom.

   (c) The Appellants did not at the time of the application meet the requirements of paragraph 276ADE.

   (d) There was no breach of Article 3.

   (e) There were no exceptional circumstances that warranted a grant of leave outside the Rules.

The Judge's Decision

6. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Dickinson ("the Judge") allowed the appeal against the Respondent's decision under Article 8. The Judge in his decision:

   (a) Set out the relevant law both in relation to Article 8 but also in relation to the best interests of the children(paragraphs 5-11)

   (b) The Appellants could not it was conceded meet the requirements of Appendix FM or paragraph 276ADE.

   (c) It was appropriate to consider Article 8 and the Judge set out the questions as in Razgar [2004] UKHL.

(d) The Judge answered the first four questions positively.

(e) In considering proportionality he took account of the fact that the best interests of the children were a primary consideration.

(f) The Judge set out those factors which were against the decision being proportionate and those in favour of it being proportionate.

(g) He set out the reasons why it would be unreasonable for the children to live in Albania by reference to the background material (paragraphs 22-25)

(h) In relation to those factors which were in favour of the decision being proportionate he set out the need to maintain immigration control; the precarious nature of the family life established at a time when they had no leave to remain.

(i) Reminded himself that the children were not to be blamed for the conduct of the parents.

(j) Concluded that the decision was disproportionate.

7. Grounds of appeal were lodged arguing that the Judge :

(a) Had misdirected himself in considering Article 8 outside the Rules.

(b) The Judge had failed to have regard for s 117B of the Nationality, Immigration and Asylum Act 2002 as amended in the proportionality assessment.

8. On 2 March 2015 First-tier Tribunal Judge Andrew gave permission to appeal in relation only to the failure to consider s 117B.

9. At the hearing I heard submissions from Ms Johnstone on behalf of the Respondent that:

(a) The Judge had failed to take into account s117B (2) in relation to the financial circumstances of the first Appellant.

(b) The Judge failed to take into account that little weight should be given to private life established while their status was precarious.

(c) She relied on EV (Philippines) and Others v SSHD [2014] EWCA Civ 874

10. On behalf of the Appellant Mr Neville submitted:

(a) There was a problem with materiality in the Respondent‘s case. In the light of the provisions of s 117 B(6)

(b) If the decision were to be set aside the second Appellant is a ‘qualifying child’ for the purpose of s 117B (6). The factual findings of the Judge had not been challenged and at paragraph 22-25 the Judge had set out reasons why it was not reasonable for the children to leave the United Kingdom there was no materiality in any error of law.

(c) In fact the Judge did consider both self sufficiency in that he found that the Appellant was a credible witness and her witness statement was to the effect that she was financially supported by her brother in law and precariousness was specifically addressed in paragraph 27.

11. In response on behalf of the Respondent Ms Johnstone stated that the Judge had to consider the burden on the public purse both now and in the future.

Finding on Material Error

12. Having heard those submissions I reached the conclusion that the Tribunal made no material errors of law.

13. In this case the Appellant and her two children were appealing a refusal of leave to remain in the United Kingdom. The first Appellant, the mother, had lived in the United Kingdom since 2006 and the two children, who were 4 years 2 months and 6 years 11 months old were both born in the United Kingdom.

14. It was the unchallenged evidence of the first Appellant that her relationship with the children's father had broken down and the Judge found as a fact that the Appellant would face considerable problems as a single woman in Albania both in relation to the social stigma of divorce but also specifically from her husband's family who blame her for the breakdown of the relationship. He also found that there was a high probability that the first Appellant would not be allowed to retain custody of the children in any custody dispute with her husband's family. The Judge found that both children spoke no Albanian and were well integrated into United Kingdom society and he concluded it would be unreasonable for them to live In Albania. It was against this background of findings that the Judge made the assessment under Article 8.

15. I accept that the Judge did not specifically refer to s 117B of the Nationality Immigration and Asylum Act 2002. However I remind myself that in Dube (ss.117A-117D) [2015] UKUT 00090 (IAC) the court found that:

> "It is not an error of law to fail to refer to ss.117A-117D considerations if the judge has applied the test he or she was supposed to apply according to its terms; what matters is substance, not form."

16. I have therefore considered whether the Judge made findings or accepted evidence that addressed the public interest factors under s 117B that he was required to do in assessing the issue of proportionality. I am satisfied that he did. The weight he gave to those factors was a matter for him particularly given what I consider to be the strong findings that he made in relation to the risk to the children of being removed from their mother if returned to Albania.

17. The only maters identified by Ms Johnstone that the Judge had purportedly omitted were those set out in 117B (3) that those seeking to remain in the United Kingdom are financially independent and117B(5) that little weight should be given to private life established when status is precarious. I am satisfied that the Judge made clear and specific findings in relation to the Appellant's precarious status in paragraph 27. In relation to her financial circumstances the Appellant states in the witness statement that was before the Judge at paragraph 7 that her and her children live in a flat paid for by her brother in law. That I accept only addresses her present circumstances and does not address the potential future burden that the Appellant will present to the taxpayer.

18. However I am persuaded that even if I were to accept that failing to assess the potential future burden of the Appellants on the taxpayer this error was not material to the outcome of the decision. If I set the decision aside to remake it I accept Mr Neville's argument that I would be obliged to account of s 117B (6):

> "(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
>
> (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
>
> (b) it would not be reasonable to expect the child to leave the United Kingdom. "

19. If the decision were being remade now the second Appellant would meet the definition of 'qualifying child' in s117D(1)(b) because he has now lived in the United Kingdom for a continuous period of 7 years.

20. I was therefore satisfied that the Judge's determination when read as a whole set out findings that were sustainable and sufficiently detailed and based on cogent reasoning. Any error in failing to factor in each and every aspect of the Appellants financial circumstances was not material to the outcome of the decision.

CONCLUSION

21. **I therefore found that no errors of law have been established and that the Judge's determination should stand.**

DECISION

22. **The appeal is dismissed.**

Signed Date 14.5.2015

Deputy Upper Tribunal Judge Birrell