IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: AA/05213/2015
AA/05214/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 March 2016	**On 5 April 2016**

Before

THE HONOURABLE LORD BURNS
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE WARR

Between

MS L K
MISS O P
(ANONYMITY DIRECTION MADE)

Appellants

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellants: Ms E Daykin, Counsel instructed by Tuckers Solicitors
For the Respondent: Mr S Whitwell, Home Office Presenting Officer

DECISION AND REASONS

1. These are two linked appeals against the decision of the First-tier Tribunal promulgated on 30 September 2015. The first appellant, born 3 August 1984, is Albanian. She is the mother of the second appellant, born 15 February 2013. She is the dependent child of the first appellant and the

first appellant's partner. The first appellant's partner is also Albanian, has been present and settled in the United Kingdom for seventeen years and was issued with a British passport on 13 September 2004. They have a second daughter who was born on 12 October 2014 who is a UK citizen.

2. The first appellant entered the United Kingdom on 31 October 2013 and claimed asylum. That claim was refused by letter of 24 February 2015 and a decision made to remove her from the United Kingdom under Section 10 of the Immigration and Asylum Act 1999.

3. The First-tier Tribunal considered the appellant's claim under Appendix FM. In particular, under E-LTRP.2.2. the Tribunal noted that it was a requirement that the appellant was not in the UK in breach of Immigration Rules unless paragraph EX applied. However, in the Tribunal's consideration of EX.1, in respect of eligibility as a partner, it only considered EX.1.(b) and not EX.1.(a). The Tribunal had thus failed to consider the appellant's parental relationship with the youngest child, who was a British citizen. At paragraph 51 of the determination the judge states that even if EX.1. was considered he did not find it unreasonable to expect the youngest child to leave the United Kingdom since she would be removed as part of a family unit. However, that was wholly to ignore the accepted Home Office policy set out in Immigration Directorate Instruction Family Migration of August 2015 and paragraph 11.2.3. in particular. That states as follows:

> "Save in cases involving criminality, the decision maker must not take a decision in relation to the parent or primary carer of a British citizen child where the effect of that decision would be to force that British child to leave the EU, regardless of the age of that child."

It goes on to state that where a decision to refuse the application would require a parent to return to a country outside the EU the case must always be assessed on the basis that it would be unreasonable to expect a British citizen child to leave the EU with that parent or primary carer. The fact that, as the Tribunal pointed out, the appellant could apply from Albania for entry clearance was irrelevant since it was not known whether or not that application would be successful and, in any event, the policy did not admit of any temporary forced removal from the United Kingdom of a British citizen child to a country outside the EU.

4. Mr Whitwell for the respondent fairly accepted that the Tribunal had taken the wrong approach to this case. In particular, he accepted that the policy of the respondent was as set out at paragraph 11.2.3. quoted above and on that basis it was unreasonable to expect the child to leave the United Kingdom. Accordingly, the requirements of EX.1.(a) were met in this case.

5. However, Mr Whitwell pointed out that that policy was not entirely inflexible. It stated there may be circumstances where it would be

appropriate to refuse to grant leave where the conduct of the parent gives rise to considerations of such weight as to justify separation. However, he accepted that no such considerations arose here.

6. In the circumstances we are satisfied that the Tribunal fell into material error in its assessment as to whether the appellant met the requirements of Section E-LTRP and Section EX.1. We are further of the view that the Tribunal's departure from the clear policy set out in paragraph 11.2.3. of the Immigration Directorate Instruction without giving reasons constituted a material error.

7. We acknowledge that that policy is not entirely inflexible and may be the subject of exception in certain circumstances but none were present in this case. We shall accordingly allow this appeal. We shall also make an anonymity direction.

Notice of Decision

The appeal is allowed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 4 March 2016

Lord Burns
Sitting as a Judge of the Upper Tribunal