IAC-FH-NL-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00372/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision sent to parties on**
On 15 February 2016	**On 1 March 2016**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERVIN MURATI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: No appearance
For the Respondent: Ms E Savage, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal on 27 October 2015, allowing the claimant's appeal on immigration and human rights grounds.

Background

2. The claimant came to the United Kingdom as a minor in 1998 and was granted indefinite leave to remain on the basis of his refugee status on 5 June 1999. He is a Kosovan man who saw his parents killed in front of him.

3. The claimant has a very substantial criminal record beginning in 2001 and ending in November 2013. It ranges from driving while disqualified, stealing from a motor vehicle, being drunk and disorderly, criminal damage, failure to surrender to bail, wounding in 2005 contrary to Section 20 of the Offences against the Person Act 1861, robbery in June 2010 and driving with an invalid Kosovan licence. On 17 September 2010, he was convicted of having a blade in a public place, and sentenced to 40 months' imprisonment. That is the index offence. On 5 February 2013, the respondent decided to remove him to Kosovo, and that is the decision against which the claimant appeals.

4. He does not wish to return there because he left during the conflict and has very bad memories of Kosovo. The claimant has a married brother, a married sister, and an unmarried brother, all still living in Kosovo. His partner has no connection to Kosovo, has never been there, and does not speak Kosovan. The same applies to their 3 children.

5. The claimant made two EEA residence card applications on 1 February 2012 and 22 May 2012, both of which were refused for insufficient evidence that the claimant's partner was exercising Treaty rights in the United Kingdom. The claimant and his partner have 3 children, and have been together for over 16 years. The youngest child is said to be a British citizen: the nationality of the elder two children has not been established, but as their mother is an EEA citizen, they are presumably entitled to Portuguese citizenship. None of the children has a passport.

6. On 18 August 2014, the appeal was allowed by the First-tier Tribunal. The First-tier Tribunal found that the claimant could not show a real risk of persecution or serious harm in Kosovo today but allowed the appeal on human rights grounds.

7. The Secretary of State appealed and the appeal was remitted to the First-tier Tribunal for hearing afresh. Upper Tribunal Judge Storey gave the following reason for remitting it:

> "I consider that because the judge's decision is now a year old and there are children involved who are now British citizens, it would be appropriate for the remaking of this decision to be remade at a hearing in advance of which the claimant's representatives have had fuller opportunity to produce updated evidence."

First-tier Tribunal decision

8. The claimant did not produce updated evidence to the First-tier Tribunal concerning his children. Nor was it clear to the second Tribunal that the elder two children were British citizens: they have no passports and the question of their nationality remains unconfirmed.

9. The claimant's partner, who had in 2011 said that she would go to Kosovo if she had to, now said that she had reconsidered her position and was not prepared to go. She had extended family in the United Kingdom and did not consider that it would be in the children's best interests. She had not left the United Kingdom after arriving here from Portugal in 1998 and neither she nor the children had passports. The elder two. The eldest are now 14 and 12 years old and have spent at least 7 years preceding the date of the decision in the United Kingdom. The Tribunal found that they must at least be European Union citizens by virtue of their mother's nationality and that the youngest is a British citizen. She is only 3 years old.

10. The First-tier Tribunal's decision on undue harshness is at paragraph 60:

> "60. I take into account in assessing whether it would be unduly harsh for the [Claimant] to return to Kosovo the circumstances in which he left. The murder of his parents before his eyes has obviously had a very serious impact on the [Claimant]. I accept the evidence that it was not until he was on remand for the index offence, when he received bereavement counselling, that he was able to face the horror and begin to come to terms with what happened to his parents. I also accept the evidence that before he received counselling, he had adopted extensive strategies to avoid facing the past and coming to terms with it: the main one was to find escape and solace in drink. The evidence is that subsequent to bereavement counselling and release from prison he has made progress in coming to terms with his past and has been able to involve his girlfriend in that process. Notwithstanding that his sister and her family remain there [in Kosovo] and incidentally of whose circumstances there were no details before the Tribunal, I find that his return to the country where he witnessed the murder of his parents would inevitably stir up memories which he has only recently started to face and come to terms with and then only in context of his life in the United Kingdom with his family. Without the security of his family and the safety of his pattern of life in the United Kingdom the [Claimant] is unlikely to be able even to cope, never mind re-integrate. ...
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> 62. It would be unduly harsh for [his partner] to live in Kosovo because of compelling circumstances over and above the very serious hardship she and the [Claimant] would experience on return to Kosovo (paragraph 399(b)(ii)). Given all the circumstances of [his partner] and her extended family in the United Kingdom and the extensive involvement of the [Claimant] in her life and more importantly the children's lives it would be unduly harsh for [his partner] as a partner and mother to remain in the United Kingdom without the [Claimant]."

Permission to appeal

11. Permission to appeal was granted on the basis that the First-tier Tribunal had arguably failed to make findings of fact on the question of whether it was unduly harsh for the claimant's children to relocate to Kosovo or Portugal, alternatively on a reasons challenge, that the judge did not

explain what was unduly harsh about the possibility of living in Kosovo other than the historic murder of the claimant's parents.

Secretary of State's case

12. For the Secretary of State, Ms Savage relied on the decision of the Court of Appeal in *SS (Nigeria) v SSHD [2013] EWCA Civ 550* at paragraph 47, *LC (China) v SSHD [2014] EWCA Civ 1310* at paragraph 24, *PF (Nigeria) v SSHD [2015] EWCA Civ 251* at paragraph 43 and *ZZ (Tanzania) v SSHD [2014] EWCA Civ 1404* and submitted that it had not been established that it would be unduly harsh for the children to relocate to Kosovo or to Port6ugal.

13. In relation to the finding that it would be unduly harsh for the claimant's partner to remain in the United Kingdom with her children and her extended family or to accompany him to Kosovo, Ms Savage argued that the First-tier Tribunal's findings of fact are unsustainable and further that the partner and her family would not be obliged to leave the European Union if the claimant were removed: they had the alternative of returning to Portugal or travelling to another EEA member state.

14. Finally, in relation to paragraph 399A, Ms Savage argued that the First-tier Tribunal's finding that there would be very significant obstacles to the claimant's integration in Kosovan society was inadequately reasoned, and that there was no satisfactory medical evidence to demonstrate that he would be unable to cope, as the First-tier Tribunal found.

15. As regards Article 8 ECHR outside the Rules, Ms Savage contended that it was not open to the First-tier Tribunal to allow the appeal outside the Rules, as the deportation provisions of the Immigration Rules are a complete code, *MF (Nigeria) v SSHD [2013] EWCA Civ 1192* at paragraphs 43-44, leaving no scope for allowing this appeal under Article 8 outside the Rules.

Discussion

16. The Immigration Rules on deportation are a complete code, as set out in *MF (Nigeria).* It is right that there are no findings of fact about the relationship between the claimant and his three children, or indeed, the nationality of the older two. That is an important omission, and a plain error of both fact and law, since the application of paragraphs 399A(ii)(a) and (b) requires such a finding.

17. Moreover, there is no indication in the First-tier Tribunal decision that the claimant took the opportunity to provide further information in relation to his two stepdaughters and his youngest daughter, such as would have discharged the burden of proof upon him.

18. Nor has there been any explanation for his failure to appear or arrange representation at the Upper Tribunal hearing today. Such evidence as is recorded in the decision indicates no more than that the claimant, his

partner and their children are a normal close family with no particularly exceptional features.

19. As regards paragraph 399A, whilst it would no doubt be distressing for the claimant to return to Kosovo where he witnessed the murder of his parents during the civil war, there is no medical evidence to underpin the First-tier Tribunal's finding of fact that he would be unable to cope and/or that his relatives in Kosovo would be unable to help him cope. Absent any medical evidence, I find that that was not a conclusion which was open to the First-tier Tribunal.

20. I must, therefore set aside the decision of the First-tier Tribunal. The question then is whether I can proceed to determine the hearing, or whether a further hearing is required. At the hearing, I gave an indication that the decision would be remade in the Upper Tribunal on a date to be fixed. I have considered the position further since then and given the paucity of evidence in relation to the children, and the absence of any assistance from the claimant or his representatives at the Upper Tribunal hearing, I consider that it is doubtful whether anything will be gained by listing this appeal for a further hearing.

21. The notice of hearing stated in terms that 'If a party or his representative does not attend the hearing, the Tribunal may determine the appeal in the absence of that party'. I proceed to do so.

22. The evidence that it would be unduly harsh for the children either to accompany the claimant to Kosovo, or to remain in the United Kingdom (or the European Union) without him, is sparse indeed. The claimant has had many opportunities over several years to provide better evidence, but has chosen not to do so. On the evidence before me, the 'unduly harsh' test is not met. The appeal therefore cannot succeed within the Rules and I dismiss it.

Conclusions

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law. I set aside the decision. I remake the decision by dismissing the appeal.

Signed: *Judith A J C Gleeson* Date: 25 February 2016
Upper Tribunal Judge Gleeson