Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/12030/2014

THE IMMIGRATION ACTS

Heard at Field House
On 11 December 2014

Determination Promulgated
On 5 January 2015

Before

THE HONOURABLE MRS JUSTICE CARR DBE
DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MRS RAJMONDA CEKURI
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:

For the Appellant: Ms J Isherwood, Home Office Presenting Officer
For the Respondent: Mr E Nicholson, Counsel

DECISION AND REASONS

1. This is an appeal brought by the Secretary of State against the determination of a First-tier Tribunal Judge promulgated on 4 August 2014 where Ms Cekuri's appeal against the Secretary of State's decision of 24 February 2014 was allowed. That decision was to refuse Ms Cekuri leave to remain and to remove her to Albania. The

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appeal was dismissed under the Immigration Rules but allowed on Article 8 grounds.

2. The relevant background facts can be summarised shortly as follows. Ms Cekuri was born on 4 January 1980 and is a female citizen of Albania. As at July 2014 she was 34 and she had two sons aged 9 and 7. She had made an application for leave to remain in the United Kingdom with her husband, Mr Edmond Poci, a British citizen. Mr Poci has been in this country since November 2003 and settled here in the United Kingdom in 2010 on the basis of marriage to an EEA national in 2000. That relationship appears to have broken down, ultimately resulting in divorce in January 2012.

3. Ms Cekuri claimed that she had been in a relationship with Mr Poci since 1998 and that they had two sons together, one in 2004 and one in 2006, both born in Albania. They had all been living together as a family since she and her sons came to the United Kingdom on 19 July 2012 illegally in the back of a lorry. Mr Poci is a self-employed taxi driver since 2009 earning just over £11,000 a year out of which he pays rent on the property. Together they have had a third son, a British citizen born in this country in January of this year, that is to say January 2014.

4. Ms Cekuri's application was initially submitted in October 2012. It was refused on 2 April 2013. As at October 2012 she could not meet the requirements of Appendix FM or paragraph 276ADE of the Immigration Rules. Following Protocol correspondence the Secretary of State agreed to reconsider that decision but she maintained it, issuing another refusal in February 2014. As we have noted, within that period a third child was born. That meant that the appellant's ability to satisfy the requirements of Appendix FM for leave to remain as his parent fell for consideration. But because the appellant was not the sole carer she could not meet those requirements either, nor could she therefore take advantage of EX.1, which is not a freestanding provision, see **Sabir [2014] UKUT 63 (IAC)**.

5. The initial decision which as we have described was upheld on review was taken on the basis that the Secretary of State was satisfied that the appellant and her dependants could not meet the requirements of Appendix FM in relation to their family life or paragraph 276ADE of the Immigration Rules in relation to their private life, and there were no compassionate or compelling circumstances meriting a grant of leave under Article 8.

6. The First-tier Tribunal Judge gave a lengthy and detailed ruling. Both the appellant and her husband Mr Poci gave evidence and the judge recorded that evidence in considerable detail. Having set out that evidence, she went on to conclude at paragraphs 22 and following that the appellant did not meet the requirements of Appendix FM or the Immigration Rules. Therefore at paragraph 23 the judge went on to apply the rule under **Gulshan** as it stood then, namely having applied the requirements of the Rules only if there may be arguably good grounds for granting leave to remain outside them is it necessary for Article 8 purposes to go on to

consider whether there are compelling circumstances not sufficiently recognised under them. The judge was satisfied that the existence of the third British son was an arguably good ground to lead to a consideration of whether or not there were compelling circumstances.

7. The judge then went on at paragraph 24 to consider the Secretary of State's own guidance to her own caseworkers in respect of assessing the child's best interests and whether it was reasonable to expect the child to leave the UK. The judge also took into account the case of **Azimi-Moayed [2013] UKUT 197 (IAC)** noting the Tribunal's comments there amongst other things that as a starting point it is in a child's best interests to be with both of their parents. They have both stability and continuity of social and educational provision and the benefit of growing up in the cultural norms of the society to which they belong.

8. The judge went on to refer to Guidance, setting out the following paragraph:

> "Where a decision to refuse the application would require a parent or primary carer 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. In such cases it will usually be appropriate to grant leave to the parent or primary carer to enable them to remain in the UK with the child, provided that there is satisfactory evidence of a genuine and subsisting parental relationship."

9. The judge then considered this guidance and those principles by reference to the facts of Ms Cekuri's case. The judge said that whilst her immigration history was not the best and there had been illegal entry she was satisfied that the behaviour could not be classed as repeatedly breaching the Immigration Law because although she had come here in July 2012 by October 2012 she had taken steps to regularise her position. At paragraph 27 the judge went on to say this:

> "I am conscious of the fact that if the third son were to stay here in the care of his father and his mother and brothers returned to Albania his father would not be able to work full-time as he does at the moment earning just over £19,000 per annum from his job as a ground worker and taxi driver and thus would not be able to support the appellant and their eldest two sons in Albania as much as he did in the past. This inability to work full-time would last until the youngest child went to nursery or school and even then could continue unless he was fortunate enough to obtain employment which paid sufficient for him to pay for full-time childcare. This inability to work full-time would then impact upon his ability to sponsor his wife and sons' return to the UK through the proper channels which would in turn mean that apart from visits to Albania the youngest child would be separated from his mother and siblings until such time as he went to school or nursery and his father

could then work and earn sufficient to bring his mother and siblings over to the UK to live permanently."

10. In all the circumstances, the judge went on to say that she was satisfied that the decision to refuse leave to remain to Ms Cekuri would have unjustifiably harsh consequences for her youngest son, either by separating him from her or by making him leave the country of his birth and losing all the attendant benefits he is entitled to as a British citizen. She was satisfied that these were compelling circumstances and, following **Razgar [2004] UKHL 27,** that made the decision disproportionate for Article 8 purposes.

11. The judge accepted in terms that this would be seen as the appellant in effect obtaining leave to remain in the UK by the back door by virtue of her youngest son's British citizenship but the Secretary of State's own guidance made it clear that the starting point was that it should be considered unreasonable for a British citizen child to have to leave the EU with his non-EEA national parent or primary carer.

12. On this appeal the Secretary of State raises a single ground of error of law. Firstly it is said that the judge noted the guidance in **Gulshan**. Then, having found Ms Cekuri's third son being born in the UK and a British citizen, that could not amount to arguably good grounds to consider whether there were compelling circumstances because that was a matter specifically recognised in the Rules, namely EX.1.(a) of Appendix FM. In those circumstances there was an error of law.

13. In her oral submissions Ms Isherwood for the Secretary of State has gone on to expand by saying effectively that there was an inadequate exercise on the facts on the question in particular of whether or not sufficiently compelling circumstances existed.

14. For Ms Cekuri Mr Nicholson says firstly there was no material error of law. The judge's reference to the Secretary of State's own guidance was entirely legitimate. She was right to have regard to that guidance and to consider that the sufficient compelling circumstances existed not least by reference to the Upper Tribunal in **Sabir**. Even if all that were wrong and in some way the Immigration Rules and Appendix FM provided a complete code, the guidance on EX.1.(a) was predicated on the **Zambrano** case which was reflected itself in the guidance to which the judge referred.

15. We remind ourselves that the right of appeal arises only on a point of law, see Section 11 of the Tribunals, Courts and Enforcement Act 2007. The central ground of appeal on which permission was granted as we have recorded relied upon the authority of **Gulshan**. The Rule in relation to **Gulshan** has of course, however, been clarified recently. We refer in particular to **R (Oludoyi) v Secretary of State for the Home Department [2014] UKUT 00539 (IAC)** considering **R (MM & Ors) v Secretary of State for the Home Department [2014] EWHC 2712 (Admin)**. Those authorities confirm that consideration of whether or not there are arguable grounds

for granting leave to remain outside the Rules is an unnecessary intermediate step. There is no threshold test. Rather there is a need to look at the evidence to see if there is anything not already adequately considered in the context of the Immigration Rules which could lead to a successful Article 8 claim.

16. Therefore, in our judgment, to the extent that the appeal relies on **Gulshan** being a threshold test and as requiring the judge to ignore any matters explicitly recognised in the Immigration Rules without more it fails. The judge was in our judgment entitled to carry out a proportionality assessment. It is right that she placed considerable weight on the Secretary of State's guidance but that guidance does no more than reflect the public interest. It is also consistent with the **Zambrano** principle previously referred to.

17. Having considered the case of **Razgar,** the central issue is the final question of proportionality.

18. In relation to the judge's decision as to the unjustifiably harsh consequences of the decision to refuse leave we cannot identify any material error of law. The judge reached a judgment which was open to her on the facts and a decision which cannot be said to be perverse or irrational. We remind ourselves of the high threshold that a finding of perversity would require.

19. We are also reminded of the remarks of Lord Justice Carnwath in **Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045** at paragraph 40.

> "Factual judgments of this kind are often not easy but they are not made easier or better by excessive legal or linguistic analysis. It is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law so as to justify an appeal under the old system or an order for reconsideration under the new nor does it create any precedent so as to limit the Secretary of State's right to argue for a more restrictive approach on a similar case in the future. However, on the facts of the particular case the decision of the specialist Tribunal should be respected."

20. Equally here, in our judgment, the decision of the specialist Tribunal should be respected in circumstances where we have been unable to identify any material error of law.

21. We do not conclude our judgment without recording the fact that, for the Secretary of State, reliance was sought to be placed on the relevant provisions of the Immigration Act 2014. Ms Isherwood was unable to state whether or not this legislation was in fact effective at the time that the decision was taken but we deal with it for the sake of completeness. Section 117B of the Act provides at subparagraph (6) as follows:

> "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."

22. For our part and albeit obiter, we cannot see that application of this provision would result in a different outcome. Indeed, if anything, it is a provision which tends to favour Ms Cekuri rather than the Secretary of State on the merits of the case.

23. For all these reasons we dismiss the appeal. The First-tier Tribunal Judge did not make an anonymity direction, we have not been asked to do so and in the absence of any explanation as to what good reasons there might be we do not make such a direction.

<u>Notice of Decision</u>

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Mrs Justice Carr

Signed Date: 18 December 2014

Mrs Justice Carr