Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Numbers: HU/10679/2019(V)
HU/10681/2019(V)

THE IMMIGRATION ACTS

Heard remotely at Field House	**Decision & Reasons Promulgated**
On 15th January 2021	**On 26th February 2021**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAJANA KURTI
MARIO KURTI
(ANONYMITY ORDER NOT MADE)

Respondents

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondents: Ms A Nizami, instructed by Alexander Shaw Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundles on the court file, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, I shall refer to the parties as in the First-tier Tribunal. The Appellants, a brother and sister, are Albanian nationals born on 3 November 1996 and 30 March 2000 respectively. Their appeal against the refusal of leave to remain in the UK was allowed by First-tier Tribunal Judge Rose on 22 November 2019.

2. The Secretary of State applied for permission on the following grounds. The family pretended to be Kosovan in order to obtain asylum and the judge failed to consider whether the Appellants could return to Albania with their mother and father, who only had limited leave to remain in the UK. The Appellants' father had remained illegally in the UK and arranged for the Appellants and their mother to enter the UK illegally. Both Appellants are working and given their unlawful immigration status it is likely that they are working illegally. The judge had failed to assess these adverse credibility points in considering the Appellants' claim. It was not credible that the Appellants could not read or write in Albanian or that the Appellants' mother could not afford to visit them in Albania because she had returned to Albania three weeks prior to the hearing. The claim that the first Appellant, Dajana, was abducted was not supported by any of the evidence. The judge accepted the bare assertions made by the Appellants which were not substantiated.

3. At paragraph 9 the grounds state:

> "The judge's overall assessment of credibility against the adverse factors is inadequate. Respectfully to overlook such adverse factors against the public interest is neither helpful nor prudent. The judge does even entertain the very likely possibility that the family have planned a dishonest strategy to bolster the Appellants' chances of remaining in the UK by claiming not to read, write or speak Albanian or that Dajana was abducted. Given the clear indications of the family's propensity to dishonesty, this is a family who clearly know how to abuse and take advantage of the UK's systems, including the unwise leniency afforded to them by the judge."

4. The grounds further submit that there are material conflicts of fact and credibility which the judge clearly overlooked and the assessment of Article 8 proportionality factors was flawed. The Appellants' relationship with their parents did not meet the test in Kugathas [2000] EWCA Civ 31. The judge had completely ignored the Appellants' illegal entry, overstaying and illegal working in his proportionality assessment. In cases concerning precarious family life the Appellants had failed to show a very strong Article 8 claim to outweigh the public interest. The judge's findings merely cite relevant jurisprudence but do not justify a conclusion that there are harsh circumstances or very significant obstacles to re-integration. The refusal of leave to remain was proportionate and the judge erred in law in concluding otherwise.

5. Permission was granted by First-tier Tribunal Judge Andrew on 3 April 2020 for the following reasons:

> "I am satisfied that there are arguable errors of law in this decision in that the judge firstly gave no consideration as to why the Appellants' parents could not accompany them to Albania given their limited status in the United Kingdom. Further, the judge did not conduct an assessment of the credibility of the Appellants. Had he done so he may well have found adverse factors. In any event he did not balance the need for immigration control against any of the adverse matters in the history of the Appellants. Further, he did not conduct a correct analysis of Section 117B, addressing the relevant parts of that Section to the Appellants."

6. In response to directions issued in the light of the present need to take precautions against the spread of COVID-19 the Appellant made submissions dated 20 and 29 July 2020. It was the Appellants' position as of 20 July 2020 that Mukarkar v The Secretary of State for the Home Department [2006] EWCA Civ 1045 at [40] applied:

> "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."

7. It is the Appellants' position that it was not part of the Respondent's case that the Appellants' parents could accompany them to Albania and the credibility points were never put to the Appellants or their witnesses in cross-examination. The judge considered Section 117B at [12] of the decision. It was submitted the decision was short but dealt with all necessary matters. The Appellant relied on Budhathoki (reasons for decisions) [2014] UKUT 00341, in which the Upper Tribunal stated:

> "We are not for a moment suggesting that judgments have to set out the entire interstices of the evidence presented or analyse every nuance between the parties. Far from it. Indeed, we should make it clear that it is generally unnecessary, unhelpful and unhealthy for First-tier Tribunal judgments to seek to rehearse every detail or issue raised in the case."

8. In the written submissions dated 29 July 2020, the Appellants submitted the matters referred to in the grounds were not part of the Respondent's case before the First-tier Tribunal. There was no challenge to the Appellants' credibility and any allegation that the witness was seeking to mislead the Secretary of State or the Tribunal was not put in cross-examination and could not be relied upon. It was not part of the

Respondent's case before the First-tier Tribunal that the family had planned a dishonest strategy to bolster the Appellants' chances of remaining in the UK.

9. The failure to refer to Kugathas was not material, given the judge's finding that there was an extremely close relationship with the Appellants and their parents. Illegal entry and illegal working have no bearing in this case. The judge allowed the appeal under the Rules on the basis of very significant obstacles to re-integration. Therefore, there was no need to consider exceptionality or compelling circumstances. In any event, the judge dealt with all relevant matters and it was open to him to allow the appeal on Article 8 grounds. It was not appropriate for the Respondent to re-argue her case.

10. The Respondent's written submissions state as follows. The First-tier Tribunal failed to assess or factor in countervailing factors when considering proportionality and failed to consider credibility in the round. The judge failed to consider whether the Appellants' parents could return to Albania, given that they only had limited leave to remain. The judge failed to take into account the following matters:

    a. the father had arranged for the Appellants and their mother to enter the UK illegally and remain in the UK unlawfully;
    b. the Appellants' illegal working;
    c. credibility issues in relation to whether the Appellants can read or write Albanian;
    d. whether the Appellants' mother could afford to visit them in Albania;
    e. the immigration history of the family in the assessment of proportionality;

    Further, the judge failed to give adequate reasons for accepting the assertion that Dajana had been abducted. Had the judge considered these matters, he would have come to a different conclusion.

11. The Respondent submitted that the written submissions of the Appellant were misconceived. The judge's findings were restricted to two paragraphs and the judge failed to deal with relevant issues. The judge failed to apply the definition of integration in Kamara. The judge's finding in the alternative lacked reasons. It was incumbent on the judge to consider not only whether there were insurmountable obstacles to family life continuing in Albania, but also matters of adverse immigration history even though it was accepted that the Appellants cannot be blamed for the wrongs of their parents. The judge's failure in this respect disclosed a misunderstanding of the principles and case law that must necessarily underpin a legally sustainable Article 8 assessment. The findings under 276ADE were predicated on an assumption that the parents would not follow the Appellants to Albania.

12. In oral submissions, Ms Nizami raised a preliminary issue in relation to paragraph 1 of the grounds on the basis that the evidence submitted with the grounds was not before the First-tier Tribunal, was not served on the Appellant and there was no application under Rule 15(2A) for that evidence to be admitted before the Upper

Tribunal. Mr Tufan accepted that the Respondent did not refuse leave on the basis of a wrongful claim to be Kosovan. The issue was not raised in the refusal letter and was not argued before the First-tier Tribunal.

13. In relation to this preliminary issue, I find that the allegation at paragraph 1 of the grounds of appeal was not relied on by the Respondent in refusing leave to remain and was not argued before the First-tier Tribunal. Given Mr Tufan's concession, it could not be relied on as a ground of appeal before the Upper Tribunal.

14. Mr Tufan relied on the written submissions of 9 September 2020 which I have summarised above. He submitted the judge's findings were inadequate and none of the reasons given by the judge satisfied the test of very significant obstacles to re-integration. There were no reasons for why the judge considered that the Appellants succeeded on an application of Razgar. The Appellants were aged 24 and 20 and so had spent a considerable period of their lives in Albania. Article 8 was not engaged on the facts and the judge failed to properly apply Razgar.

15. Ms Nizami relied on her written submissions of 20 and 29 July 2020 and submitted the Respondent was seeking to re-argue the case both in the grounds and in oral argument. The Respondent was represented before the First-tier Tribunal and the judge properly considered all the evidence before him. In making a decision in favour of the Appellants, following the case of Mukarkar, there was no error of law. Credibility was not an issue in this appeal. If the Appellants' unlawful working was part of the Respondent's case it should have been put to the Appellants when they gave evidence before the First-tier Tribunal and it was not.

16. The judge's failure to consider the position of the Appellants' parents' return to Albania was not raised in the reasons for refusal letter or at the hearing. It was not appropriate for the Respondent to argue the point, which was not dealt with before the First-tier Tribunal, and it was not Robinson obvious. It should have been put to the Appellants' parents that they could return to Albania as a family unit. The Respondent was seeking to rely on adverse factors in the grounds of appeal which were not put to the Appellants in evidence and were not part of the Respondent's case before the First-tier Tribunal.

17. Ms Nizami submitted that paragraph 6 of the grounds of appeal made an impermissible allegation. Any allegation of deception should have been put to the witnesses in cross-examination. In any event, it was unclear how the Respondent was evidencing the deception upon which she relied.

18. Notwithstanding, the credibility points raised by the Respondent in the grounds of appeal, the Appellants' parents were granted further leave to remain. It was unfair for the Respondent to raise adverse credibility points against the Appellants which were not put in cross-examination and which were not held against their parents in relation to their grant of leave to remain. It was open to the judge to accept the unchallenged evidence that Dajana was kidnapped on return to Albania. The

evidence appeared in all four of the witness statements before the First-tier Tribunal. The Respondent had not challenged any of this evidence in cross-examination.

19. Ms Nizami submitted the judge considered the evidence and submissions and there was no error of law in the judge's failure to consider points which were not made before him. The judge was entitled to reach the conclusions he did. There were very significant obstacles to re-integration and objective evidence supporting the high unemployment rate. It was not open to the Respondent to undermine the judge's finding on the basis of an argument not made before the First-tier Tribunal. The allegation at paragraph 9 of the grounds was particularly unfair.

20. The judge had engaged with the argument the Respondent put forward on appeal. The fact that the decision was a short one did not mean it contained an error of law. It was not necessary to rehearse every detail. The judge was not asked to carry out a credibility assessment and the Appellants' credibility was not challenged. The judge gave adequate reasons for finding there were very significant obstacles to integration, namely lack of employment, accommodation, social contact, language skills and the time spent in each country. The judge took into account the statutory considerations and engaged with all the points in the skeleton argument which was before him.

21. The Appellant relied on Ghising (family life - adults - Gurkha policy) [2012] UKUT 00160 (IAC) to support the submission that the Appellants although adults still had a family life with their parents. There was no material error of law and the judge had dealt with all relevant points. Ms Nizami invited me to dismiss the appeal. Both parties were of the view that if I found the judge had made an error of law the matter should be remitted to the First-tier Tribunal and none of the findings should stand.

Discussion and Conclusion

22. I agree with Ms Nizami that the Respondent is seeking to rely on issues which were not part of the Respondent's case before the First-tier Tribunal. The judge heard evidence from both Appellants and their parents. The Respondent's note from the presenting officer's unit, dated 8 November 2019, submitted with the grounds of appeal stated that there were no credibility issues and recorded the limited extent of cross-examination. The judge took into account the evidence adduced in cross-examination in his findings.

23. There were no credibility issues raised before the judge and the credibility points made in paragraphs 1 to 9 of the grounds of appeal were not put in cross-examination. The judge's failure to take those into account could not give rise to an error of law. The judge was entitled to rely on the unchallenged evidence in the Appellants' witness statements.

24. I am satisfied the judge took into account all relevant matters and he properly directed himself in law. His decision was short, but his reasons were adequate. The

grounds assert that the judge failed to take into account matters which were not relied on in the refusal letter and were not put to the witnesses in evidence. They were not part of the Respondent's case.

25. The grounds fail to identify matters which were in evidence and which the judge failed to take into account in concluding that there were very significant obstacles to re-integration. It was not the case that the Appellants claimed they could not speak Albanian. Their evidence demonstrated they could not read or write Albanian to a level which would enable them to access employment. The judge was entitled to accept the Appellants' evidence on this point.

26. I accept that the judge failed to demonstrate that he had applied the five steps in Razgar and merely stated that removal would offend the Razgar principles. However, it was agreed by both the Appellant and the Respondent, that unless an error was shown in respect of the judge's finding on very significant obstacles to integration, any error in the judge's assessment of Article 8 would not be material.

27. The evidence before the judge demonstrated a close family relationship. The judge was aware of the Appellants' illegal entry to the UK as children and the grant of further leave to remain to their parents notwithstanding their immigration history. The Appellants' father had been residing in the UK in excess of 20 years at the date of hearing.

28. I find there was no error of law in the judge's conclusion that there were very significant obstacles to re-integration in Albania. Having made such a finding, the judge's conclusion that the refusal of leave to remain would amount to a disproportionate interference with their Article 8 rights was open to him on the evidence before him and he gave adequate reasons for coming to that conclusion. Accordingly, I dismiss the Respondent's appeal to the Upper Tribunal.

Notice of Decision

Appeal dismissed

An anonymity order was not made.

J Frances

Signed Date: 11 February 2021

Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.
4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email