Upper Tribunal
(Immigration and Asylum Chamber)

SF and others (Guidance, post–2014 Act) Albania [2017] UKUT 00120(IAC)

THE IMMIGRATION ACTS

Heard at Field House

Judgment given orally at hearing

On 17 January 2017

Promulgated on

Before

MR C M G OCKELTON, VICE PRESIDENT

UPPER TRIBUNAL JUDGE KAMARA

Between

SF

SOF

XF

(ANONYMITY DIRECTION MADE)

Appellants

And

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation :

For the Appellant: Mr A Eaton, instructed by Duncan Lewis & Co Solicitors

For the Respondent: Mr T Wilding, Senior Home Office Presenting Officer.

Even in the absence of a “not in accordance with the law” ground of appeal, the Tribunal ought to take the Secretary of State’s guidance into account if it points clearly to a particular outcome in the instant case. Only in that way can consistency be obtained between those cases that do, and those cases that do not, come before the Tribunal.

DETERMINATION AND REASONS

1.
There are three appellants: all are nationals of Albania, a mother and her two young children. Each of them entered the United Kingdom unlawfully some time, apparently, in 2012. Previous to that, they had lived in Albania. The first appellant’s husband came to this country much earlier. He obtained indefinite leave to remain and subsequently, by false representations as to his nationality or identity or

both, obtained a grant of British citizenship. He is currently serving a sentence of seven and a half years imprisonment for offences connected with people-trafficking.

2.
After the appellants arrived in the United Kingdom, the first appellant gave birth to a further child; that child was born when the child's father had indefinite leave to remain (whatever may be said about his citizenship) and as a result the youngest child is a British citizen. The appellants were, on 29 April 2015, served with notices refusing asylum claims and deciding that they should be removed from the United Kingdom as illegal entrants, which it is accepted they are.

3.
A number of claims were raised in response to that decision. The asylum claim is no longer pursued, and was not pursued before the First-tier Tribunal. A claim based on Article 3 of the European Convention on Human Rights was also not pursued before the First-tier Tribunal. The First-tier Tribunal was invited to consider a claim based on the Immigration European Economic Area Regulations 2006 (as amended) on the basis that the first appellant was the primary carer of an EU citizen child. That claim was dealt with by the First-tier Tribunal and rejected as a matter of jurisdiction. That matter is again no longer pursued. What is pursued is an argument that because of the nationality of the youngest child, it would be unreasonable to expect that child to leave the United Kingdom; and that that has an impact on the merits of the decision that the appellants should be removed. In so far as that matter is concerned, before the First-tier Tribunal there was some difficulty in ascertaining precisely whether the youngest child is indeed a British citizen. The Presenting Officer evidently took the position that because of the unedifying immigration history of the father there was some doubt about the citizenship of the child. That doubt was endorsed by the First-tier Tribunal Judge who decided that the child was, if we put it in this way, not entitled to be regarded as a British citizen for the purposes of the appeal. That, it is accepted, was wrong. The youngest child is a British citizen. The Secretary of State has formally accepted that matter in the Rule 24 notice and indeed rightly so.

4.
The First-tier Tribunal dismissed the appeals on the basis that there was no perceptible reason why this Albanian family, including now three children and a mother, all of whom have Albanian nationality (whether or not they also have British citizenship) should not live in Albania. Their face-to-face contact with the children's father was the subject of evidence at the hearing; the judge decided that it was not particularly significant and that contact with him while his sentence continued could be maintained by telephone and so on.

5.
The grounds of appeal, as pursued, are as we have said, now limited to the question whether the need of the youngest child to leave the United Kingdom under those circumstances was properly assessed.

6.
The jurisdiction of this Tribunal is that set out in the 2007 Act. As we pointed out to Mr Eaton, if we are satisfied that the making of the First-tier Tribunal decision involved an error of law we may, (but need not) set that decision aside; if we do set it aside then the decision has to be remade by the Upper Tribunal or by remittal to the First-tier Tribunal. We therefore invited Mr Eaton to explain to us what it was in the decision that had been made, taking into account the facts and evidence before the First-tier Tribunal, that showed that the decision would have been different if the First-tier Tribunal Judge had reached a conclusion that the youngest child was a British citizen and entitled to be regarded as

such. We think it is fair to say that Mr Eaton failed to provide any reason at all to demonstrate that the decision would, or indeed might, have been different. The matters to which he referred were not matters which showed any aspect of unreasonableness which could have conceivably affected the First-tier Tribunal's Judge's decision.

7.
Mr Wilding, however, has with the fairness which Presenting Officers always attempt to apply, drawn our attention to an important guidance document. It is the Immigration Directorate Instruction - Family Migration - Appendix FM, Section 1.0(B) "Family Life as a Partner or Parent and Private Life, 10 year Routes". It is the edition of August 2015 and therefore not in force at the date of the decision under appeal, but it was in force at the date of the First-tier Tribunal hearing and decision, and is still in force. It contains important guidance about the following topic at 11.2.3: Would it be unreasonable to expect a British Citizen Child to leave the UK? We will set out the relevant parts, they are 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. This reflects the European Court of Justice Judgment in Zambrano .

…

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.

It may, however, be appropriate to refuse to grant leave where the conduct of the parent or primary carer gives rise to considerations of such weight as to justify separation, if the child could otherwise stay with another parent or alternative primary carer in the UK or in the EU.

The circumstances envisaged could cover amongst others:

•
criminality falling below the thresholds set out in paragraph 398 of the Immigration Rules;

•
a very poor immigration history, such as where the person has repeatedly and deliberately breached the Immigration Rules.

In considering whether refusal may be appropriate the decision maker must consider the impact on the child of any separation. If the decision maker is minded to refuse, in circumstances where separation would be the result, this decision should normally be discussed with a senior caseworker and, where appropriate, advice may be sought from the Office of the Children's Champion on the implications for the welfare of the child, in order to inform the decision."

We were not specifically referred to any other part of this document and we do not need to set any more out.

8.
Mr Wilding very properly accepted this was not, from the point of view of the relationship between the first appellant, the mother, and the British citizen child, a case which involves criminality; and this was not a case in which the conduct of the mother or of the other children was such as to give rise to considerations of such weight as to justify separation: but in any event it does not appear that there has been any consideration given to the possibility of the British citizen child staying with another parent or alternative primary care in the EU. There is said to be a grandmother here. No other details are known; certainly the Secretary of State has not at any stage taken the view that there was an alternative primary carer, and in any event, of course the result of the decision would be the separation of the youngest child from his siblings and from his mother if they had to return to Albania leaving him here.

9.
It appears to us inevitable that if the guidance to which Mr Wilding has drawn our attention had been applied to the present family, at any time after it was published, and on the basis that the youngest child is a British citizen, the conclusion would have been that the appellants should have been granted a period of leave in order to enable the British citizen child to remain in the United Kingdom with them. The question is then whether that guidance as guidance has any impact on the First-tier Tribunal or on us.

10.
It is clear that the appellants do not have available to them a ground of appeal on the basis that the decision was not in accordance with the law such as before the amendments made to the 2002 Act by the 2014 Act they might have had. Nevertheless it appears to us that the terms of the guidance are an important source of the Secretary of State’s view of what is to be regarded as reasonable in the circumstances, and it is important in our judgement for the Tribunal at both levels to make decisions which are, as far as possible, consistent with decisions made in other areas of the process of immigration control.

11.
If the Secretary of State makes a decision in a person’s favour on the basis of guidance of this sort, there can of course be no appeal, and the result will be that the decision falls below the radar of consideration by a Tribunal. It is only possible for Tribunals to make decisions on matters such as reasonableness consistently with those that are being made in favour of individuals by the Secretary of State if the Tribunal applies similar or identical processes to those employed by the Secretary of State.

12.
On occasion, perhaps where it has more information than the Secretary of State had or might have had, or perhaps if a case is exceptional, the Tribunal may find a reason for departing from such guidance. But where there is clear guidance which covers a case where an assessment has to be made, and where the guidance clearly demonstrates what the outcome of the assessment would have been made by the Secretary of State, it would, we think, be the normal practice for the Tribunal to take such guidance into account and to apply it in assessing the same consideration in a case that came before it.

13.
In our judgement, therefore, the way forward in this case is to conclude that, not for the reasons argued by Mr Eaton, but for those, as it happens, argued by Mr Wilding, this is a case where it would

be unreasonable to expect the youngest child to leave the United Kingdom. We will therefore set aside the decision of the First-tier Tribunal and substitute a decision allowing the appeals of all three appellants on that ground. The period of leave is a matter to be determined by the Secretary of State.

C. M. G. OCKELTON

VICE PRESIDENT OF THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Date: 24 January 2017