Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07477/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26th June 2017	**On 4th July 2017**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

MANUSHAQE PECAKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Cisnerus, instructed by Haq Hamilton Solicitors
For the Respondent: Mr N Bramble, Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Albania born on 17th March 1983. She appeals against the decision of First-tier Tribunal Judge Monson, promulgated on 7th November 2016, dismissing her appeal, against the refusal to grant leave to remain, under Appendix FM and on Article 8 grounds.

2. The Appellant appealed on the ground that the judge had erred in law in his consideration of EX.1(a) and whether it was reasonable to expect the child to leave the UK. The judge had wrongly asked himself the question of whether it would be

reasonable for the child to relocate to Albania with both parents. The judge had fallen into error in stating, at paragraph 42, that the best interests of the child lie in him 'resettling' in Albania with his parents. The judge failed to refer to the circumstances of the Appellant's husband and his length of residence and ties to the UK, and failed to appreciate that the Appellant's husband was from Prinzen, Kosovo.

3. Permission was granted by First-tier Tribunal Judge Andrew on 26th April 2017 on the grounds that she was satisfied there was an arguable error of law in the decision at paragraph 42. It was arguable that the judge failed to recognise the Appellant's partner was not of Albanian descent but Kosovan and that he is now a British citizen. The judge failed to consider whether the Appellant's partner could resettle in Albania. Judge Andrew found no arguable error of law in relation to Article 8.

4. In the Rule 24 response, the Respondent stated:
"It is submitted that it is absolutely apparent that the FTIJ was not operating under a mistake of fact and was completely aware of the nationality of the parties and their correct immigration histories. At paragraph 7 the FTIJ sets out the Appellant's evidence that the father is a British citizen and at 23 that he came from an area that was called Northern Albania because of the open border. At paragraph 25 the FTIJ records that the father had been to Albania many times. At paragraph 31-34 the FTIJ then considers EX1a, finding at paragraph 34 that '*The apprehended difficulties faced by the couple in relocating to Albania or Kosovo are economic. They are not societal, linguistic or cultural.*' On this basis, the FTIJ finds that EX1b is not made out. It is submitted that there is nothing in the circumstances of the parties that evidence that the threshold of insurmountable obstacles is met. The Respondent relies upon the Supreme Court decision of Agyarko in this regard.
It is submitted that the FTIJ's approach to EX1a does not disclose an arguable error of law. The Appellant conceded at paragraph 36 that the Zambrano principle is not engaged. The FTIJ then correctly directs himself in respect of s. 55 jurisprudence by reference to EV Philippines and MA Pakistan. At 42 he then finds on account of the child's circumstances his best interests are to accompany his parents to Albania. The FTIJ carefully points out that he has excluded the wrong doing of his mother in the best interest assessment. It is submitted that the grounds fail to identity anything specifically said by the FTIJ that could be construed as erroneous in fact or legal approach."

Submissions

5. Mr Cisnerus relied on his skeleton argument and submitted that the judge was confused as to the status of the Appellant's husband. The judge stated that he had returned to Albania many times which suggests that the judge was of the view that he originated from Albania. The judge assumed that the Appellant and her husband could go back to Albania and the fact that the Appellant's husband was a British citizen was not sufficiently taken into account. The judge assumed the Appellant's husband could settle in Albania.

6. The judge failed to address whether the Appellant's husband could relocate to Albania. It was for the Respondent to show that a British citizen could relocate outside the UK. Mr Cisnerus relied on Sanade and others (British children – Zambrano – Dereci) [2012] UKUT 00048 (IAC) where the Tribunal held at paragraph 95: "Where the child or indeed the remaining spouse is a British citizen and therefore a citizen of the European Union, it is not possible to require them to relocate outside of the European Union or submit that it would be reasonable for them to do so. The case serves to emphasise the importance of nationality already identified in the decision of the Supreme Court in ZH (Tanzania). If interference with family life is to be justified it can only be on the basis that the conduct of the person to be removed gives rise to considerations of such weight as to justify separation."

7. Mr Cisnerus submitted that the judge had erred in his consideration of the status of the Appellant's husband in Albania which had affected his findings on the best interests of the child. The error was material and had affected the judge's assessment of Article 8.

8. At paragraph 42, the judge was not entitled to reach the conclusion that the Appellant and her husband could resettle in Albania because it was based on the assumption that the Appellant could return to Albania with her husband and therefore there were no significant obstacles.

9. Mr Bramble submitted that the judge was aware of the nationality of the Appellant's husband. At paragraph 3, the judge referred to him being a national of Kosovo after birth and at paragraph 7 that he was a British citizen who was granted refugee status in 2002. At paragraph 23 the judge acknowledged that the Appellant's husband was born in Prinzen which was in Northern Albania and had an open border with Kosovo. At paragraph 25 the judge noted his ability to return to Albania many times in order to continue his relationship with the Appellant. The judge was not confused as to the status of the Appellant's husband and the judge did not think that he was an Albanian national.

10. Mr Bramble submitted that the judge considered EX.1. as early as paragraph 31 and he dealt with very significant difficulties at paragraph 32. His conclusion at paragraph 34 that the difficulties were economic was open to the judge on the evidence before him. This was the starting point. Zambrano was not engaged. There was also an alternative argument separating the mother from the child, but that was not pursued before the First-tier Tribunal. The judge was not confused as to the nationality of the Appellant's husband. It was in the best interests of the child to remain with both parents. The Appellant, her husband and child could relocate to Albania as a family unit. There was no error of law in the decision.

11. In response, Mr Cisnerus submitted that the judge should have considered whether it was reasonable for the Appellant's husband and child to leave the UK. The judge failed to consider the position of the Appellant's husband and child in the UK and had erred in considering whether it was reasonable for the child to go to Albania. This was material following MA Pakistan. Had the judge considered the child's

British citizenship then resettlement in Albania was a finding which was not open to the judge. The judge did not consider whether the child as a British citizen should be removed from the UK. The judge applied the wrong test in EX.1. and what followed made his decision erroneous.

Discussion and Conclusions

12. I am not persuaded that the judge was confused as to the status of the Appellant's husband or indeed his nationality. The judge is quite clear that the Appellant's husband, the child's father, originated from Kosovo, that he was born in Prinzen and that this was in Northern Albania which had an open border with Kosovo. The judge was also aware that the Appellant's husband is now a British citizen who had previously been granted refugee status in the UK in 2002.

13. The judge took into account the husband's length of residence and ties to the UK at paragraphs 8 and 18. In considering insurmountable obstacles he took into account the ability to lawfully enter and stay in another country, any cultural barriers, the impact of mental or physical disability and the security situation in the country of return. On the facts, the Appellant's husband had been able to lawfully enter Albania on numerous occasions. There were no cultural barriers, disability or security problems. The judge found that the Appellant had her husband could relocate to Kosovo or Albania. There were no insurmountable obstacles which would be faced by the Appellant and her husband in continuing their family life outside the UK and which could not be overcome or entail very serious hardship.

14. The judge found at paragraph 34: "Although the obstacles to family life being carried on outside the United Kingdom do not have to be literally insurmountable, the threshold is nonetheless very high, as is apparent from the wording of EX.2. The apprehended difficulties faced by the couple in relocating to Albania or Kosovo are economic. They are not societal, linguistic or cultural. It is clear from the authorities and also from the Home Office guidance that a significant downgrade in the socio-economic conditions which the couple will enjoy in the country of return is not sufficient to engage EX.1.(b)." This finding was open to the judge on the evidence before him.

15. Mr Cisnerus submitted that the judge was wrong to consider relocation to Albania. The judge should have considered whether it was reasonable for the Appellant's husband to relocate outside the UK. The judge did so. At paragraph 34 the judge considered whether family life could continue outside of the UK and concluded that it could continue in Albania or Kosovo. There was no error of law in considering the proposed country of return.

16. The judge first considered whether there would be insurmountable obstacles to family life continuing between the Appellant and her husband outside the UK, namely in relocating to Albania or Kosovo, and having found that there were not, the

judge went on to consider the best interests of the child. There was no error of law in the judge's approach and his findings were open to him on the evidence before him.

17. It was conceded at the hearing before the First-tier Tribunal that the Zambrano principles were not engaged. This was not a case where the child would be compelled to follow his mother to Albania because the child's father could look after him in the UK in the Appellant's absence.

18. The judge found that the British citizenship of the Appellant's son was not determinative of whether it was in his best interests to remain in the UK. The question was whether it was reasonable to expect him to leave the UK. The judge properly directed himself in accordance with EV Philippines and MA Pakistan. The child was 2 ½ years old at the date of hearing and had not started nursery. Any proposed interference with his family life that he had as a British citizen was minimal given his best interests were to remain with both parents. The judge also took into account section 117B(6) of the Nationality, Immigration and Asylum Act 2002. He acknowledged that British citizenship should be given some weight leaning in favour of leave to remain being granted.

19. The judge found at paragraph 42: "Aside from his status as a British national, the best interest considerations in favour of the child accompanying his parents to Albania are overwhelming, given his age and the fact that he has not yet embarked on his primary school education. He has not developed a private life outside the home, so what is most important for his welfare and wellbeing is that he should continue to live in the same household as both his parents, wherever that household is located. Resettlement in Albania will mean that he can enjoy prolonged family reunion with relatives on both his father's side and mother's side, and he will have the benefit of being immersed in the social and cultural milieu from which both his parents spring. Accordingly, overall his best interests lie in him resettling in Albania with his parents, given that there are not insurmountable obstacles to family life between his parents being carried on in Albania. Moreover, having regard to wider proportionality considerations, while he is not to blame for the choices made by his parents, his mother's adverse immigration history reinforces the public interest in requiring the entire family to resettle in Albania, and thus it is reasonable to expect the child to leave the United Kingdom with his parents. So EX.1(a) is not made out."

20. The judge found that the best interests of the child were to remain with both parents; there were no insurmountable obstacles to both parents relocating outside the UK; there was evidence that the Appellant's husband had visited Albania many times and had carried on his relationship with the Appellant there; and it was reasonable for the child to leave the UK and live in Albania with his parents. The judge's findings were open to him on the evidence before him and he gave adequate reasons for his conclusions.

21. In relation to Article 8 the Appellant had entered the UK illegally and established family life here when she knew that her status was unlawful. The judge also considered whether the Appellant could return to Albania and obtain entry

clearance. He considered that a British citizen child would not be compelled to accompany his mother, but it would probably be in his best interests to remain with his mother given that she had the day-to-day care of him while his father was at work. The Appellant's child would be separated from his father whilst the entry clearance application was pending, but it was reasonable to expect him to leave the UK for the purposes of seeking entry clearance.

22. I find that there was no material error of law in the judge's decision. In summary, he was well-aware that the Appellant's husband and child were British citizens. He properly considered paragraphs EX.1(a) and EX.1(b) of the Immigration Rules. On the evidence before the judge there were no insurmountable obstacles to the Appellant and her husband continuing family life outside the UK and, given that the child was under three years old and had not started school, his best interests were to remain within the family unit and return to Albania with his mother and her husband. Accordingly, I dismiss the Appellant's appeal.

Notice of decision

Appeal dismissed

No anonymity direction is made.

J Frances

Signed Date: 3rd July 2017

Upper Tribunal Judge Frances

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed Date: 3rd July 2017

Upper Tribunal Judge Frances