Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/ 11969/ 2018

THE IMMIGRATION ACTS

Heard at Field House Remotely	**Decision & Reasons Promulgated**
On 2 December 2020	**On 3 March 2021**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

GM
(ANONYMITY ORDER IN FORCE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Wilding, Counsel instructed by Dotcom Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. I make this order because the case requires detailed consideration of the health of the appellant's son who is a child and there is no legitimate public interest in the identity of a child with such serious disabling physical conditions.
2. This is an appeal against a decision of the First-tier Tribunal dismissing the appellant's appeal against a decision of the Secretary of State on 27 April 2018 refusing the appellant leave to remain in the United Kingdom.

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3. The appellant is a citizen of Albania. She claims to have entered the United Kingdom irregularly on 24 February 2015. Certainly she was present in the United Kingdom on 25 February 2015 because she claimed asylum. The asylum application was refused and an appeal dismissed. Her appeal rights were exhausted in January 2017. However, in April 2017 partly as a result of matters that emerged during the appeal hearing she was given discretionary leave to remain.

4. She has a son, who I identify simply as "E", who was born in June 2015. It follows that the appellant was pregnant when she left Albania.

5. The child E has very significant health problems. In layman's language, and for the purposes of following the appeal rather than describing with clinical accuracy his condition, all the body parts associated with the creation, storage and expulsion of urine are underdeveloped. He cannot pass urine in the normal way and is dependent on a catheter administered by his mother to drain his bladder which is itself an improperly formed organ.

6. The appeal against the decision to refuse leave on human rights grounds has previously been determined unsatisfactorily by First-tier Tribunal Judge Blundell. That decision was set aside by the Upper Tribunal and the appeal was redetermined, this time by First-tier Tribunal Judge Khan.

7. For reasons that I endeavour to explain below I have come to the conclusion that there is no material error in Judge Khan's decision and so I will dismiss the appeal.

8. In doing this I am very aware that the appellant's son has particular and serious medical needs and that removing him from the medical care that is available to him in the United Kingdom as well as the support mechanisms that have been developed in his school is an extremely serious step. However, there are many children in the world who would benefit from expert medical treatment in the United Kingdom but that does not give them a right to enter, and only rarely to remain, in the United Kingdom. I am satisfied that on the evidence before him the First-tier Tribunal Judge was right to dismiss the appeal even though for reasons which I will explain parts of the decision can be criticised fairly.

9. I begin by looking at the decision of First-tier Tribunal Judge Blundell because that helps me understand the decision complained of. As indicated the appeal on asylum grounds was unsuccessful but the appellant and E were given discretionary leave that lasted until 30 September 2017. They applied for further leave just before that leave expired and supported the application with a letter from solicitors acting on behalf of the appellant. The gist of the case then is that E had been given discretionary leave so that he could undergo surgery in the United Kingdom but he continued to be significantly unwell and it was contended that removing him (and by implication leaving him in the United Kingdom and removing his mother) would be contrary to the United Kingdom's obligations under Article 3 and Article 8 of the European Convention on Human Rights.

10. In outline it was the Secretary of State's case that E would get adequate treatment, or rather that adequate treatment was available for him, in Albania.

The Reasons for Refusal Letter refers to a "MedCOI" Report, which I take to be a Medical Country of Information Report, and with reference to generic evidence concludes that appropriate expertise is available in Albania and appropriate medication and that the "threshold in **N (FC) v SSHD [2005] UKHL 31** has not been reached".

11. Judge Blundell's summary of E's health problems is particularly apt. It is set out at paragraph 18 of his decision and reasons and I repeat it below:

> "[E] was born on [ ] June 2015. Although the ultrasound scan in Tirana revealed 'no obvious foetal abnormalities', E fell ill shortly after birth and has received extensive treatment in the UK. There is a great deal of medical evidence before me concerning his condition. A letter from Dr Wesley Hayes, a Consultant Nephrologist from GOSH, dated 23 June 2018 is of particular assistance. Dr Hayes stated that E has a urological condition which is managed by Professor Cuckow, comprising narrowing of the urinary tract following surgical intervention; an abnormality of the prostate; and micropenis. In addition, he has abnormal kidney function and high blood pressure. He has undergone several surgical procedures and was, at that time, under three monthly review for his kidney function and blood pressure. He received medication for his blood pressure and antibiotics to minimise the risk of infection. He also required regular input from the Nephrology Bladder Nurse. It was difficult to provide a prognosis at that time. Dr Hayes did say, however, that if 'ongoing care from a Paediatric Nephrologist and Paediatric Urologist were not available to E, there is a risk that he would experience sepsis, kidney failure and growth impairment".

12. At paragraph 20 Judge Blundell summarised the evidence from the school that E attended. His development was delayed and he could be clumsy. There were key workers trained to help him. At paragraph 23 Judge Blundell said:

> "The respondent referred in the Notice of Immigration Decision to a MedCOI document which suggested that the requisite medication and expertise was available in Albania. As I have recorded above, I asked [the Presenting Officer] to produce this unpublished document at the start of the hearing. He was unable to do so and I refused his application to produce it on another day. It is a matter of concern that this material was not made available to the Tribunal and the appellant in advance of the hearing. I proceed on the basis considered in MH (Pakistan) [op cit] and decline to attach any weight to the assertion in the refusal letter, since it is unsupported by any evidence".

13. The judge then explained why the appeal could not succeed on "Article 3" grounds and why the appellant's case was hopeless without the needs of her son being considered. The judge then reviewed the medical evidence before him and noted that there was a letter from a Professor Buba at the University Hospital Centre Mother Teresa in Tirana saying that that hospital could not help, it did not have the necessary expertise but also saying they could not comment on what might be achieved in private hospitals. Judge Blundell said that at paragraph 30:

> "This letter falls some way short of establishing that the appellant's son could not receive adequate treatment in Albania as a whole. The letter refers specifically to the facilities available in Mother Teresa Hospital alone and Professor Buba is quite clear that he is unable to comment on the facilities available in private hospitals. Given the rejection of the appellant's asylum claim and her failure to establish that she has no support network in Albania, both of these gaps in the letter are significant. There may be other facilities in which adequate treatment

> is available through public funding and there may be private facilities in which the appellant could – with the support of her family – access adequate treatment for her son. Whilst I am prepared to accept that there is some benefit in E receiving a continuity of care from GOSH, I cannot find on the evidence before me that his best interests militate in favour of him and his mother remaining in the UK on account of an absence of suitable treatment in Albania. In light of the fact that he would be accompanying his mother to the country of their nationality, and taking into account the absence of adequate evidence to show that treatment would not be available, I find that E's best interests are to follow his mother to Albania".

14. At the hearing before the Upper Tribunal the appellant abandoned any claim based on Article 3 of the European Convention on Human Rights.

15. The Upper Tribunal Judge found the following errors of law in the decision as it related to Article 8 of the European Convention on Human Rights. First, there was no consideration of any improvement in the appellant's son's condition so that the circumstances that led to his being given discretionary leave may have changed. Second, the finding that it was in E's best interest to accompany his mother to Albania was wrong because there was no medical evidence to show that treatment was available to Albania or that the support and assistance available in school would be reproduced. Third, there was no adequate assessment by the First-tier Tribunal of how care could be transferred to a different hospital presumably in Albania.

16. The remitted hearing of the appeal came before First-tier Tribunal Judge M A Khan. It is his decision to dismiss the appeal before him that came before me.

17. Judge Khan heard evidence and considered the material before him.

18. He found the appellant to be generally incredible and gave reasons for that finding.

19. He set out his conclusions as to this appeal from paragraph 35.

20. At paragraph 38 he set out a large quotation from a letter of Dr Ashraf Gabr who was an associate specialist in paediatrics dated 15 July 2019. This referred to E being "significantly much better".

21. He then looked at a letter from E's general medical practitioner dated 27 September 2019. This referred to E being diagnosed at a very young age with a variety of related problems and his condition being managed at the Great Ormond Street Hospital for Children and there being "no definite improvement overall" and E requiring "twice daily catheterisation".

22. Judge Khan then noted part of Dr Gabr's letter where Dr Gabr said that E needed a "multidisciplinary team in paediatric urology and nephrology" but then said he could not comment on whether such a team was available in Albania.

23. Judge Khan then referred to a letter dated 8 November 2019 written by one Karen Ryan who, according to the judge, "appears to be a nurse".

24. I consider that letter now. There is no doubt that Karen Ryan is a nurse. She identifies her qualifications as "CNS Urology". At the risk of stating the obvious, "CNS" indicates "Clinical Nurse Specialist" and is regarded as a higher

nursing qualification. Ms Ryan opines that "it is unlikely that this level of specialism is available in Albania" but offers no explanation to justify that opinion. Judge Khan then referred to the care plan for E and the observation that it was "extremely unlikely" that E would be taken ill suddenly at school.

25. At paragraph 45 Judge Khan said:

> "Clearly things have moved on from E's early life as a baby. Although he is regularly assessed and monitored by Dr Gabr, there is no mention of any further treatment by way of operations suggested by Dr Gabr. Dr Gabr states that he cannot comment on the health system and the availability for E's treatment in Albania".

26. The Judge Khan noted that it was not for the respondent to establish that treatment was available but for the appellant to show that it was not.

27. It was the appellant's oral evidence that she had not made enquiries as to whether any facilities were available in Albania which may not be as good as those in the United Kingdom but which would still be of significant value.

28. The judge did note a statement from the appellant's solicitors that they had been in contact with the school in Albania and referred to a written response from the school. The judge described the appellant's evidence as "neither persuasive nor believable, particularly in light of previous credibility findings on his [sic] evidence."

29. Judge Khan did have a document that at least identified the MedCOI response indicating that general medical and inpatient treatment by a paediatrician is available for these conditions.

30. Having acknowledged the seriousness of the condition Judge Khan found that the appellant had benefited from many procedures and operations and the situation was "nowhere as near as it was in April 2017" (paragraph 48).

31. Judge Khan's Decision and Reasons is criticised and permission to appeal was given by a First-tier Tribunal Judge.

32. I can simplify things to some extent by recording that Mr Clarke accepted that there were things to criticise in the decision of Judge Khan. Whilst there is certainly evidence of continuing treatment and evidence of *relative* wellness it is hard to see how Judge Khan concluded on the evidence before him that there was a significant improvement in the appellant's child's condition. Indeed, there seems to be no clear prognosis for E at all. To some extent the medical practitioners will have to await events.

33. However, Judge Khan did find that there was no evidence that was sourced properly before the Tribunal that some treatment would be available and he clearly weighed this against the absence of evidence that treatment would not be available which he clearly recognised as a continuing problem in the evidence before him.

34. There was no clear and reasoned finding about the best interests of E. To me it seems clear on the evidence the best interests of E are to remain in the United Kingdom with his mother who will support him as he benefits from treatment under the health service and from a school where special provisions are made and where he is making a good impression. It does not seem to be suggested

anywhere that E would get better treatment in Albania and the evidence about what treatment is available is very scanty. However, it is trite law that the best interests of a child are not determinative of an appeal and certainly not determinative of the outcome of a human rights balancing exercise.

35. I consider the grounds in more detail.

36. Paragraph 3 begins with the assertion that the appellant and her son were granted discretionary leave "to remain in the United Kingdom for the son to continue his medical treatment and for his long term prognosis to be clarified". It is not absolutely clear to me where this phrase originates or that it is strictly correct although it is said that the Presenting Officer confirmed that this was the position according to the notes on the Home Office system. I do accept that it is a fair general description of the reasons for giving discretionary leave.

37. According to the grounds, in the refusal letter the Secretary of State considered the earlier grant of discretionary leave and said that the circumstances resulting in this grant "no longer prevail". It was said that the child E's condition had been diagnosed and had stabilised and there had been necessary follow-up treatment available in Albania.

38. The grounds point out that further surgery is planned and that Judge Khan has significantly understated the severity of E's condition. The grounds also contend that the judge was wrong to find that the appellant had family contacts and had not given proper reasons for rejecting her evidence to the contrary.

39. At paragraph 15 Judge Khan is criticised further. The grounds also complain that, contrary to the finding of the judge, the appellant had provided a letter from Dr Buba about treatment in Albania and she had contacted schools but they were not very responsive. The grounds conclude with the assertion that if the appellants (plural) are entitled to a further grant of discretionary leave then there is no public interest in their removal. That much is probably uncontroversial. It is the word "if" that is the problem.

40. In an effort to expedite the case efficiently in the time of national lockdown Directions were given that led to the appellant serving written submissions. These are signed by Mr Wilding. Appropriately, they echo the grounds. They begin by complaining that the judge did not outline the kind of life the appellant's son would face in Albania in the light of the known medical conditions and available treatment and associated with this how the appellant herself would cope. They criticise the judge for his apparent dismissal of the nurse's letter and repeat the evidence that he needs multidisciplinary treatment. They remind me of the reports of Dr Gabr, Dr Cukow and Dr Hayes. They complain that there is no "best interest" finding at all and certainly not in the light of the evidence about the child's health and likely circumstances in Albania. They further complain that Judge Khan did not consider properly the appellant's explanation for being unable to obtain a death certificate for her father. It is the appellant's case that she had always lost contact with her family and such things were not available.

41. They conclude by complaining that the balancing exercise was inadequate.

42. These things were developed in submissions before me.

43. There is the Rule 24 Notice in the form of a letter signed by Mr Chris Avery, Senior Home Office Presenting Officer. The letter points out that the findings about the death certificate are part of an overall adverse credibility finding and says that the judge did refer generally to the medical evidence but this is not a particularly illuminating or helpful document.

44. As is apparent from my commentary, there are certain points where I agree with the criticisms made in the grounds. Judge Khan's apparent conclusion that there has been a significant improvement in the appellant's child's condition is not supported by the evidence. He has got older and is doing well at school and his condition is better understood but he is still a very damaged and poorly child. There is no thorough evaluation of the conditions facing the appellant or the child on return but neither is there any good evidence, as far as I can see, that the appellant would not be able to cope if she were not able to get treatment for the child.

45. I agree with Mr Avery's rather isolated submission that there is a general adverse credibility finding and this is brought about by the appellant's own conduct. She has not shown that she would not have contact with her family and that does make a difference to any balancing exercise.

46. I cannot agree that there is any kind of public law obligation to the appellant created by the period of leave granted after the first hearing. That was something the Secretary of State wanted to consider and this was done. What Mr Wilding was not able to do was to identify any present policy now that entitles the appellant to remain or that in any other way shows an obligation entitling her to remain. It is not a good point and Mr Wilding did not make much of it.

47. Mr Clarke had one strong point and he advanced emphatically. However much sympathy one must feel towards this child and the mother who is clearly doing all that can be expected there is not any evidence that the child cannot manage in Albania. There is evidence from competent people that hospitals cannot provide care but there is no evidence that *no* hospital can provide care. It is not sufficient to say that private hospitals might be able to do something but the writer does not know. That writer may not know but someone else needs to be asked and Mr Clarke is right to say that is not for the Secretary of State. It is for the appellant to show that she cannot take the child to Albania and get proper care and she has not excluded possibilities that are identified in her own evidence.

48. I fully accept that the child's conditions are complex. I would not be surprised if it is the case that there is nowhere in Albania that can provide appropriate, still less comparable, give support but I do not know that and I cannot make decisions based on what boils down to "gut instinct" and what might be an entirely unjustified prejudice against healthcare facilities in Albania. It is for the appellant to show me. She has had help from solicitors for some time and the evidence is not there. Without that evidence the other criticisms fall away because they are not material.

49. Judge Khan has clearly had regard for child's state. I do not suggest for a moment that Judge Khan has persuaded himself that the child is in good health but any suggestion in his decision that the child does not need constant care

and supervision in the sense of regular contact with medical specialists is unsound. None of this matters because the evidence necessary for a conclusion to lead to this appeal being allowed has not been laid and the decision is not deficient in a way that matters.

50. There is some suggestion before me that fresh evidence has been found of a kind that is suitable to assist the appellant. If that is right then I respectfully ask the Secretary of State to give it appropriate care and not to be in a hurry to say it should have been produced earlier so will not be considered now. This case is about the welfare of a child with very significant physical difficulties and a mother who is managing but probably needs some support. The main reason for dismissing the appeal is, I find, sound, namely that the evidence necessary to allow the appeal had not be led. If it is produced then I hope that the Secretary of State will think carefully.

51. Nevertheless without in any way undermining the good work done by Mr Wilding and his solicitors the necessary work to lead to the appeal being allowed has not been done. Judge Khan could not have allowed this appeal on the material before him because the evidence was not there to show that the necessary treatment for the child was not available to the child in the event of return to Albania.

52. It follows that I dismiss the appeal as indicated above.

Notice of Decision

This appeal is dismissed.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 1 March 2021