

Heard at Field House  
On 23 June 2004  
Written 12 July 2004

FZ ( Article 8) Serbia and Montenegro [2004] UKIAT 00204

## **IMMIGRATION APPEAL TRIBUNAL**

### **Date Determination Notified**

22 July 2004

Before

**Mr S L Batiste (Vice-President)**  
**Mr J G Macdonald**  
**Ms V S Street**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

**Appellant**

and

**Respondent**

For the Appellant: Ms K Evans , Presenting Officer.

For the Respondent: Mr B Walker-Nolan, instructed by Messrs G Singh.

### **DETERMINATION AND REASONS**

1. The Respondent is a citizen of Serbia and Montenegro (Kosovo). The Appellant appeals, with permission, against the determination of an Adjudicator, Mr M Rothwell, allowing the Respondent's appeal against the decision of the Appellant on 26 February 2002 to refuse leave to enter or remain on human rights grounds.
2. The Adjudicator rejected the Article 3 appeal but allowed the appeal under Article 8 only on the basis that to return the Respondent and his family to Kosovo would be disproportionate under Article 8(2) having regard to their private and family life.
3. Permission to appeal was granted to argue that as the Adjudicator had found that the family would be able to continue their family and private life in Kosovo as a family unit, removal would not involve any interference with it and would not be in breach of Article 8(1). Moreover as the Adjudicator had held that there would be no breach of Article 3 on return, it followed that any interference with private life would not reach the necessary level of severity required to engage Article 8, as per the decision of the Court of Appeal in **Ullah**. Since the grant of permission, the House of Lords has considered appeals in **Ullah and Doh [2004] UKHL 26** and **Razgar [2004] UKHL 27**

and delivered its judgments in both on 17 June 2004. Also the Tribunal in **M (Croatia) [2004] UKIAT 00024\*** has considered the scope of the role of an Adjudicator and the Tribunal when assessing proportionality under Article 8(2). We shall say more about these cases later but they have to be taken into account by us in our assessment, and both Representatives addressed them before us, even though the Adjudicator could not have been aware of them at the time he wrote his determination.

4. As indicated we are concerned with Article 8 only. There has been no cross-appeal by the Respondent in respect of the rejection of the other aspects of his claim. In his assessment of Article 8, the Adjudicator correctly directed himself to the step-by-step approach recommended by the Tribunal in **Nhundu & Chiwera 01/TH/00613** and to the guidance of the Court of Appeal in **Mahmood [2001] Imm AR 229 (CA)**. His relevant findings of fact are contained in paragraph 4.6 as follows.

"I have referred in some detail to the [Respondent's] evidence about his family. He has supported his evidence by documents that establish a status of these family members, two of whom came to this country with the [Respondent] and his wife. I accept that the [Respondent] has been in this country since June 1998 - that is now over five years ago. I accept that he was married before he came and that since he arrived, he and his wife have had two sons, one of whom is attending school. The evidence is that he [that son] is developing in a conventional way, enjoys playing and speaks English, as I would have expected. He and his brother have known no other country and they have a close relationship with their uncles and other relatives as well as with English friends that the family have made. Of course neither the [Respondent] nor his wife work because they are not entitled to do so, although I accept the [Respondent's] evidence that those relatives who now have status in this country do work and make a contribution to this country. I also accept his evidence that they provide emotional support to him and that his cousin, Bekim, in particular is like a brother to him. I find there is no evidence of the whereabouts of his mother and two brothers whom he left behind in Kosovo. I find there is evidence of his wife's sisters and parents are living in Kosovo, although in accommodation that is inadequate for them, let alone for anyone else. I accept the [Respondent's] evidence that his home was burnt down in Kosovo as well as his shop. Thus he has no property or any existing economic support for his return."

5. In earlier paragraphs of the determination the Adjudicator described the extended family of the Respondent. A cousin, one who travelled to the UK with the Respondent and his wife, was granted asylum in October 2001 and has recently obtained British citizenship. They have a very close relationship "like brothers" and live only five minutes drive from each other. He helps the Respondent with his boys and with psychological support in the light of their experiences in Kosovo. The Respondent's wife has an uncle and two brothers with status in the UK. The brothers live just across the road from the Respondent and have recently applied for citizenship. The Respondent had two brothers and sister who he said had disappeared in Kosovo, but the Adjudicator who had heard and dismissed his asylum appeal had held this to be a lie. The Respondent's wife's two sisters and parents lived in a village not far from Pristina.

6. On these established facts (which have not been challenged in the grounds of appeal or by Ms Evans), the Adjudicator reached the following conclusions in paragraph 4.7.

"It is not claimed that the [Appellant's] decision is unlawful, or not in

accordance with his immigration control powers. So the real question as usual is whether the breach of his family and private life would be proportionate. The [Appellant] says it is because the [Respondent] and his immediate family would be able to return together to Kosovo.”

7. Pausing for a moment, it emerges from this that although the Adjudicator directed himself initially to the guidance of the Tribunal in *Nhundu & Chiwera*, he did not in practice follow the step by step approach he had earlier described. Specifically the Adjudicator did not consider under Article 8(1) whether the removal of the family as a whole constituted interference with their private and family life, but went directly to the question of proportionality.
8. This is the first challenge to the determination set out in the grounds of appeal and upon which Ms Evans expanded before us. She argued that as the Respondent's nuclear family would be returned together as a unit, removal could not constitute interference with their family life. Mr Walker-Nolan on the other hand argued that the Respondent's relationship with his wider family was held by the Adjudicator to be special and the removal of the Respondent and his nuclear family could constitute interference with it. He accepted however that the links with the wider family were emotional and to a degree financial, but not that there was any real evidence of dependency, despite the psychological support described.
9. With regard to the extent to which wider family members can be taken into account when assessing family life under Article 8 (1), the Tribunal has already established in a number of cases clear parameters to be applied. Thus in **S (Afghanistan) [2003] UKIAT 00132** the Tribunal held that blood ties with a wider family do not in themselves constitute family life. In **Salad [2002] UKIAT 06698** it held that links between adults siblings will not engage the protection of Article 8 without evidence of dependency involving more than normal emotional ties. The Adjudicator had no regard to this body of jurisprudence. There is nothing in the Adjudicator's findings of fact to suggest any material dependency by the Respondent upon his wider family. The reference to psychological support comes nowhere near this. Any financial support can continue after removal if the parties wish. Accordingly, we conclude, applying the above authorities with which we concur, that removal of the Respondent, his wife and their two children together could not constitute interference with their family life, notwithstanding their separation from those members of their wider family who are in the UK. The question of proportionality therefore never arises in relation to family life. In this respect the Adjudicator was wrong.
10. However there is the further question of private life. The Adjudicator in paragraph 4.8 held that "the family would be able to continue their family and private life in Kosovo as a family unit." Paragraph 2 of the grounds of appeal argues therefore that removal will not result in interference with their private life either, and again proportionality does not arise. The flaw in this argument however is that "private life" has been interpreted in the Strasbourg and UK jurisprudence in a broad way. In **Pretty v UK (2002) 35 EHRR1**, it was held that it included the "a physical and psychological integrity of a person" and also "a right to personal development, and the right to establish and develop relationships with other human beings and the outside world."
11. Ms Evans conceded on the basis of her interpretation of the jurisprudence that the Respondent has established private life in the UK and that removal would interfere with it and that accordingly the Adjudicator was right to go on to consider the issue of

proportionality in relation to interference with the right to private life. We should say that we have some doubts about whether that interpretation is in general terms correct. Not all relatives constitute “family life,” and not all incidents of life constitute “private life,” but that is a question for another case.

12. The grounds of appeal then argue that the Adjudicator was in error in concluding that return would not be proportionate on the facts as established. Reliance was placed in the grounds of appeal on the Court of Appeal decision in **Ullah**, to the effect that the situation facing the Respondent and his family in Kosovo was not sufficiently severe to be in breach of Article 3, and could not therefore be disproportionate another Article 8.
13. However, as both Representatives acknowledged, this judgment of the Court of Appeal has been superseded by the judgments of the House of Lords in **Ullah [2004] UKHL 26** and in **Razgar [2004] UKHL 27**. It is in **Razgar** that the House of Lords considered the specific question as to whether  
“rights protected by Article 8 can be engaged by the foreseeable consequences for health or welfare of removal from United Kingdom pursuant to an immigration decision where such removal does not violate Article 3”.
14. In the leading judgment, Lord Bingham concluded that in principle it could, provided the facts relied upon were sufficiently strong. He put it in this way:  
“9. This judgment establishes, in my opinion quite clearly, that reliance may in principle be placed on Article 8 to resist expulsion decisions, even where the main emphasis is not on the severance of family and social ties which the Applicant has enjoyed in the expelling country but on the consequences for his mental health of removal to the receiving country. The threshold of successful reliance is high, but if the facts are strong enough Article 8 may in principle be invoked. It is plain that “private life” is a broad term and the Court has wisely eschewed any attempt to define it comprehensively..... Elusive though the concept is, I think one must understand “private life” in Article 8 as extending to those features, which are integral to a person's identity or ability to function socially as a person.  
10. I would answer the question of principle above by holding that the rights protected by Article 8 can be engaged by the foreseeable consequences for health of removal from United Kingdom pursuant to an immigration decision even where such removal does not violate Article 3, if the facts relied upon by the Appellant are sufficiently strong. In so answering I made no reference to “welfare”, a matter to which no argument was directed. It would seem plain that, as with medical treatment so with welfare, an Applicant could never hope to resist an expulsion decision without showing something very much more extreme than relative disadvantage as compared with the expelling state.”
15. Accordingly, the Adjudicator was not constrained in assessing proportionality under Article 8 merely by the fact that he had rejected the Respondent’s Article 3 appeal.
16. However, since the Adjudicator reached his decision, there has been further guidance on the scope of the Adjudicator’s and the Tribunal's role in assessing proportionality. It has not been overturned in any superior court and is therefore still binding authority on the Tribunal. It is the case of **M (Croatia) [2004] UKIAT 00024\***. It states as follows:

18. The starting point should be that if in the circumstances the removal could reasonably be regarded as proportionate, whether or not the Secretary of State has actually said so or applied his mind to the issue, it is lawful. The Tribunal and Adjudicators should regard Shala, Edore and Djali as providing clear exemplification of the limits of what is lawful and proportionate. They should normally hold that a decision to remove is unlawful only when the disproportion is so great that no reasonable Secretary of State could remove in those circumstances. However, where the Secretary of State, eg through a consistent decision-making pattern or through decisions in relation to members of the same family, has clearly shown where within the range of reasonable responses his own assessment would lie, it would be inappropriate to assess proportionality by reference to a wider range of possible responses than he in fact uses. It would otherwise have to be a truly exceptional case, identified and reasoned, which would justify the conclusion that the removal decision was unlawful by reference to an assessment that removal was within the range of reasonable assessments of proportionality. We cannot think of one at present; it is simply that we cannot rule it out. This decision is starred for what we say about proportionality.”
17. The Adjudicator in this appeal, when assessing proportionality clearly put himself into the role of the primary decision maker, which is a function reserved to the Secretary of State, who in this appeal is the Appellant. The Appellant’s decision was contained in a letter dated 26 February 2002, which accompanied the notice of the decision to refuse leave to enter under Articles 3 and 8 of the Human Rights Act 1998. The Appellant concluded that removal would be proportionate. The proper task for the Adjudicator should have been therefore to consider whether the disproportion was so great on the facts as established that no reasonable Secretary of State could have reached that decision. The Adjudicator cannot be blamed for this error, because M (Croatia) was decided after the promulgation of his determination. Nevertheless, as both Representatives agreed, his conclusion as to proportionality is thereby flawed and must be set aside.
18. However as there is no dispute over the facts, we can cure these defects by assessing proportionality for ourselves in accordance with M (Croatia), which is a starred decision that is binding upon us and upon Adjudicators. Both Representatives indicated that that was what they wished us to do. Nevertheless, as requested by the Representatives, we note for the record before describing our conclusions, Ms Evans’ oral undertaking before us that irrespective of the outcome of this appeal the Appellant will consider the Respondent under his current backlog clearance exercise.
19. We conclude, for the reasons described below and taking all the relevant evidence into account, that there is no exceptional or other factor, taken singly or cumulatively arising in this appeal that would take the Appellant’s decision outside the realms of reasonableness open to him, having regard to the need to balance all the factors in favour of the Respondent against his policy of maintaining a firm, fair and consistent immigration system.
20. The length of time the Respondent has now been here is significant but does not entitle him to remain under any published policy or concession of the Appellant. Nor does the fact that both children were born here, qualify them under the Appellant’s 7 year policy concerning children. They are young enough to be able to adapt to life in Kosovo and have no special needs. The facts of this appeal reveal no exceptional

health or welfare issues, either here or in Kosovo. The situation in Kosovo will clearly be materially less good for the Respondent and his family than in the UK and there will be relative disadvantage. However many Kosovans have returned in these circumstances and this difference is not in itself a sufficient basis for allowing the human rights appeal. There are opportunities for housing and employment. The infrastructure is being restored. The Respondent and his nuclear family have at least some relatives in Kosovo, although others are in the UK. There is no reason given in the determination why the wider UK family, having obtained status here, cannot visit the Respondent in Kosovo, even though as Mr Walker-Nolan indicated they would not wish to return there to live for economic reasons. The fact that as ethnic Albanians they originally obtained refugee status here, does not mean that under the changed situation in Kosovo they cannot visit that country. In any event the Respondent will also be able to maintain contact with his relatives in the UK by telephone, correspondence and in due course perhaps visits here. The Respondent and his family will be also able to build a new private life in Kosovo, as the Adjudicator held. Also, as we have indicated previously, the Appellant and his nuclear family will be returned together and there will be no interference in their own family life between themselves.

21. We conclude that the facts as established do not demonstrate any matter whereby the decision reached by the Appellant can be said to be outside the range of reasonable decisions open to him. Accordingly his decision is proportionate under Article 8(2). The Adjudicator erred in law in reaching a contrary conclusion in the process by which he reached his conclusion.
22. Therefore, for the reasons given above this appeal is allowed.

**Spencer Batiste  
Vice-President**