Heard at Field House FR (Article 8 - Mahamood) Serbia & Montenegro [2003] UKIAT 00187
On 22 oct 2003

IMMIGRATION APPEAL TRIBUNAL

Date determination notified

05/11/2003

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Before:
Mr J Perkins
(Chairman)
Mrs M E McGregor

Between:

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

Respondent

DETERMINATION AND REASONS

1. Before us Mr G Phillips, a Home Office Presenting Officer, appeared for the appellant (herein after "the Secretary of State") and Mr Y S Lim, from Antons, Solicitors, appeared for the respondent (herein after "the claimant).

2. The claimant is a citizen of the Federal Republic of Yugoslavia. He was born on 15 March 1981 and so is now 22 years old. In a determination promulgated on 30 January 2003 an adjudicator, Mr T. O'Flynn, allowed the claimant's appeal against a decision of the Secretary of State that it was not contrary to the United Kingdom's obligations under the European Convention on Human Rights to return the claimant to Kosovo. The adjudicator accepted that the claimant had married a British National on 1 March 2002. Their son, Leo, was born on 21 July 2002. The adjudicator took account of the appellant's wife being settled in the United Kingdom where she had strong family support and decided it was not

proportionate to the proper purpose of immigration control to expect the claimant's young family to remove to Kosovo.

3. The Secretary of State had never considered the point because the form SEF was not returned and the Secretary of State was not told of the claimant's marriage. The adjudicator was right in the circumstances to address his own mind to the issue. On the facts of this case the adjudicator had to decide if the decision to remove the claimant was an interference in his family life and, if it was, then if that interference was proportionate to the proper purpose of enforcing immigration control. Following Edore v SSHD [2003] EWCA Civ 716 we can only interfere if the adjudicator's conclusion was not lawful, that is if the decision that removal was disproportionate was not one that he could reasonably have made.

4. Mr Lim repeated orally an application made by facsimile on the day before the hearing for the hearing to be adjourned. The claimant's former solicitors were not able to represent him before the Tribunal because they were closing their immigration department and the claimant was looking for alternative representation. He had only recently contacted Mr Lim's firm. We accept that the claimant was concerned that the preparation of his appeal was not improperly rushed. It was not his fault that his former solicitors were no longer undertaking immigration work. However it seemed to us that the case did not need a great deal of advanced preparation or notice. It turned on a particular point of law. The adjudicator had decided that the decision to remove the claimant was contrary to his rights under article 8 of the European Convention on Human Rights. The Secretary of State had been given permission to appeal on the basis that it was arguable that this conclusion was not open to the adjudicator. We saw no reason why competent solicitors could not deal with this point at short notice and refused the application. We put the case back in the list because Mr Lim wanted time to prepare further.

5. The adjudicator reminded himself of the decision of the Court of Appeal in Mahmood v Secretary of State 2001 Imm AR 229 and particularly the summary of European case law given by the Master of the

Rolls at paragraph 55. Sub-paragraphs 3 and 4 are well-known and are set out in the Secretary of State's grounds of appeal. At sub-paragraph 3 it says "removal or exclusion of one family member from a state where other members of the family are lawfully resident will not necessarily infringe article 8 provided that there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded, even where this involves a degree of hardship for some or all members of the family." The use of the word "necessarily" implies that there will be occasions when removal of a family member infringes article 8 even where there are no insurmountable obstacles to the family living together in the country of origin of the family member excluded. Whilst it is right to say that article 8 will normally be breached if there are insurmountable obstacle (a very high test) to family life being resumed in the country of origin of the family member excluded it is just wrong to say that article 8 will not be breached unless there are insurmountable obstacles. To the extent that the grounds of appeal suggest otherwise we disagree with them.

6. This is explained to some extent in sub-paragraph 4 which says "article 8 is likely to be violated by the expulsion of a member of a family that has been long established in a state if the circumstances are such that it is not reasonable to expect the other members of the family to follow the member expelled." Although the appellant has not been long established in the United Kingdom he is a member of a family that has. The adjudicator has addressed his mind to this at paragraph 11.5 of the determination. He has also recognised that the claimant married at a time when he knew that his right to reside in the United Kingdom was precarious. In fact he married on 1 March 2002. He had been told in a letter dated 10 May 2001 that his application for refugee status had been refused.

7. With respect to the adjudicator we do not accept that it was open to him to decide on these facts that it was unreasonable to require the appellant's family to remove to Kosovo with him. We recognise that Mr

Lim had only been recently instructed and we interrupted proceedings to enable him to take instructions to make quite sure that there were not, for example, any serious health problems or any other reason that made it necessary for the claimant's wife and child to remain in the United Kingdom. There were none. Mr Lim explained that the claimant's son had, or was suspected of having, epilepsy when he was born but the situation had now resolved to the extent that he was not being treated but he was monitored by a general medical practitioner. Medical care is available in Kosovo and we did not see this is a reason to justify the conclusion that it was unreasonable to expect the claimant's family to remove with him to Kosovo.

8. The adjudicator correctly recognised that a state is entitled to enforce immigration control but did not, we find, give sufficient weight to this when conducting the balancing exercise required to decide if the interference is proportionate to that proper purpose. The entitlement to enforce an immigration policy always weighs heavily (not conclusively) in favour of upholding the decision of the Secretary of State. A decision that requires family members to remove to a different country in order to preserve family unity will only be unreasonable, and therefore contrary to article 8 in the way contemplated in Mahmood, where the disruption inherent on removal is exceptionally severe. That is simply not the case here. In reaching this conclusion we recognise that conditions in Kosovo are far from ideal but there is no reason why the claimant's family could not be expected to cope if they chose to go and live there.

9. We also know that that the immigration rules provide for a husband to join his wife in the United Kingdom provided that certain conditions can be satisfied. Again the Secretary of State is entitled to operate a policy of immigration control and it is not normally proportionate to that proper purpose to permit a person to circumvent the rules by being allowed to remain in the United Kingdom. A husband (or wife) should not normally be permitted to "queue jump" or avoid satisfying the immigration rules. We see no justification for the finding that this claimant ought not to be

expected to leave the United Kingdom and make an application to join his wife as the rules contemplate.

10. In all the circumstances we have to conclude that the adjudicator was wrong. The decision that he made was not within the range of decisions open to him. We allow the Secretary of State's appeal.

Jonathan Perkins
Vice President
28 October 2003