Heard at Field House
**J(Article 8- Queue Jumping- Visa Applications-Neighbouring Countries) Kosovo CG [2003] UKIAT 00041**
On 4 August 2003
Written 4 August 2003

**IMMIGRATION APPEAL TRIBUNAL**

**Date Determination Notified**

18.08.02

Before

**Mr S L Batiste (Chairman)**
**Mr P R Lane**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**
**Appellant**

and

**Respondent**

**DETERMINATION AND REASONS**

1. The Respondent is a citizen of the Federal Republic of Yugoslavia (Kosovo). The Appellant appeals, with leave, against the determination of an Adjudicator, Ms G Elliman, allowing the Respondent's appeal under Article 8 against the decision of the Appellant on 26 May 2001 to issue removal directions and refuse asylum. Before us, Ms J Sigley, a Home Office Presenting Officer, represented the Appellant and Mr J Benson, instructed by Messrs Charles Annon & Co, represented the Respondent.

2. The Respondent arrived in the UK clandestinely and claimed asylum on 22 April 2000. He did not attend his asylum interview and his claim was rejected. The only issues arising before us, as before the Adjudicator, relate to an Article 8 claim arising from his marriage to a British citizen, which the Adjudicator allowed.

3. The Respondent was married on 4 August 2001, though at the time of the hearing before the Adjudicator on 24 March 2003, they were not living together and had not been for about six weeks. She was living with her parents and he was living with friends. This separation was temporary whilst they waited to move into a new house, purchased by his wife's parents, where they would live together. His wife had a child by a previous relationship, who the Respondent cares for as his own.

4. As the marriage took place after the issue of the removal directions, the Appellant did not address, in his refusal letter, the consequences of the marriage in the context of Article 8. However the Appellant was represented at the hearing before the Adjudicator and argued, amongst other things, that it would not be disproportionate for the Respondent to return to Kosovo and to make an application to enter the UK as a spouse in accordance with the Immigrations Rules.

5. The Adjudicator accepted that there was family life between the Respondent his wife, and her child and that this had subsisted for three years. She accepted further that the interference caused by removal would be in accordance with the law or and that his removal would be in pursuance of one of the legitimate aims under Article 8(2), namely the maintenance of an effective immigration policy. However the Respondent's representative at the hearing argued that return would be disproportionate because there was no evidence that the Respondent could apply for a visa in Kosovo at all, or that such a visa could be obtained within a reasonable length of time. The Adjudicator, with the approval of the two representatives, undertook research of her own after the hearing was over, and concluded that there were no visa applications facilities in Kosovo at all and that, although there were facilities in Skopje in Macedonia, this facility appeared to have closed in March 2003. She therefore concluded as follows.

   > "I am left to conclude (in the absence of any further information on this crucial point) that it would actually appear to be physically impossible for the [Respondent] to obtain a visa for entry to the United Kingdom from any Embassy or British post in the region."

6. Accordingly she held that the prolonged absence caused by this would disrupt his family life in a way that would be disproportionate.

7. The grounds of appeal by the Appellant, which were amended with the leave of the Tribunal, attacked this decision on two bases. The first was that the Adjudicator was wrong to find that the Respondent could not obtain a visa within the region. There were at all material times facilities for obtaining a visa in Skopje, Tirana or Sofia, all within the region and relatively easily accessible from Kosovo. The second basis of the appeal is that the Adjudicator was wrong to conclude that the marriage was subsisting. An Immigration Officer had visited his address of 20 April 2003 and found the Respondent in his bedroom with a woman who was not his wife and when asked he was unable to give the address or telephone number of where his wife was.

8. We first considered whether, in line with the guidance of the Court of Appeal in Oleed, the Adjudicator's assessment of proportionality under Article 8 was either "plainly wrong or unsustainable."

9. In making our assessment we have first assessed the law and have regard, as invited by both representatives, to the decision of the Court of Appeal in **Amjad Mahmood [2001] INLR** 1. It undertook a very thorough review of the Strasbourg jurisprudence on the issue of proportionality. Lord Philips MR summarised the position as follows.

   > "I have drawn the following conclusions as to the approach of the Commission and the ECHR to the potential conflict between the respect for family life and the enforcement of immigration controls.
   >
   > 1. A state has a right under international law to control the entry of non-nationals into its territory, subject always to its treaty obligations.

2. Article 8 does not impose on a state any general obligation to respect the choice of residence of a married couple.
3. 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 rights provided there are no insurmountable obstacles to the family living together in the country of origin of the family members excluded. Even where this involves a degree of hardship for some or all members of the family.
4. Article 8 is likely to be violated by the expulsion of a member of the 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 that member expelled.
5. Knowledge on the part of one spouse at the time of the marriage that rights of residence of the other were precarious militates against a finding that an order excluding the latter spouse violates Article 8.
6. Whether interference with family rights is justified in the interests of controlling immigration will depend on (i) the facts of the particular case and (ii) the circumstances prevailing in the state whose action is impugned.

10. He also held in paragraph 65 that;

> 65. If and when the Appellant applies for permission for a settlement visa in accordance with [the Rules] his application will have to be considered having regard to his rights under Article 8. In the circumstances I do not consider that the possibility that his application may not succeed his any reason for excusing him from the requirement to make an application outside the country if he wishes permission to settle here with his wife and family.

11. Additionally Laws LJ stated at paragraphs 23 and 26 that

> 23. Firm immigration control requires a consistency of treatment between one aspiring immigrant and another. If the established rule is to the effect – as it is – that a person seeking rights of residence here on grounds of marriage, (not being someone who already enjoys a leave, albeit limited, to remain in the UK) must obtain an entry clearance in his country of origin, then a waiver of that requirement in the case of someone who has found his way here without an entry clearance and then seeks to remain on marriage grounds, having no other legitimate claim to enter, would, in the absence of exceptional circumstances to justify the waiver, disrupt and undermine firm immigration control, because it would be manifestly unfair to other would-be entrants who are content to take their place in the entry clearance queue in the country of origin.
> 26. No matter that the immigrant in the individual case, having arrived here without the required entry clearance, may be able to show that he would have been entitled to one, or even that the Home Office actually accepts that he meets the [Immigration] Rules' substantive requirements; it is simply unfair that he should not have to wait in the queue like everyone else. At least it is unfair unless he can demonstrate some exceptional circumstances, which reasonably justifies his jumping the queue.

12. The Court of Appeal in **Isiko [2001] Imm AR 291** also concluded that the Respondent was entitled to regard as important the integrity of the immigration regime as a whole, and expressly approved the above observations by Laws LJ. The Court of Appeal in **Soumahoro [2003] EWCA Civ 840** went further and concluded that an Adjudicator, in circumstances when it is necessary to reach his or her own conclusions on proportionality, (such as in the appeal before us, where there are new facts that have not been considered by the Appellant) should pay a very considerable deference to the view of the Appellant as to the importance of maintaining an effective immigration policy.

13. The Tribunal in **Ahmed [2002] UKIAT01757** applying these general principles, held that it would be proportionate to remove an illegal entrant, separated from his UK wife and British child because queue jumping for entry clearance will not be acceptable provided a genuine application under the Rules from his home country would not take too long.

14. In terms of this appeal, most of the factors described in Mahmood apply. The Respondent's immigration status was precarious when he was married, and both parties to the marriage would have been aware of this. The Adjudicator notes the Respondent's wife's evidence that she did not believe she would be able to go to Kosovo if the Respondent returned to live there, because of her daughter's education and her own financial obligations in the UK. The Adjudicator did not actually consider whether there is any insuperable obstacle to return, but the evidence does not suggest that there is, though plainly the wife would not wish to live in Kosovo and it would be difficult for her and her daughter to do so. The Respondent has not been in the UK for long.

15. Ms Sigley then produced various papers to us, showing how Kosovans can make visa applications for the UK, it being conceded that there are no visa application facilities available in Kosovo itself. There are issuing posts in Skopje, Tirana and Sofia, all in neighbouring countries in the region. The most obvious to use for Kosovans is Skopje, which is only a short journey of one and a half hours from Pristina by road. Initial applications can be made by letter, but an applicant will have to attend an interview, following which the decision is usually made. An applicant would need a travel document to travel to Skopje but not a visa. FRY passports are available in Pristina or alternatively UNMIK travel documents can also be made available to Kosovo residents. Ms Sigley argued therefore that the Adjudicator was plainly wrong to conclude that there were no readily available visa facilities for the Respondent in his region and was therefore also wrong to allow the Article 8 appeal.

16. The first issue argued before us was a dispute over the evidence concerning the availability of visa facilities in Skopje. Ms Sigley informed us that her inquiries at the Home Office had indicated that there was a visa office in Skopje and always had been. She produced a document from the British Embassy in Skopje obtained on 1/8/03 stating that the visa section was available on the fifth floor of the Embassy. New applications were accepted between 8:00-9:30 on Monday to Thursday, effective from 8 July 2003. Applications could be made in a drop box through a courier, a representative or in person. A CIPU bulletin of 17 December 2001 also confirmed that visas were then available in the ways described above.

17. Mr Benson on the other hand produced a very brief document, which he said he had obtained in a search on the Internet, also on 1 August 2003. It is dated 20 March 2003. It states that

> "The visa section at the British Embassy in Skopje closed on 20 March 2003. Skopje also handles applications for Pristina. It is hoped that this will be a temporary measure and the situation will be reviewed on 26 March."

18. Mr Benson asked as to conclude that there was a serious issue over whether visas could be processed at the Embassy in Skopje. We do not agree. All the evidence taken together, shows that visa applications for Britain from Macedonia and Pristina are handled in the Embassy in Skopje and have been at all material times, as Ms Sigley was informed. At the most, the section was closed in March, as a temporary measure and re-opened. There were new opening hours effective from early July 2003. We have therefore assessed this appeal on the basis that the Respondent would have to make his application, not from within Kosovo, but through the Embassy at Skopje, which is 1½ hours by road from Pristina. He could also choose to make his application, if he so wished, via the UK Embassies in Tirana and Sofia, but the journey there would be somewhat longer.

19. Mr Benson then argued that in Mahmood, Laws LJ in paragraph 23 had referred to making visa applications from a country of origin, and that his comments therefore did not apply where there were no visa facilities within the country of origin. We do not agree. In context it is clear that Laws LJ was not being prescriptive in his comments but was indicating that anyone from a particular country should have to undergo the same procedures as others from that country. Of course there may be circumstances in which there may be exceptional difficulties in requiring an individual to seek a visa in another country. These would plainly have to be taken into account on the facts of any particular appeal. But, we conclude that the broad principles described in Mahmood are equally applicable whether the visa application can be made and processed from within the applicant's own country or, within a reasonable time, from another country nearby. As the Tribunal is well aware, there are a number of countries in the world where there are no visa processing applications but facilities are made to their nationals in our Embassies in neighbouring countries. However, to distinguish these countries, as such, from countries where there are UK visa application facilities as Mr Benson has urged, would make no real sense. The journey across a large country to the British Embassy in the capital many miles away may be more complicated and difficult than travelling a few miles across the border to our Embassy in a neighbouring country. We conclude that when a journey to another country is required in order to make a visa application, that does not itself render the need for such an application disproportionate, but each claim must be assessed on it own facts, in case there are specific problems or obstacles in travelling to the other country.

20. Mr Benson then argued that the Respondent was an exceptional case. He would need to apply for a passport or an UNMIK travel document to travel to Macedonia. We are not impressed by this argument, as the Respondent will have to obtain a passport to receive his visa to travel to the UK, should his application be successful, as would anyone else from Kosovo, seeking to enter the UK legally. There is no evidence before us that this process will cause undue delay. Passports are readily available in Pristina, and indeed may be available in the UK if the Respondent applies before returning. The Respondent can start his visa application process off before he obtains his passport. We can see no

good reason on the evidence before us why the need to have a passport before travelling to the UK, which is required of all lawful immigrants to this country, should present any undue difficulty or delay for the Respondent. With such a passport the Respondent will not face any difficulties from the border guards Macedonia. A journey of about 1½ hours by road in his home region is not unduly excessive to expect of a person who wishes to travel to the UK, and has already done so once, albeit illegally. Nor for that matter would it be excessive if he had to travel to Tirana or Sofia for this purpose

21. We therefore conclude, on the facts of this appeal, that there is no good reason why the Respondent cannot return to Kosovo and make a lawful application to enter the UK in accordance with the facilities available in his region, or that requiring him to do so would be disproportionate. We further conclude, for all the reasons stated above, that the Adjudicator was plainly wrong to allow his appeal under Article 8 and that the decision, which is unsustainable, must be set aside.

22. There is then the second ground of appeal. Ms Sigley indicated that this would not be relevant if she succeeded on the first ground, and Mr Benson did not dissent from this. We agree. The Adjudicator concluded that the Respondent had a subsisting marriage and would be able to succeed in his marriage application. That may well be true. Certainly the Respondent and his wife attended the hearing before us as a couple and produced statements to the effect that their marriage subsisted. On the other hand the report from the Immigration Officer, to which we have referred above, offers some evidence to the contrary.

23. However we do not consider it is for us to decide this issue for ourselves, either under the Immigration Rules or under Article 8. No application under the Rules has yet been made for leave to enter as a spouse. Still less has any decision been made by an Entry Clearance Officer in Skopje or elsewhere, who is, as we are, required to take into account an applicant's human rights. If we were to go on and deal with this issue ourselves, we would in effect be assuming, without any good reason, that in such cases an Entry Clearance Officer will make a decision that is not in accordance with the law. His decision will be subject to a right appeal in the usual way.

24. The Tribunal addressed a similar point in its starred decision in Chawish [2002] UKIAT 01376. In that case the Applicant, a Kurd from Iraq, was a beneficiary of an undertaking not to remove him until a safe means of returning him to the KAA could be found. He argued that if he remained in the UK without any immigration status he would be destitute and this would be in violation of his Article 3 rights. The Tribunal held that

> "It would be unlawful for the Secretary of State to act in such a way as to breach the claimant's human rights or indeed those of anyone seeking to enter or to remain in United Kingdom. If he did act in such a way, a legal challenge could be brought and the decision would be overturned. The law does not tolerate anyone being left destitute as a number of decisions of the Court of Appeal have made clear."

25. This in our view is the correct approach. We should not prejudge the Entry Clearance Officer's decision, and we should not assume that an Entry Clearance Officer would breach Article 8 when making that decision.

26. For the reasons given above this appeal is allowed, the Adjudicator's decision to allow the appeal under Article 8 is set aside, and the Appellant's original decision is upheld.

**Spencer Batiste**
**Vice-President**