



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: IA/27523/2014

THE IMMIGRATION ACTS

Heard at Field House, London  
On 15 April 2015

Determination Promulgated  
On 29 April 2015

Before

DEPUTY UPPER TRIBUNAL JUDGE GRIMES

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MILIAM GAXHA

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Home Office Presenting Officer

For the Respondent: Mr S Kerr, Karis Solicitors

DETERMINATION AND REASONS

1. Whilst this is an appeal by the Secretary of State for the Home Department for convenience I will refer to the parties in the determination as they appeared before the First-tier Tribunal.
2. The appellant, a national of Albania, appealed to the First-tier Tribunal against the decision of the Secretary of State of 16 June 2014 to refuse his application for leave to remain on the basis of his private and family life in the UK with his British citizen partner and to remove him from the UK. A First-tier Tribunal panel comprising Designated Judge David Taylor and First-tier Tribunal Judge Manyarara allowed the appeal and the Secretary of State now appeals with permission to this Tribunal.

3. The panel identified the issue to be determined as whether the appellant and his partner (herein the sponsor) had been living together in a relationship akin to marriage for at least two years and, if so, whether there were insurmountable obstacles to relocation to Albania [8]. On the basis of the oral evidence before them the panel found that the appellant and his partner began a relationship in May 2010 and that they began to live together in a relationship akin to marriage in the sponsor's parents' home in January 2011, a period of almost four years at the date of the hearing. The panel accepted that the sponsor's mother has health problems, that the sponsor provides her with practical assistance which could not be provided by anyone else and that there are therefore insurmountable obstacles to family life between the appellant and the sponsor continuing outside the UK. The panel therefore found that the appellant met the requirements of Appendix FM with reference to Ex 1 and allowed the appeal under the Immigration Rules. The panel also considered Article 8 and found that it would be a disproportionate interference with the appellant's family life to require the appellant to leave the UK to make an application for entry clearance to return to the UK to join the appellant.
4. The Secretary of State contends in the grounds of appeal to the Upper Tribunal that the panel erred in its consideration of Ex 1 of Appendix FM in that the difficulties listed by the panel do not amount to insurmountable obstacles. It is further contended that the panel erred in consideration of Article 8 in that it failed to identify exceptional reasons for departing from the Immigration Rules. It is contended that the panel further erred in failing to consider the provisions of section 117A and 117B of the Nationality, Immigration and Asylum Act 2002 in weighing the public interest.
5. Mr Melvin indicated that he did not challenge the findings of fact. However he submitted that the panel applied the wrong test in considering whether there are 'insurmountable obstacles' to the family life between the appellant and his partner continuing outside the UK under Ex 1 of Appendix FM. At the hearing before me Mr Melvin further submitted that the panel had erred in failing to make any finding as to whether the appellant met the eligibility requirements of Appendix FM in light of the fact that he does not have entry clearance. Mr Melvin submitted that the panel erred in its consideration of Article 8 in failing to consider section 117.
6. Mr Kerr submitted that the appellant does meet the eligibility requirements of Appendix FM. He submitted that the panel properly applied the test in Ex 1. He accepted that the panel did not set out the conditions in section 117 in considering Article 8 but submitted that this is not material given that the appeal was allowed under the Immigration Rules.

#### Error of Law

7. The requirements for limited Leave to Remain as a partner are set out in Appendix FM paragraph R-LTRP.1.1 as follows;

**R-LTRP.1.1.** The requirements to be met for limited leave to remain as a partner are-

- (a) the applicant and their partner must be in the UK;

(b) the applicant must have made a valid application for limited or indefinite leave to remain as a partner; and either

(c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets all of the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; or

(d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; and

(ii) the applicant meets the requirements of paragraphs E-LTRP.1.2-1.12. and ELTRP.2.1.; and

(iii) paragraph EX.1. applies.

8. Ex 1 provides;

**EX.1.** This paragraph applies if

(a) (i) the applicant has a genuine and subsisting parental relationship with a child who-

(aa) is under the age of 18 years, or was under the age of 18 years when the applicant was first granted leave on the basis that this paragraph applied;

(bb) is in the UK;

(cc) is a British Citizen or has lived in the UK continuously for at least the 7 years immediately preceding the date of application; and

(ii) it would not be reasonable to expect the child to leave the UK; or

(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK or in the UK with refugee leave or humanitarian protection, and there are insurmountable obstacles to family life with that partner continuing outside the UK.

**EX.2.** For the purposes of paragraph EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.

9. Mr Melvin contended that in order to meet the eligibility requirements the appellant had to have been granted entry clearance. He referred in particular to E-LTRP1.12 which provides;

"The applicant's partner cannot be the applicant's fiancé(e) or proposed civil partner, unless the applicant was granted entry clearance as that person's fiancé(e) or proposed civil partner".

10. However the appellant in this case does not claim to be a fiancé or proposed civil partner. He claims to be, and was found by the panel to be, 'a person who has been living together with the applicant in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application' within Gen 1.2 (iv). E-LTRP1.12 was considered by the Secretary of State in the Reasons for Refusal letter after the

Secretary of State found that the appellant had not shown that he was living with the appellant in a relationship akin to marriage. The panel found that he had been living with the sponsor for almost four years and accordingly the requirement at E-LTRP1.12 did not apply. Accordingly the panel did not err in its consideration of the eligibility requirements.

11. In relation to Ex 1 the panel said at paragraph 44 that it found that there are 'insurmountable obstacles' to family life between the appellant and the sponsor continuing outside the UK because of three factors. These are the level and nature of care required by the sponsor's parents and their ongoing reliance on the sponsor; the fact that there is no-one the sponsor can turn to for assistance as any alternative option is not without difficulty; and the significant issues that the sponsor's sister deals with in relation to her own child's mental health conditions as well as the care of her grandchildren. The panel went on to conclude at paragraph 45 that '*there are significant difficulties in relation to the sponsor being able to follow the appellant to Albania, and this would thereby entail hardship*'. The respondent contends that this final sentence indicates that the panel applied the wrong test. However this sentence is a direct application of the wording of Ex 2 which defines 'insurmountable obstacles'. Further, the panel made a clear finding at paragraph 44 that there are insurmountable obstacles and gave the reasons for that finding. Paragraph 45 is simply a further explanation of the reasons for that finding applying the definition in Ex 2.
12. I am satisfied that the First-tier Tribunal properly considered all relevant provisions of Appendix FM including Ex 1 and reached reasoned findings which were open to the panel on the basis of the evidence before it.
13. Mr Kerr properly accepted that the First-tier Tribunal panel did not set out the considerations in section 117 in considering Article 8. However this is not a material error in this case as, having found that the appeal was allowed under the Immigration Rules, it was not necessary for the panel to go on to consider Article 8 at all.

Conclusion:

The making of the decision of the First-tier Tribunal did not involve the making of a material error on point of law.

The decision of the First-tier Tribunal shall stand.

Signed

Date: 27 April 2015

A Grimes  
Deputy Judge of the Upper Tribunal