Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07336/2015**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 August 2017	**On 04 October 2017**

Before

UPPER TRIBUNAL JUDGE CRAIG

Between

MR ARTUR BARDHOSHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Kerr, Counsel, instructed by Karis Solicitors
For the Respondent: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania who was born on 27 February 1989. He first arrived in this country in 2012 without leave and remained here until towards the end of 2013. He was stopped in a car and it was discovered that he was in this country unlawfully. He was removed on 24 November 2013. By this time he had met a Ms Wells and been in a relationship with her for some eight months.

2. Even though the appellant knew full well that he had absolutely no right to be in the country he once again entered without leave on 23 March 2014

when he began living with Ms Wells. It is accepted that they have been living together since then. In July 2013 the appellant had applied for asylum, which is some four months after his relationship with Ms Wells had commenced, but that application was refused and, as already noted, the appellant had failed to leave the UK until he was removed in November 2013.

3. In July 2015 the appellant applied for leave to remain under Article 8 on the basis of his family life with Ms Wells (to whom at this time he was not married) and her two daughters, the youngest of whom was born on 1 July 2004 and so at that time was aged 12 years. She is now 13. The application was refused. The appellant could not succeed under the Rules as a partner because he did not meet the requirements set out within Appendix FM; as provided in GEN.1.2(iv), in order to be defined as a "partner" for the purposes of Appendix FM, an unmarried couple had to have been living together in a relationship akin to a marriage or civil partnership for at least two years prior to the date of application, which the appellant and Ms Wells had not by that stage.

4. The appellant appealed against the respondent's refusal to grant him leave to remain and his appeal was heard at Harmondsworth on 29 March 2017 before First-tier Tribunal Judge Amin but in a Decision and Reasons promulgated on 20 April 2017 Judge Amin dismissed the appeal.

5. By this stage the appellant and Ms Wells were married, having been married in 2016. Accordingly, by the time the appeal was heard the general conditions set out within Appendix FM did apply.

6. There was some discussion during the hearing as to whether or not with regard to Article 8 and in particular to Appendix FM the First-tier Tribunal ought to have had regard to the position as it applied at the date of hearing or whether it should only have considered the position at the date of the decision, which was September 2015, both the application and the decision having postdated the change in the Rules which applied from April 2015. However, this is an Article 8 appeal and the position with regard to appeals remains as set out within Section 85 of the Nationality, Immigration and Asylum Act 2002, which is that (pursuant to Section 85(4)): "On an appeal under Section 82(1) … against a decision [the Tribunal] may consider … any matter which [it] thinks relevant to the substance of the decision, including … a matter arising after the date of the decision".

7. The provisions set out within Appendix FM are said within the Appendix to be designed to demonstrate the matters which should be taken into account in order to ensure that the respondent complies with her obligations under Article 8 of the ECHR, taking into account the need to safeguard and promote the welfare of children in the UK in line with the respondent's duty under Section 55 of the Borders, Citizenship and Immigration Act 2009. Appendix FM is not designed on its face to provide a specific right under the Rules to leave to remain; rather it is designed to

set out the basis upon which an application under Article 8 will be considered and determined.

8. Certainly, and in my judgment rightly, Judge Amin did consider this appeal on the basis that Appendix FM applied.

9. The appellant was given permission to appeal against this decision by Upper Tribunal Judge Smith on 4 July 2017. While she refused permission on some of the grounds for reasons which she gave (and with which I am in entire agreement) at paragraphs 3 to 5 of her decision she gave her reasons as follows:

> "3. I grant permission however on grounds 3 and 4. In relation to ground 4, the judge arguably did not, when considering whether there were insurmountable obstacles to the appellant and his wife continuing their relationship in Albania, take into account the position of her children ([31] to [35] of the decision). A judge may well be entitled to conclude that it would not be unreasonable for them to go to Albania with the couple if that were their decision or remain with their natural father but that is not considered.
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> 4. That potential error also arguably impacts on the finding in relation to entry clearance. The issue whether there are 'insurmountable obstacles' arises first when applying the Immigration Rules (EX.1). The issue whether it would be reasonable to expect the appellant to return to Albania in order to make an application under the Rules as a spouse arises only outside the Rules and therefore after it has been determined that there are no insurmountable obstacles to family life continuing in the home country.
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> 5. The appellant may, on the facts of this case, face an uphill struggle in persuading a judge that his appeal should be allowed. However, I am (just) persuaded that there is an arguable error for the reasons I have identified and that the error may be material. I therefore grant permission to appeal".

10. The problem with the decision which Judge Smith identified was that Judge Amin was obliged to consider (and he did) pursuant to Appendix FM whether or not there were "insurmountable obstacles" to Ms Wells' relocating with the appellant to Albania in order for family life to continue. Appendix FM contains within it a number of requirements before leave to remain will be granted to a person on the basis of family life carried out with that person's partner, but the relevant requirements (which this appellant could not satisfy) are all waived if the requirements of Section EX.1 are satisfied. The relevant part of EX.1 provides as follows:

> "EX.1. This paragraph applies if
>
> …

(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 … and there are insurmountable obstacles to family life with that partner continuing outside the UK".

11. What amounts to "insurmountable obstacles" is then clarified in EX.2 as follows:

> "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".

12. In this case, as already noted, Ms Wells has two young children, the youngest of whom was 12 and the older child 16. These children both have regular contact with their natural father and also regularly see their grandmother, who, it appears, provides support to both her grandchildren. The father, as noted at paragraph 25 of Judge Amin's decision, has his daughters to stay with him regularly.

13. At paragraph 29 of his decision the judge stated as follows:

> "29. The children have a very strong relationship with their mother and their natural father. The children do not have to leave the UK as their best interests are met by their parents in the UK. The children are not required to leave the UK".

14. I note (and emphasise) that the judge's finding with regard to the best interests of the children was that these were met by both their parents, and not just by one of them.

15. The judge properly noted at paragraph 30 that the applicant had "shown a completely blatant disregard of the Immigration Rules" and that "his wife has been supporting him financially". He also noted, again absolutely properly, that both the appellant and his wife had entered into this relationship with full knowledge that the appellant's immigration status was precarious.

16. The judge then went on to consider whether there were insurmountable obstacles for the appellant and his wife returning to Albania, in order to see whether they could continue their family life there. The difficulty with this aspect of the decision is that the judge did not in the context of this decision take account of the position of the children. As Judge Smith noted when giving her reasons for granting permission to appeal, it might be that a judge could find that it would not be unreasonable for the children to go to Albania with their mother and stepfather or indeed remain with their father in this country. The effect of the former, however, would be that the children would be deprived of the advantages to which they are entitled as British citizens and for this reason this may not be a reasonable

course to follow. Were the appellant's wife to choose to accompany her husband to Albania, she would in those circumstances face the prospect of parting from her children. In these circumstances the judge when considering whether there are "insurmountable obstacles to family life with that partner continuing outside the UK" would have to have in mind whether or not the difficulties which would be faced by the appellant's partner (in parting from her children) were sufficiently "significant" that they either could not be overcome or would entail "very serious hardship" for the appellant's wife. Absent such consideration in my judgment he has failed adequately to consider within Appendix FM whether or not there are insurmountable obstacles to family life continuing. This is an exercise which needs now to be conducted. Despite the robust and thoughtful way in which the respondent's case was argued before this Tribunal, I cannot rule out the prospect that a judge when considering the position of the children would find that the effect on the wife of travelling to Albania with her new husband without her children would entail very serious hardship for her.

17. It follows that this appeal will have to be reheard. Having heard submissions from the appellant in particular in this regard (the respondent's position being neutral) I am persuaded that the appropriate course is to remit the appeal back to the First-tier Tribunal so that the appeal can be reheard by any judge other than Judge Amin and I will so order.

Decision

I set aside the decision of First-tier Tribunal Judge Amin as containing a material error of law and remit the appeal back to Hatton Cross to be determined by any judge other than First-tier Tribunal Judge Amin.

No anonymity direction is made.

Signed:

Upper Tribunal Judge Craig Date: 29 September 2017