



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/01150/2019 (V)

THE IMMIGRATION ACTS

Heard at: Field House
On: 22 January 2021

Decision & Reasons Promulgated
On: 09 February 2021

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

EL
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr A Slatter, instructed by Sabz Solicitors LLP
For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This has been a remote hearing to which there has been no objection from the parties. The form of remote hearing was skype for business. A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.
2. The appellant is a citizen of Albania born on 27 May 1991. He entered the United Kingdom clandestinely on 10 February 2017, having previously attempted unsuccessfully, on several occasions in 2015 and 2016, to enter the UK by way of student visa applications (four times) and then by travelling through Europe clandestinely and being detained and

expelled and being made the subject of an order in Spain which excluded him from entering Europe for three years and excluded him from Spain for six years.

3. On 5 May 2017 the appellant made an application for leave to remain on family and private life grounds (as the partner of a British national) which was refused with an out of country appeal on 11 January 2018. The appellant married his British partner, AD, in the UK on 27 October 2017. He made further Article 8 human rights submissions on the basis of his marriage, on 2 February 2018. The submissions were rejected on 9 February 2018, but further to judicial proceedings being lodged and a consent order agreed, the Secretary of State reconsidered the appellant's applications of 5 May 2017 and 2 February 2018 and refused his human rights claim with an in-country right of appeal, in a decision dated 3 January 2019.

4. In the meantime, the appellant made an asylum claim on 15 February 2018 on the basis that his parents, who were Christian, had thrown him out of their house in Albania and threatened to kill him and his wife after finding out that she was Muslim and that he was therefore at risk in Albania. The appellant's claim was refused and certified on 19 December 2018, with an out of country right of appeal.

5. In the decision of 3 January 2019 refusing the appellant's Article 8 human rights claim, the respondent considered that the application fell for refusal under the suitability provisions in section S-LTR.1.6 of Appendix FM on the basis that the appellant's presence in the UK was not conducive to the public good. The respondent referred, in that respect, to the appellant's 14-month prison sentence in May 2016 for using forged documents, which was commuted to a six-year expulsion order for Spain and a three year ban for Europe. The respondent accepted that the appellant was validly married to AD and that the relationship was a genuine and subsisting one, but considered that he did not meet the eligibility requirements in paragraph E-LTRP.2.1 to 2.2. The respondent considered further that EX.1.(b) did not apply as it was not accepted that there were insurmountable obstacles to family life with his wife being enjoyed in Albania. The respondent noted that the appellant had met his partner in Albania in September 2012 and had maintained a long distance relationship with her whilst he was in Albania and she was in the UK, and considered that he could continue to do so until he acquired the necessary entry clearance to re-enter the UK and join her lawfully. The respondent did not accept that the appellant's parents wanted to kill him and his wife but considered that in any event they could relocate to another part of Albania away from his parents. It was considered that there were no very significant obstacles to integration in Albania and no compelling circumstances justifying a grant of leave outside the immigration rules.

6. The appellant appealed against the decision of 3 January 2019 and his appeal was heard by First-tier Tribunal Judge Devittie on 28 June 2019. Judge Devittie heard from the appellant and his wife. He found that the appellant's overall conduct did not disclose that his presence in the UK was not conducive to the public good and accordingly he concluded that the suitability provisions did not apply. The judge found, further, that there were insurmountable obstacles to family life continuing in Albania and he allowed the appeal.

7. The Secretary of State sought permission to appeal to the Upper Tribunal and, following a grant of permission on 18 December 2019, followed by a hearing on 12 February 2020, I set aside Judge Devittie's decision on the following basis:

"9. ... Ms Isherwood made submissions as to the errors of law in the judge's findings under the immigration rules. She submitted that the judge had erred in his consideration of the suitability provisions as he had based his findings on the appellant's reliance upon the case of Mateta & Ors, R v [2013] EWCA Crim 1372, whereas that case was not applicable to the appellant's circumstances as it was a criminal case and, with reference to [20] and [21] of the judgment in that case, it was not open to this appellant to rely on the defence in Article 31 of the Refugee Convention. Ms Isherwood submitted further that the judge had erred in his assessment of insurmountable obstacles to family life continuing in Albania as he had failed to take account of the stringent test and high threshold confirmed in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 with reference to Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11 and in Kaur, R (on the application of) v Secretary of State for the Home Department [2018] EWCA Civ 1423. The judge had provided insufficient reasons for concluding that the factors he took into account at [13] amounted to insurmountable obstacles and had erred by accepting assertions made by the appellant and his wife about difficulties they would face in Albania which were not supported by any evidence.

10. Mr Richardson accepted that Mateta & Ors did not apply to the appellant's circumstances, but he submitted that there was no indication that the judge reached his conclusion on section S.LTR.1.6 on the basis of that case. He accepted that the judge's decision on suitability was a generous one but submitted that it was not outwith the range of reasonable responses, in particular given that the respondent, in the decision of 19 December 2018 refusing the appellant's asylum claim, specifically stated at [128] that that application did not fall for refusal on grounds of suitability. Mr Richardson accepted that the judge's decision on insurmountable obstacles was also a generous one, but submitted that it was one which he was entitled to reach on consideration of all the factors taken cumulatively.

11. I am unable to agree with Mr Richardson, that the judge's findings and conclusions can be justified as being nothing more than generous and I have to concur with Ms Isherwood, that the judge erred in law in his approach to the issues of both suitability and insurmountable obstacles.

12. With regard to the suitability provisions, Mr Richardson's strongest point is the fact that the provisions were not applied in the respondent's decision of 19 December 2018, as is made clear at [128] of the refusal letter. However, there was also not as detailed a consideration of the circumstances leading to the appellant's expulsion and exclusion in the decision of 19 December 2018 as there was in the decision of 3 January 2019. In any event, that was not the basis upon which the judge decided that the suitability provisions did not apply. Whilst it may be that his findings at [11] did not rely solely on the principles in Mateta, I am in agreement with Ms Isherwood that the submissions made in reliance on that case clearly formed part of his assessment, given the specific reference at [10]. Mr Richardson quite properly accepted that the principles in Mateta

did not apply to the circumstances in this appellant's case and, to the extent that the judge thought that they did, he erred in law. The judge quite simply did not give any proper consideration to the appellant's conviction, but stated at [11(ii)] that his conduct was "out of character", without any explanation for such a conclusion. I am therefore in agreement with Ms Isherwood, that the judge's approach to the issue of suitability was incorrect and was legally flawed.

13. Likewise, the judge's approach to the question of insurmountable obstacles to family life continuing in Albania was legally flawed. The factors relied upon by the judge at [13] of his decision as amounting to insurmountable obstacles were the hostility of the appellant's parents to his wife and their objection to their marriage, the fact that his wife's qualifications in law would not be recognised in Albania and the assertion that that would make it difficult for them to survive economically, his wife's lack of ties to Albania and the emotional stress his wife was experiencing. However, there was no consideration by the judge as to why the appellant could not support himself and his wife and no consideration of whether there was any evidence, other than bare assertions, to support the claims made. Further, the judge failed to explain how those factors, even taken cumulatively, met the high threshold of establishing insurmountable obstacles. Indeed, there was nothing in the judge's assessment to indicate that he was aware of the high threshold to be met and the stringent test set out in Agyarko and confirmed in TZ and Kaur.

14. For all of these reasons the judge's decision cannot stand and has to be re-made. Mr Richardson requested a further hearing for the re-making of the decision, rather than it being re-made on the available evidence. Ms Isherwood agreed to that request in the interests of fairness. Accordingly, the case will be listed for a resumed hearing in the Upper Tribunal for the decision to be re-made on the appellant's Article 8 claim."

8. The matter then came before me for a resumed hearing, by way of skype for business.

Hearing and Submissions

9. The appellant and his wife, AD, gave oral evidence before me, remotely, both adopting their witness statements, subject to minor amendments. AD's mother was also available to give oral evidence but neither party had any questions for her. I was also provided with two further, supplemental bundles, which were in addition to the evidence previously before the First-tier Tribunal and which included a psychological report for AD, evidence of her work and studies and more recent witness statements.

10. The appellant explained that he had been held in a detention centre in Spain before being expelled for six years. He had only gone to Spain in order to travel to the UK as he had previously been unsuccessful in his attempts to travel directly to the UK. He wanted to come to the UK to study and to be with his wife, but had been refused a student visa four times and did not know what else to do. He travelled to Spain legally, with his own passport, and then obtained a false Italian identity document in Spain, but was caught at the airport trying to leave Spain with the document. He bought his own travel ticket to return to Albania. It was before he went to Spain that he told his family that his wife was Muslim, when he told them that they were going to get married. After that, he did not have any more contact with them and did not go back to them when he returned to

Albania. When his wife came to see him in Albania they stayed in an apartment which belonged to her friend's parents and they did not go outside. The appellant said that he currently lived in his wife's house in the UK. They had previously been living with her family but his wife had bought a house a month ago and they had moved there. He was not working but he studied English online. He could speak English, and spoke it with his wife, but he wanted to improve. His wife was a paralegal in a law firm and was doing a legal practice course. In response to my question, why he could not have returned to Albania after his marriage and applied for entry clearance to return to the UK, the appellant said that he was not safe in Albania as his parents had threatened him and also he was not able to fly through Europe because of the Spanish expulsion order. He had entered the UK clandestinely, in a lorry.

11. The appellant's wife then gave her evidence, under cross-examination from Ms Cunha. She said that it was in May 2016, when she was visiting her husband in Albania, that they had told his parents that they wanted to get married and they therefore found out then that she was Muslim. His parents verbally abused her and attacked her and so they both packed up their bags and left. She came back to the UK. That was the time when he tried to come to the UK through Spain but was expelled. After that, she put her life on hold and decided to find another country where they could be together. She left her job and her family and got a flat in Germany and waited for him there, but he did not manage to get there. After some time she went to Albania to see him, but they could not stay there as it was a small country and they feared his family and feared that something would happen. She was not Albanian herself, but was from Kosovo. They thought about her husband going back to Albania and applying for entry clearance but it was not safe there and they did not think that he would be granted a visa as he had been refused four times previously. Their priority was to be together and they did not know what else to do. It did not matter which country they were in, but they just wanted to be with each other.

12. Both parties made submissions, relying on skeleton arguments previously submitted - in the respondent's case, from Mr Howells on 13 July 2020.

13. Ms Cunha submitted that the suitability provisions were properly applied as there was a clear intention by the appellant to frustrate immigration control and that had to outweigh the public interest. There were no insurmountable obstacles to family life continuing in Albania. Although the decision was harsh, it was not unjustifiably harsh. The appellant had never sought the protection of the police in Albania and that was an option still open to him. There was no evidence to suggest that he would be subjected to physical harassment from his family if he returned there. He should return to Albania and apply for entry clearance to join his wife. The expulsion order was due to expire in a year and he would be able to re-apply at that time. There was no breach of Article 8.

14. Mr Slatter relied upon the case of Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope) [2020] UKUT 376 in submitting that the suitability provisions in paragraph S-LTR.1.6 did not apply. Alternatively, in accordance with Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673, the respondent could not pass the first stage of the relevant test and the expulsion order in May 2016 did not provide a basis for finding

that the suitability provisions applied. Mr Slatter relied upon the guidance in Lal v The Secretary of State for the Home Department [2019] EWCA Civ 1925 in submitting that there were insurmountable obstacles to family life continuing in Albania as it would lead to very serious hardship, especially for the appellant's wife, and in particular because of her mental health condition, as set out in the psychological report, and her ties to the UK in the form of her work and family. The public interest in requiring the appellant to go back to Albania and re-apply for entry clearance was outweighed by the fact that he met the requirements of the immigration rules and by a multitude of other factors such as the global pandemic and the uncertainty he would face. The decision was therefore disproportionate and in breach of Article 8.

15. At the conclusion of the hearing I advised the parties that I would be allowing the appeal. The following are my reasons for doing so.

Discussion and Findings

16. I start by saying that, having heard oral evidence from the witnesses, and in particular the appellant's wife, I entirely understand why Judge Devittie allowed the appeal in the First-tier Tribunal and I endorse his findings and conclusions. In re-making the decision, therefore, I am particularly careful not to make the same errors of law as I identified in setting aside his decision and I endeavour to give as full reasons as possible for making the decision that I do.

17. Turning first of all to the suitability provisions in paragraph S-LTR.1.6, I find there to be a number of reasons why that provision ought not to have been applied in the appellant's case. I agree with Mr Slatter that, further to the findings in the case of Mahmood, S-LTR.1.6 was not applicable in the appellant's case. In that case, the Upper Tribunal said:

"74. We agree that the absence of a suitability requirement addressing the previous use of false representations or a failure to disclose any material fact, as provided for by paragraph 322(2) of the Rules, when Appendix FM was inserted into the Rules was consistent with Parliament's then intention. We therefore agree that the insertion of paragraph S-LTR.4.2. which mirrors, in part, paragraph 322(2) was to address a failure of the suitability requirements previously established under Section S-LTR in not permitting the respondent to adversely rely upon the previous use of false representations and related concerns. In such circumstances, we are satisfied that the scope of paragraph S-LTR.1.6. is not sufficiently wide to capture the use of false representations in an application for leave to remain before the respondent or in a previous application for leave to enter or remain.

75. We conclude the paragraph S-LTR.1.6., a mandatory ground of refusal, does not cover the use of false representations or a failure to disclose material facts in an application for leave to remain or in a previous application for immigration status."

18. I accept that the circumstances in the appellant's case were different, that his case involved the use of a false document with the intention to frustrate immigration control. However, it seems to me that the principles in Mahmood can equally be applied to the

appellant's case, given that there was no question of false documentation being used in the present application for leave to remain. Further matters undermining the applicability of the suitability provision in S-LTR.1.6 are the fact that it relates to a matter occurring five years ago, in another country, and where the three year ban from Europe expired nearly two years ago and the exclusion from Spain is due to expire next year. Furthermore, irrespective of my observations at [12] of my error of law decision, it is of some significance that only two weeks prior to the decision of 3 January 2019, the respondent expressly stated in her decision refusing the appellant's asylum claim on 19 December 2018, at [128], that the suitability provisions did not apply. In light of all these considerations it does not seem to me that the respondent can properly be justified in saying that the appellant is a person whose presence in the UK is not conducive to the public good solely by reason of his acquisition of a false identity card in Spain five years ago, particularly when considering the overall picture and the nature of his motivation for his actions.

19. It is the case that the appellant previously sought to obtain entry clearance to the UK through legitimate channels, as a student, but was refused four times. Having heard the appellant's evidence and the particularly compelling evidence of AD, I accept that the genuine intention was for the appellant to study in the UK, for them to return to Albania to get married and for him to then apply for entry clearance as a spouse and for them to return to the UK together. I entirely accept AD's account of their decision to get married earlier when he was refused a student visa and of the reaction of his family when they told him they were to marry and that she was a Muslim. It is clear that AD suffered emotionally from that experience, that she feared remaining in Albania and that she struggled to cope with the separation from her husband and the failure of their plans to be together in the UK. It was on that basis that the appellant decided to attempt his journey to the UK through Spain, using a false Italian identity document. Whilst such actions cannot in any way be condoned, I do not consider the circumstances as a whole, including the observations made above, are such as to justify an exclusion from the UK and the application of the suitability provisions. For all of these reasons I do not find that S-LTR.1.6 was properly applied to the appellant.

20. As such, it is open to the appellant to meet the requirements of the immigration rules under Appendix FM, applying the exception in EX.1(b). It is not in dispute that the other eligibility requirements, such as the financial requirements, are met and the only obstacle to meeting the full requirements of the rules, therefore, is the appellant's immigration status. I therefore turn to the relevant question of "insurmountable obstacles", in accordance with EX.2, and have regard to the very high threshold to be met in that regard, as set out in Agyarko and Ikuga, R (on the applications of) v Secretary of State for the Home Department [2017] UKSC 11 and referred to in the case of Lal, as entailing 'very serious hardship'.

21. Despite the high threshold, I find that the test is met in this case for a number of reasons, some of which I have already referred to above. As already stated, I entirely accept the very credible evidence of AD who provided a compelling account of her experiences at the hands of the appellant's family when they discovered that she was not

of the Christian faith. Whether or not objectively well-founded, I accept that she has a genuine, subjective fear of living in Albania, a country which she described as being so small that she would remain in fear of his family finding them wherever they were and punishing them. I accept that the appellant is also in fear of his family. When taken together with the fact that AD is not an Albanian citizen and has never lived there or spent more than a few days there when visiting the appellant, that she is a British citizen and that her immediate family all live in the UK, that she is in the middle of her law studies and has a good job working in a law firm as a paralegal and is successfully pursuing a legal career in this country, and that she is in a vulnerable mental and emotional state, it seems to me that there is sufficient basis for establishing that very serious hardship would result from the couple having to move to Albania in order to maintain their family life.

22. I have had regard to the Secretary of State's grounds of appeal challenging the First-tier Tribunal's conclusions on the issue of 'insurmountable obstacles' and, in anticipation of any such challenge to my own findings, I would refer to the additional evidence that is before me which was not before Judge Devittie or was not referred to in his decision. With regard to the question of evidence of the hostility of the appellant's family and why that would prevent the couple from living elsewhere in Albania, I refer to my findings above and to the evidence of AD which, as I have stated previously, was compelling. I have evidence of AD's studies and employment in the legal profession in the UK. Clearly AD would not be able to follow her chosen profession if she were to relocate to Albania, given the different legal system there. I also now have the benefit of a psychological report, dated 16 June 2020, in the first supplementary bundle, to which I accord due weight. The report followed an assessment of AD undertaken by Sarah Kasule, a specialist psychological therapist, on 27 May 2020, and refers to the trauma suffered by AD following the incident when she was attacked and threatened by the appellant's family. Ms Kasule's opinion, at paragraph 13.1 of her report, was that AD was suffering from PTSD and that her mental illness may worsen if she had to relocate to Albania and to leave behind the security of her environment, work and family in the UK.

23. It is also of relevance that Ms Kasule had concerns about AD being separated from the appellant and at paragraph 7.4 she opined that AD would be at a relatively high risk of suicide if the appellant was removed from the UK, as he was her protective factor preventing her from committing suicide. That of course is of particular relevance to the question of the appellant returning to Albania to apply for entry clearance to return to the UK as a spouse. In the current climate, with the uncertainty and delays caused by the coronavirus, requiring the appellant to do so may well result in a lengthy separation from AD. AD's evidence was that she and her husband had thought about regularising his stay here by him making such an application, but they were fearful that after his previous unsuccessful attempts to join her, and the outstanding exclusion order from Spain, he would not be able to return here. It seems to me that that is a realistic concern.

24. For all of these reasons, considering the passage of time since the appellant's immigration offences and the nature of his offences, the impact of return to Albania or separation on AD's life and in particular on her mental health, the fear of the appellant's family, the current situation regarding coronavirus and all other matters referred to above,

I conclude that the high threshold of demonstrating insurmountable obstacles to family life continuing in Albania has been met and that the appellant meets the requirements of EX.1 of the immigration rules. I find further that refusing the appellant's application would result in unjustifiably harsh consequences for him and in particular for his wife AD such that the decision is not a proportionate one and would be in breach of Article 8. In any event, the requirements of the immigration rules having been met, the public interest does not require the appellant's removal, and that is sufficient in itself for the appeal to be allowed.

DECISION

25. The original Tribunal was found to have made an error of law and the decision was set aside. I re-make the decision by again allowing the appellant's appeal.

Anonymity

The anonymity order previously made is maintained.

Signed *S Kebede*
Upper Tribunal Judge Kebede

Dated: 26 January 2021