



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/06453/2015

**THE IMMIGRATION ACTS**

**Heard at Field House  
on 13 July 2017**

**Decision & Reasons Promulgated  
on 20 July 2017**

**Before**

**UPPER TRIBUNAL JUDGE BLUM**

**Between**

**[FAHRIJE R]  
(ANONYMITY DIRECTION NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr M Aslam, Counsel, instructed by Metrolaw Solicitors  
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. This is an appeal against the decision of Judge of the First-tier Tribunal Cockrill (Ftj), promulgated on 26 October 2016, dismissing the Appellant's appeal against the Respondent's decision of 17 September 2015 to refuse her human rights claim which was made on the basis of her family life relationship with her husband, a British citizen.

**Factual Background**

2. The Appellant is a national of Kosovo, date of birth [ ] 1978. At the date of the hearing before the First-tier Tribunal she had 2 brothers and a sister living in Kosovo as well as her parents. She met her husband, [HS], in Kosovo in April 2013. He was visiting from the UK. The Appellant's husband was originally a national of Kosovo. His date of birth is 14 February 1970. He came to the UK in February 99 during the conflict in Kosovo. He sought asylum but was granted Exceptional Leave to Remain and obtained Indefinite Leave to Remain in 2007. He subsequently naturalised as a British citizen. [HS] was previously married and, at the date of the First-tier Tribunal's decision, his 2 children with his former spouse were aged 11 and 16 years old. [HS] did not however have direct contact with his children. Pursuant to a Child Arrangement Order he was able to send cards, gifts and letters to his children. [HS] suffered from Post-Traumatic Stress Disorder (PTSD), did not work and was in receipt of Disability Living Allowance.
3. The Appellant and her husband underwent a 'traditional' marriage ceremony in Kosovo on 23 June 2013 with the full approval of their respective families. The Appellant remained in Kosovo until 6 June 2014 when she entered the UK as a visitor. In her visitor application form she indicated that she was in full-time employment with a company called Standard Benz, and that her total monthly income was €318. She indicated that she was coming to visit the UK for between 5 and 7 days in order to see her 2 brothers, who were both British citizens. She explained at the First-tier Tribunal hearing that she indicated in her visitor application form that she was "single" because she and her husband had only undergone a 'traditional' ceremony and were not yet legally married. The Appellant returned to Kosovo on 14 July 2014 and then returned to the UK on 14 August 2014. She and [HS] were legally married on 30 October 2014 in the UK.
4. After becoming an overstayer the Appellant made an application for leave to remain on the basis of her relationship with her husband. In her decision refusing this application the Respondent accepted that the Appellant had a genuine and subsisting relationship with [HS]. The Respondent considered that the Appellant did not meet the requirements of EX.1.(b) of the immigration rules (which requires there to be insurmountable obstacles preventing family life from continuing with the partner outside the UK). Whilst noting that [HS] suffered from PTSD the Respondent was of the view that this did not prevent them from living together in Kosovo. There were said to be no evidence that insurmountable obstacles existed, as understood by reference to EX.2. of the immigration rules. The Respondent said it was open to the Appellant to return to Kosovo and obtain the correct entry clearance to join her spouse in the UK. The Respondent went on to consider whether the Appellant met the requirements of paragraph 276ADE(1) in respect of her private life rights but concluded that she did not. The Respondent finally noted that there were no exceptional circumstances which, consistent with the right to respect for family and private life in article 8, warranted a grant of leave to remain outside the immigration rules.

## **The decision of the First-tier Tribunal**

5. The FtJ had before him and Appellant's bundle running to 169 pages. He heard oral evidence from both the Appellant (via an Albanian interpreter) and her partner (also through the Albanian interpreter). It was conceded by the Appellant's representative that she could not succeed in her appeal under the immigration rules and her case was advanced on the basis that her removal would constitute a disproportionate interference with article 8 outside the immigration rules (see [22] & [25]).
6. Having accurately directed himself with respect to the 5 prong test in *Razgar* [2004] UKHL 27 the FtJ accepted that the decision constituted an interference with article 8 but that it was a lawful decision and one made in pursuit of the legitimate public interest considerations. The FtJ then considered whether the decision was proportionate. At [27] the FtJ noted that the Appellant's husband had psychological difficulties, suffered from PTSD and was in receipt of public funds. The FtJ noted however, at [28], that [HS] had returned to Kosovo both in 2013 and then again in July 2014 and that [HS] enjoyed a 'perfectly good' relationship with his family in Kosovo and with his wife's family. The FtJ concluded that [HS] could return to Kosovo to be with the Appellant while she makes an application for entry clearance, and, at [29], found that the couple could maintain their family life in Kosovo. The FtJ noted that the Appellant came to the UK as a visitor and overstayed and that it was always open to her to return to Kosovo and make an entry clearance application in accordance with the immigration rules. The FtJ stated that he was mindful of the 'Chikwamba' principle (*Chikwamba* [2008] UKHL 40) but he was not satisfied that returning the Appellant to Kosovo would constitute a disproportionate interference with article 8.

## **The grounds of appeal and the error of law hearing**

7. The grounds, which are discursive, essentially contend that the FtJ attached insufficient weight to the psychological difficulties of the Appellant's husband. In granting permission Judge of the First-tier Tribunal P J M Hollingworth found it arguable that the FtJ should have considered the question of the effect upon the Appellant's husband of a return to Kosovo for the period which it would be anticipated would be required for her to make an application. It was said to be unclear what this period would be and whether any consideration had been given to the impact on the Appellant's husband in light of the evidence from the husband's GP.
8. At the hearing Mr Sharma expanded upon the grounds. He submitted that the FtJ's proportionality assessment was deficient as there was no assessment or recognition of the adverse impact that returning or relocating to Kosovo would have on the Appellant's husband nor had there been any satisfactory assessment of the difficulties faced by the Appellant's husband in being separated from his children, and that there

had been no consideration of the factors in s.117B of the Nationality, Immigration and Asylum Act 2002. Mr Tufan submitted that the absence of any express reference to the s117B factors did not render the decision unsafe as most of the factors went against the Appellant (there was for example, no evidence of her proficiency in English and the relationship existed when her leave was precarious). Nor could the Chikwamba principle assist the Appellant as there was no certainty that entry clearance would be granted. I reserved my decision.

## Discussion

9. The grant of permission was primarily premised on the absence of sufficient consideration of the impact on the Appellant's husband of returning to Kosovo given his mental health condition. The evidence relating to the nature and extent of [HS]'s mental health condition was however considerably lacking. Mr Sharma relied on a GP letter, dated 16 September 2016. This stated,

*"This is to confirm that this 46-year-old gentleman is a patient at this practice. He has a history of depression and anxiety and post-traumatic stress disorder. He reports that his wife has been a big support to him psychologically. He also has 2 children in this country."*

10. A further letter from a different GP, dated 23 June 2015, confirmed in broad terms that [HS] had a history of PTSD and anxiety with depression and was on medication to help with these conditions. In his statement [HS] stated that his PTSD was due to the 'persecution and harassment' in Kosovo but I note that he was not recognised as a refugee and no details have been provided of any ill-treatment he suffered. Whilst the FtJ did not doubt that the Appellant's husband has a history of depression, anxiety and PTSD, there was no evidence before the FtJ detailing the nature or severity of his condition, no evidence detailing the medication prescribed for his condition and no independent medical evidence on the possible impact on his condition if he decided to relocate to Kosovo in order to maintain his relationship with the Appellant. The FtJ noted that [HS] had already returned twice to Kosovo, and that he had his mother living there as well as the Appellant's family. Given the vague nature of the evidence relating to [HS]'s medical conditions, the fact that he had already returned twice to Kosovo, and the absence of any evidence that suitable medical treatment would not be available in Kosovo, the FtJ was rationally entitled to conclude that [HS] could return to Kosovo either to remain with his wife while she made an entry clearance application or permanently. In light of the dearth of medical evidence the reasoning given by the FtJ to support his conclusion was adequate.
11. Mr Sharma submitted that the FtJ failed to consider whether returning to Kosovo for a limited period of time in order to enable the Appellant to make an entry clearance application would breach the 'Chikwamba'

principle. There was however no acknowledgement by the Respondent that, but for her immigration status, the Appellant met the requirements for entry clearance as a spouse, and it was not, in any event, apparent from the evidence before the FtJ that the Appellant did indeed meet all the requirements. Mr Sharma acknowledged that the Appellant did not have the appropriate English language qualification. *Agyarko* [2017] UKSC 11 indicated that there 'might' be no public interest in removing an individual, even if they resided illegally in the UK, if they were otherwise certain to be granted leave to enter in respect of an application made overseas. There is however no such certainty in the facts presented to the FtJ sufficient to have entitled him to allow an appeal based on the Chikwamba principle.

12. The FtJ was demonstrably aware of [HS]'s claims in respect of his relationship with his children. The FtJ recorded the evidence and submissions that the husband could not return to Kosovo because his children were in the UK. At [24] the FtJ accepted that relocating to Kosovo would mean that [HS] would lose some opportunity of bumping into his children from time to time, but he also noted that [HS] only had indirect contact with his children by reference to a Court Order. It was accepted by Mr Sharma at the error of law hearing that there was no independent evidence before the FtJ relating to the impact on the children or the relationship [HS] had with his children if he relocated to Kosovo. Mr Sharam submitted that the FtJ erred in law by failing to consider the potential impact on the children in the future, but there was simply no evidence presented by the Appellant sufficient to entitle the FtJ to reach any conclusion as to how the children may be affected in the future.
13. The fact remains that [HS] did not enjoy, by reason of a Court Order, any direct contact with his children. If he decided to relocate to Kosovo this would not have materially affected the nature or quality of the relationship he had with his children at the date of the First-tier Tribunal hearing. An indirect relationship characterised by the sending of cards, gifts and letters can be effectively replicated even if the father is in another country. Given the nature of the relationship between [HS] and his children, the absence of any evidence speaking to the impact on the children if their father decided to relocate to Kosovo, and the absence of any evidence that [HS] would be unable to continue having indirect contact with his children from Kosovo, the FtJ cannot be said to have failed to adequately take into account the relationship between the Appellant's husband and his children.

### **Notice of Decision**

**The First-tier Tribunal did not make a material error of law. The appeal is dismissed.**



Signed  
Upper Tribunal Judge Blum

20 July 2017

Date