



**IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER**

Case No: UI-2024-000565

First-tier Tribunal No:
HU/54623/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of April 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

**NANDO ISMALAJ
(NO ANONYMITY ORDER MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr P Richardson, Counsel, instructed by Mayfair Law Solicitors

For the Respondent: Mr E Tufan, Senior Presenting Officer

Heard at Field House on 2 April 2024

EXTEMPORE DECISION AND REASONS

1. The Appellant appeals with limited permission against the decision of First-tier Tribunal Judge Monson (“the Judge”), promulgated on 21 December 2023, following a hearing on 7 December. By that decision, the Judge dismissed the Appellant’s appeal against the Respondent’s refusal of his human rights claim, a claim which had been based on Article 8 and in particular the Appellant’s relationship with a Romanian national (Ms C) who had settled status in the United Kingdom under the EUSS.
2. The Appellant is an Albanian national who came to this country unlawfully in 2018 and has remained in this country without status ever since. He made EUSS applications in 2021 and 2022, both of which were refused. The human rights claim was made on 7 March 2023. The Appellant had married Ms C in August 2021.
3. The core issue in this appeal relates to whether or not there were insurmountable obstacles to the couple being able to enjoy their family life together in Albania, with reference to EX.1 and EX.2 of Appendix FM to the Immigration Rules. In refusing the human rights claim, the Respondent had asserted that there were not.
4. On appeal, evidence was put forward asserting that there would be such obstacles, with particular reference to Ms C’s circumstances. She had been in the United Kingdom since 2012 and had what was said to be significant ties here. She was self-employed as a physiotherapist, had never been to Albania and did not speak the language.
5. The relevant findings are set out at [32]-[39] of the Judge’s decision. The Appellant’s Counsel (not Mr Richardson) had effectively accepted that

there was no evidence relating to Ms C's mental health at that time. At [36]-[39] the Judge said as follows:

"36. I consider that the crucial consideration is that the appellant and the sponsor developed their family life together in the full knowledge the appellant was in the UK unlawfully, and therefore there was no guarantee that they would be able to continue to carry on family life in the UK as opposed to elsewhere. I consider that the sponsor must also have known this when she successfully applied for a grant of settled status under the EUSS.

37. Accordingly, at all material times the sponsor has been facing a choice between giving priority to enjoying the benefits and advantages accruing from being a person present and settled here or giving priority to a family life with the appellant.

38. Against this background, I am not persuaded that the difficulties that the couple will face in carrying on family life together in Albania are ones which would entail very serious hardship for the appellant or the sponsor. In the alternative, they are not difficulties which cannot be overcome.

39. For the above reasons, I find that the requirements of EX.1(b) of Appendix FM do not apply in the appellant's case, and thereby the appellant does not qualify for leave to remain under the Rules."

6. The core aspect of the grounds of appeal put forward related to the Judge's statement within [36] that he regarded the couple's knowledge or the fact of and the couple's knowledge of the Appellant's unlawful status in this country as constituting "the crucial consideration" in the insurmountable obstacles assessment. It is on this basis that permission was granted by the First-tier Tribunal.
7. Following the grant of permission, the Respondent provided a rule 24 response which essentially contended that even if an error might have

been committed at [36], it was immaterial given the Judge's decision as a whole, together with the underlying evidence.

8. Prior to the hearing, a psychotherapist's report was served by the Appellant's representatives. It is clear enough that this was intended to constitute a rule 15(2A) application and that this evidence had not been before the Judge and would therefore only potentially be relevant if this case were to be either remitted or reheard in the Upper Tribunal following the setting aside of the Judge's decision.
9. At the hearing itself I received helpful submissions from Mr Richardson and Mr Tufan. Mr Richardson relied on the grounds of appeal and in essence submitted that the entirety of the Judge's assessment of the insurmountable obstacles test flowed from what he had said at [36]. The fact of the Appellant's unlawful status and the couple's knowledge thereof was not relevant to EX.1 and EX.2 and the Judge's error in this regard, in effect, undermined everything else that followed.
10. Mr Tufan submitted that whilst what was said at the beginning of [36] appeared to constitute an error, it was in all the circumstances immaterial because the factors relied on in respect of the insurmountable obstacles could not have satisfied the high threshold.
11. I fully appreciate that the Judge had before him evidence and that he had heard from both the Appellant and Ms C. I do not interfere with the decision of the Judge lightly but, in this case, I am satisfied that there has been a clear error of law. This has, in effect, been accepted by the Respondent but for the avoidance of any doubt, I conclude that the Judge was wrong to have regarded the Appellant's unlawful status in this country together with the couple's knowledge thereof as being a relevant consideration, let alone "the crucial consideration" in the application of the insurmountable obstacles test under EX.1 and EX.2 of Appendix FM.

12. The grounds of appeal put the point succinctly. Unlawful status in this country is in effect the prerequisite for an individual to need to have to rely on the insurmountable obstacles test in the first place; in other words, it is the reason for the test. That status and the party's knowledge of it is not a relevant consideration when one comes to actually apply the test.
13. What is important in applying the test is to take account of all relevant facts of the couple's circumstances and to leave none out of account.
14. I conclude that the error I have just identified was material, having regard to the fairly low threshold as discussed by the Court of Appeal in Degorce v HMRC [2017] EWCA Civ 1427: the question is whether the error might have made a difference, not whether it would have.
15. It is clear enough to me that what the Judge said at [37]-[39] was all based on and flowed from the error committed at [36] and did not represent a properly considered assessment of all the relevant factual aspects of the case put to him.
16. At [37], I agree with Mr Richardson's submission that it was in effect a repetition of the point made in the previous paragraph. In respect of [38], as I read it on what I consider to be a fair and sensible basis, the Judge's statement that he was not persuaded that the test was met, was entirely predicated upon the "background" which can only have related back to what was said in [36] and [37]. I have already concluded that what was said in these passages was erroneous, namely regarding the unlawful status and knowledge thereof as constituting the crucial consideration in the overall exercise. In respect of [39], the Judge is clearly relying on what he had already said as underpinning his overall conclusion in respect of EX.1: the use of the phrase "For the above

reasons” at the beginning of that particular passage is strongly indicative of that.

17. It is fair to say that on the facts of the Appellant’s case, the Judge or another judge might have rejected the insurmountable obstacles test on a legally adequate basis. Having said that, and even having regard to the high threshold imposed by EX.1 and EX.2 together, it cannot be said that a negative outcome for the Appellant was inevitable and in my view, but for the error committed by the Judge, there might have been a different outcome.
18. It is appropriate to remit this appeal to the First-tier Tribunal on the basis that: (a) there has not been a full fact-finding exercise in respect of the relevant circumstances in the case; (b) the appellant seeks to rely on new evidence which is not yet been the subject of any scrutiny; and (c) fairness requires that the appellant be given an opportunity to have his case dealt with at again at first instance.
19. There are no preserved findings from the Judge’s decision.
20. In respect of the expert report from Mr Ryan Marcovich, Physiotherapist/trainee Counselling Psychologist, dated 22 March 2024 (the subject of the rule 15(2A) application), I admit it in evidence at this stage, although it will be for the First-tier Tribunal to assess its relevance and weight.

Notice of Decision

The decision of the First-tier Tribunal involve the making of an error of law and that decision is set aside.

The appeal to the Upper Tribunal is accordingly allowed.

This case is remitted to the First-tier Tribunal (Taylor House hearing centre) to be reheard afresh by a judge other than Judge Monson.

H Norton-Taylor

**Judge of the Upper Tribunal
Immigration and Asylum Chamber**

Dated: 4 April 2024