IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No.: UI-2024-001273

First-tier Tribunal No:
HU/51848/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 6th of June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARMIR TROCI
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms S. Nwachoko, Senior Home Office Presenting Officer
For the Respondent: Mr D. Bazini, Counsel instructed by AA Immigration Lawyers Ltd

Heard at Field House on 13 May 2024

Although the Secretary of State is the appellant in these proceedings in the Upper Tribunal, for ease of reference I shall refer to the parties as they were before the First-tier Tribunal.

DECISION AND REASONS

1. The Secretary of State appeals from the decision of First-tier Tribunal Judge Howard promulgated on 19 February 2024 ("the Decision"). By the Decision, Judge Howard allowed the appellant's appeal against the

decision of the Secretary of State made on 30 January 2023 to refuse to grant him leave to remain on family or private life grounds.

Relevant Background

2. The appellant is a national of Albania, whose date of birth is 16 October 1998. The appellant's evidence is that he entered the United Kingdom in 2015 when he was aged 16 or 17. He entered on a visit visa with his mother in order to visit his brother here. It is not in dispute that the appellant overstayed his visa, and that he made an unsuccessful claim for asylum in December 2015.

3. On 18 May 2021 the appellant's representatives made further submissions on the appellant's behalf as to why he should be granted leave to remain. One of the reasons given was that the appellant was in a genuine and subsisting relationship with a qualifying partner, Miriam Abdalla.

4. In the refusal decision, the Secretary of State accepted that the appellant met all the requirements of Appendix FM for a grant of leave to remain as the partner of a British citizen, except for the immigration status requirement; and the Secretary of State was not satisfied that there were insurmountable obstacles to the appellant and his partner continuing their family life outside the UK.

The Decision of the First-tier Tribunal

5. The appellant's appeal came before Judge Howard sitting at Hatton Cross on 24 January 2024. Both parties were legally represented. The Judge received oral evidence from the appellant and his partner, each of whom adopted their respective witness statements as their evidence in chief, and each of whom was cross examined by the Presenting Officer.

6. In the Decision at para [23], the Judge summarised Ms Abdalla's evidence about the care she gave to her grandmother, who resided with her mother. She visited her grandmother every couple of days. Her mother, who was the principal breadwinner, worked seven days a week for 12 hours a day. Her grandmother had rheumatoid arthritis as well as other health concerns. There was no social services care plan in place.

7. The Judge's findings of fact on the application of EX.1 were set out at paras [34] to [39].

8. The Judge said that he was satisfied that the appellant's father would not countenance the appellant and his partner living with them. That left the prospect of the appellant and his partner having to find the means to finance their accommodation in Albania. For the moment, it was Ms Abdalla who worked and provided all that was needed to provide accommodation for the family and to meet their other subsistence needs. Were she to go to Albania, this employment would be entirely lost, and she would not have the means to provide as she did now, unless she were to

find work in Albania. The prospects of so doing were limited in the extreme by virtue of the fact that she did not speak Albanian. The prospects were further compounded by the fact that she had health issues, which while they did not prevent her from studying or working, were physically limiting.

9. Ms Abdalla also had significant commitments to her family in the UK. She was the principal carer of her grandmother. The options for care of this older woman had been explored in evidence before him. Ms Abdalla's mother worked for many days and many hours a week. She (the mother) was described as the principal earner for this family, and that the Judge accepted.

10. Ms Abdalla had two older brothers who, on the face of it, would be able to care for their grandmother. However, Ms Abdalla explained that they did not have any form of relationship with their maternal grandmother at all, and the Judge was quite satisfied that she was honest in what she was telling her. The Judge continued:

> 38. To require Ms Abdalla to relocate to Albania would result in her having to give up all that she currently does for her family. For the various reasons identified above this would result in the circumstances of her grandmother and her family more generally suffering genuine hardship.
>
> 39. As Ms Abdalla said to me, living in Albania is simply not an option for her due to the extensive family commitments she has the UK. Cumulatively the factors set out above, and about which I am satisfied, which would engage if the appellant were to return to Albania, mean that the insurmountable obstacles spoken of in paragraph EX.1(b) and 2 are present.

11. The Judge went on to conclude that on the balance of probabilities the appellant met all the relevant requirements of Appendix FM and that, applying *TZ (Pakistan) & PG (India)* [2018] EWCA Civ 1109, the fact that the Rules were satisfied was determinative of the issue of proportionality.

The Grounds of Appeal

12. The grounds of appeal to the Upper Tribunal were settled by Samuel Pierce on behalf of the Secretary of State.

13. Ground 1 was that the Judge had failed to resolve why the appellant could not be expected to return to Albania and apply for entry clearance, which is a point that was raised both in the refusal letter and the pre-hearing review.

14. Ground 2 was that the Judge's reasons for finding that there were insurmountable obstacles to the appellant's relationship with his partner continuing in Albania were inadequate. It was submitted that the Judge's findings failed to adequately reason why the couple met the high threshold of insurmountable obstacles, and this amounted to a material error of law.

The Reasons for the Grant of Permission to Appeal

15. On 8 March 2024 First-tier Tribunal Judge SJP Buchanan granted permission to appeal on both grounds. With reference to Ground 2, he observed that it was arguable that section EX.1 of Appendix FM was expressly limited to consideration of the difficulties faced by the appellant or her partner in continuing family life together, rather than any more broadly stated hardship arising for the grandmother or other family members.

The Hearing in the Upper Tribunal

16. At the hearing before me to determine whether an error of law was made out, Ms Nwachoko acknowledged that Ground 2 was the key ground of appeal, and she sought to develop it by reference to the Supreme Court decision in *Agyarko*.

17. I asked her whether the "*very serious hardship*" provision in EX.2 was referable only to the couple, or whether it applied to other family members. She submitted that the wording of the Rule indicated that it was only very serious hardship to the applicant or their partner that was relevant.

18. On behalf of the appellant, Mr Bazini submitted that the issue identified by Judge Buchanan in the grant of permission was not part of the grounds of appeal to the Upper Tribunal, and nor was it an issue that had been raised before the First-tier Tribunal.

19. Mr Bazini referred me to the Guidance published for Home Office staff on 14 February 2024 on the topic of EX.1(b) - Insurmountable Obstacles. This stated that being separated from extended family members - such as where the partner's parents, their siblings or both live here - would not usually amount to an insurmountable obstacle, "*unless there were particular factors in the case to establish the unusual or exceptional dependency required for Article 8 to be engage*d".

20. Mr Bazini submitted that this passage in the Guidance showed that the Secretary of State recognised that the impact upon extended family members could be an insurmountable obstacle in certain circumstances. Accordingly, there was no error of law in the Judge's approach. The error of law challenge was no more than an expression of disagreement with findings that were reasonably open to the Judge, for the reasons which he gave. It was a perfectly lawful decision, and in effect it was a "*sour grapes*" challenge. It might be that another Judge would have reached a different conclusion on the same evidence, but that was not the test.

21. In reply, Ms Nwachoko reiterated her submission that the Judge had failed to give an adequate explanation for his conclusion that EX.1 applied. The evidence did not disclose an unusual or exceptional dependency. This was why the grounds of appeal made reference to the absence of a care plan for the appellant's grandmother.

Discussion and Conclusions

29. Before turning to my analysis of this case, I remind myself of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years, including in *Volpi & another v Volpi* [2022] EWCA Civ 464 at [2].

30. Ground 1 was not pursued by Ms Nwachoko, but it is helpful to consider it briefly, as the discussion illuminates the issue which arises under Ground 2.

31. The appellant is an overstayer, but he does not otherwise have an adverse history such as to fall foul of the suitability requirement. Accordingly, the public interest does not require him to return to Albania to apply for entry clearance in order to regularise his immigration status if EX.1(b) applies.

32. The corollary of this is that EX.1 must be applied without any immigration or proportionality "*overtones*". EX.1 would not fall for consideration if the appellant met the immigration status requirement, and therefore it would have been wholly wrong for the Judge to allow his analysis to be contaminated by taking into account the reasonableness or viability of the appellant returning to Albanian to seek entry clearance in the event that EX.1 did not apply. The stringency of the test to be applied under EX.1 does not vary according to the strength or weakness of the applicant's case outside the Rules.

33. Accordingly, the Judge was right to consider as a discrete issue whether EX.1 applied; and, having found that it did, it would have been an error of law for the Judge to hold that, nonetheless, it was proportionate to require the appellant to return to Albania to apply for entry clearance.

34. In short, having found that EX.1 applied, it was irrelevant that returning to Albania to seek entry clearance was arguably an inherently more reasonable and less drastic course of action for the couple to adopt. Even if this was true, it could not be treated as detracting from the finding that EX.1 applied. Thus, Ground 1 is not made out.

35. Turning to Ground 2, the definition of insurmountable obstacles in EX.1(b) is given in EX.2 as follows:

> 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 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."

36. Mr Bazini mounted an eloquent and robust defence of the Judge's findings on EX.1(b), and I accept that on one level the error of law challenge could be characterised as no more than an expression of disagreement with the findings that were reasonably open to the Judge for the reasons which he gave.

37. However, I am persuaded that the Judge has materially erred in law in the respect identified by Judge Buchanan when granting permission, and as developed by Ms Nwachoko in oral argument.

38. As submitted by Ms Nwachoko, the definition of insurmountable obstacles in EX.2 expressly refers to very significant difficulties which would be faced by the applicant or their partner, and which could not be overcome or would entail very serious hardship *for the applicant or their partner*. The definition does not embrace hardship for extended family members of the partner.

39. I do not consider that this definition is impliedly broadened by the Guidance for Home Office staff published on 14 February 2024.

40. I accept that the guidance shows that the Secretary of State envisages circumstances where separation from extended family members can amount to an insurmountable obstacle, where there are particular factors in the case to establish the unusual or exceptional dependency that is required for Article 8 to be engaged.

41. The significance of this formulation is that, where such unusual or exceptional dependency arises, this may engender hardship for the applicant or their partner arising from the prospective rupture of the strong family life tie which they enjoy with the extended family member.

42. This is underscored by the fact that the same Guidance goes on to state, in respect of an applicant and partner being separated from a child from a former family relationship, as follows:

> Such a claim will normally only succeed where the particular circumstances of the case mean that (taking into account the child's best interests as a primary consideration) it would be unjustifiably harsh to expect the child to relocate overseas with the applicant's partner, or for the applicant's partner to do so without the child.

43. Judge Howard did not make a finding that there was an unusual or exceptional dependency of the grandmother on Ms Abdalla. The Judge also made no finding as to the existence of family life between Ms Abdalla and her grandmother such as to engage Article 8, and I do not consider that such a finding can be inferred from the evidence summarised at para [23] of the Decision.

44. Mr Bazini submits that at no stage in the proceedings before the First-tier Tribunal was it flagged up by the Secretary of State that the Judge should distinguish between hardship to the couple and hardship to extended family members, and that the distinction is absent from the Secretary of State' grounds of appeal.

45. However, I consider that the distinction is implicit in Ground 2 which asserts that the Judge's findings failed to adequately reason why the couple meet the high threshold of insurmountable obstacles. This necessarily leads back to the definition of 'insurmountable obstacles' in

EX.2, and its exclusive focus on obstacles faced by the applicant or their partner, rather than upon obstacles faced by extended family members who are left behind in the UK. The Secretary of State was entitled to assume that the Judge would apply the definition, and so in relying on the distinction as part of the error of law challenge, the Secretary of State is not taking a point which ought to have been flagged up in the proceedings before the First-tier Tribunal.

46. In addition, the Judge's finding at [38] falls short of what is required to meet the definition, even if it is given the extended meaning contended for by Mr Bazini. Not only does the Judge not make any finding of consequential hardship to Ms Abdalla, but the Judge does not find that the circumstances for the partner's grandmother and her family more generally would amount to *very serious* hardship, but only to *genuine* hardship. This is not enough.

47. I accept that the Judge's conclusion on EX.1 is cumulative, but nonetheless on a holistic assessment the Judge failed to give adequate reasons for finding that the requirements of EX.1(b) are met.

48. I have carefully considered the venue of any rehearing, taking into account the submissions of the representatives. Applying *AEB* [2022] EWCA Civ 1512 and *Begum* (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC), I have considered whether to retain the matter for remaking in the Upper Tribunal, in line with the general principle set out in statement 7 of the Senior President's Practice Statement.

49. I consider that it would be unfair for either party to be unable to avail themselves of the two-tier decision-making process and I therefore remit the appeal to the First-tier Tribunal.

Notice of Decision

The decision of the First-tier Tribunal contains an error of law, and accordingly the decision is set aside in its entirety, with none of the findings of fact being preserved.

This appeal is remitted to the First-tier Tribunal at Hatton Cross for a fresh hearing before any Judge apart from Judge Howard.

Andrew Monson
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
25 May 2024