Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/51025/2013

THE IMMIGRATION ACTS

Heard at Glasgow **Determination promulgated**

on 14 July 2014 **on 15 July 2014**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

ARTAN OOSJA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr D Byrne, Advocate, instructed by McGill & Co, Solicitors
For the Respondent: Mrs S Saddiq, Senior Home Office Presenting Officer

No anonymity order requested or made

DETERMINATION AND REASONS

1) The appellant appeals against a determination by First-tier Tribunal Judge Morrison, promulgated on 11 February 2014.

2) The appeal to the First-tier Tribunal proceeded only on grounds of Article 8 of the ECHR, outwith the Immigration Rules (see paragraphs 2, 5(vii) and 10 of the determination).

3) The grounds of appeal to the Upper Tribunal firstly quarrel with the judge's conclusion that the effect of requiring the appellant's wife to move to Italy

© CROWN COPYRIGHT 2014

would be serious but not unduly harsh. Secondly, the judge is said to have erred also by looking at the possible outcome of the appellant's asylum claim in Italy, rather than taking as a starting point an *ex facie* valid asylum claim. Thirdly, the grounds contend that although the matter was not argued before the First-tier Tribunal, the subsequent judgment of the Supreme Court in *EM* (Eritrea) v SSHD [2014] UKSC12 "presents a compelling reason for the decision to be revisited on the basis of an alteration in applicable jurisprudence such that the appellant may now succeed on grounds that were previously unattainable. It is … in the interests of justice to allow such a proximate and germane decision to be considered."

4) On 3 March 2014 a First-tier Tribunal Judge granted permission to appeal, because the judge "failed to consider *EM*."

5) In a response under Rule 24 the SSHD submits that the judgment in *EM* does not add anything to the appellant's appeal so as to reveal any flaw in the determination, and that it is unreasonable to criticise the judge for failure to address a judgment not available to him.

6) Mr Byrne submitted on the *EM* ground that the Upper Tribunal should remit to the First-tier Tribunal for evidence to be led on whether the appellant's removal to Italy would involve a breach of Article 3 of the ECHR, there being insufficient evidence before the Upper Tribunal to enable it to decide the matter. He turned next to the Article 8 grounds, which had not been excluded from the grant of permission, and argued as follows. The judge erred by not considering "insurmountable obstacles" prior to the logically second test of "unjustifiably harsh consequences". The determination at paragraphs 27 and 28 leapt over the correct test in the Rules. That error was material because it was capable of affecting the outcome, there being different tests to apply at different stages.

7) Mr Byrne sought also to rely on a new point, set out at paragraph 6 of the skeleton argument, of error in assuming that the appellant might re-enter the UK if he secured refugee status in Italy. There are no Immigration Rules allowing for such transfer, or any provision within the Refugee Convention. The Secretary of State's discretion was previously set out in an asylum policy instruction (API) but that has been withdrawn. Mr Byrne produced a copy of the respondent's "transfer of refugee status – interim notice" dated 5 February 2013.

8) The skeleton argument also develops a "*Chikwamba*" point at paragraphs 7 and 8, which I find rather obscure and not particularly relevant. I did not understand Mr Byrne to rely significantly upon it.

9) Mrs Saddiq submitted that the judge did not fall into the error of deciding the validity of the appellant's asylum claim, but considered rather the procedural options open to the appellant and his position while awaiting an outcome in Italy. The judge specifically reminded himself at paragraph 31

that it was not for him to speculate on the claim, and said that any view he expressed on it did not form part of his decision. Even if the judge failed to consider the case along the lines of *EM,* there was not shown to be anything specific in that case to benefit the appellant. As to Article 8, it was plain that there were no insurmountable obstacles to family life between the appellant and his partner continuing outside the UK. It was questionable whether the system of the reception of asylum seekers would apply to the appellant, given that he is married to an EEA national with rights of free movement as a Union citizen for herself and her family members.

10) I reserved my determination.

11) *EM* post dates the decision of the First-tier Tribunal. There can be no error of failing to consider *EM* directly. Nor can there be any constructive error of failing to apply and consider the law as subsequently explained therein, when the appellant’s case was expressly put to the First-tier Tribunal on Article 8 ECHR in respect of family and private life consequences, and not on any Article 3 arguments along the lines of the appellants in *EM*.

12) I was not referred to any principle derived from *EM* or any passage from the judgement to show error of law by the First-tier Tribunal. I see nothing to suggest any error such as to entitle the appellant to a new opportunity to develop in these proceedings a case based on Article 3 ECHR risk on from return to Italy, which he did not choose to argue previously. He has made no application to adduce, even at this late stage, any evidence to support any such case.

13) The judge had to make a proportionality judgment. The case did not turn on any nicety of whether insurmountable obstacles and unjustifiably harsh consequences are significantly different tests, or which test applies first. The appellant’s wife is an EU citizen with free movement rights to live in Italy or the UK as she chooses. There are various options available to the couple. It was not speculative but realistic for the judge to explore these options. There is no refinement of respect for the appellant’s asylum claim which required him to overlook that the appellant has willingly travelled to and from Albania. The Article 8 grounds amount only to disagreement with a proportionality assessment properly reached. (While it is not necessary to go any further for present purposes, it might have been surprising if any judge had concluded otherwise in the circumstances of this case.)

14) The judge observed at paragraph 30 that if successful in his asylum application in Italy the appellant would be entitled to enter the UK. The appellant did not maintain to the contrary in the First-tier Tribunal, or until providing his skeleton argument on 10 July 2014 to the Upper Tribunal. This was only one of the possible eventualities considered by the judge, and not the critical reason for dismissing the appeal.

15) The interim notice which Mr Byrne produced says that UK policy on transfer of refugee status has been withdrawn for review, but it also appears

that applications for transfer will be considered if the country which recognises an applicant as a refugee has ratified the European Agreement on the Transfer of Responsibility for Refugees, a Council of Europe Agreement of 16 October 1980. Italy has ratified that agreement. I do not think that withdrawal of an API indicates that the UK has ceased to honour its obligations as a signatory to a European Agreement. As his wife's family member, the appellant would have other avenues of entry to the UK in any event. At its best the point, taken very late, goes to a matter well short of being determinative.

16) The determination of the First-tier Tribunal, dismissing the appellant's appeal, shall stand.

15 July 2014
Judge of the Upper Tribunal