Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA002842016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 26 April 2017	**On 8 May 2017**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

ARBEN QEMA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Muquit, Counsel instructed by Malik & Malik Solicitors
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania who was born on 30 September 1984. He appealed against the decision of the Secretary of State on 25 May 2016 to deport him pursuant to Regulation 19(3)(b) of the Immigration (European Economic Area) Regulations. His appeal was dismissed by Judge of the First-tier Tribunal Metzer in a decision of 14 September 2016

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following a hearing at Hendon Magistrates' Court on 2 September 2016. Permission was granted by Deputy Upper Tribunal Judge Symes on 13 March 2017. Thus the matter came before me.

2. It was accepted by the respondent that the appellant was in a genuine and subsisting marriage with Lithuanian national, Ms Vaiciuyete and that she was a qualified person. Judge Metzer heard evidence from both.

3. I have adopted the appellants' immigration history as set out by Judge Metzer, but it is not entirely clear to me and should be clarified and agreed by the parties at a future hearing. It seems that he entered the UK unlawfully in October 2001. He claimed asylum using an alias and claiming that he was a Macedonian national or a Moldovan national. In any event, this application was refused on 20 February 2002 and on 27 September 2004 the appellant voluntarily departed to Albania. It seems that he had been granted discretionary leave here in the UK until he turned 18. He returned to the UK on 12 January 2005 with entry clearance for two years as the spouse of a British citizen and on 5 January 2007 he made an application for ILR but this was refused because his marriage had broken down and on 17 April 2007 he was detained and removed to Albania. On 2 March 2007 he was convicted of harassment and sentenced to five months' imprisonment and a restraining order was imposed for a period of twelve months. It seems that a deportation order was made against him and he appealed against this, his appeal was dismissed and he was subsequently removed to Albania on 25 February 2008. He then made an application for entry clearance which was refused. He entered the UK illegally on 6 January 2010 in breach of the deportation order and using his brother's passport which contained a UK residence permit. This led to a further conviction and the appellant was sentenced to twelve months' imprisonment. On 22 February 2010 the appellant applied under the Facilitated Return Scheme and he was removed to Albania on 26 April 2010. In January 2011 the appellant was apprehended attempting to gain entry to the UK in breach of a deportation order and removed. He returned to the UK illegally in 2011.

4. The judge's salient findings are at paragraphs 22 to 28 and are as follows:

> "22. In the Appellant's favour, I find that he is in a genuine and loving relationship with his wife and was also close to his mother-in-law and to his family in the United Kingdom. There are only two convictions recorded against him in 2007 and 2010. I note that he describes himself as a reformed character and is remorseful for his offending.
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> 23. However, it is necessary to set against the points in the Appellant's favour the fact that for the considerable majority of his time in the United Kingdom he has entered and remained unlawfully. The only period where he had lawful status in the United Kingdom was in 2005 to 2007. The Appellant regularly

attempted to gain entry to the United Kingdom in breach of a Deportation Order. In January 2010, he did so by using a passport belonging to his brother which contained a UK Residence Permit which resulted in the criminal conviction. He then sought re-entry to the United Kingdom illegally on a number of occasions in 2011.

24. In February 2012, a telephone call was received to the police to advise that he had re-entered the United Kingdom. A document provided to me by Mr Bose on behalf of the Respondent confirms the content of that telephone call. The Appellant denied that he sought to harass his ex-partner and there is no other evidence to support the allegation which was not taken further. However, the Appellant was not in a position to explain how his ex-partner could possibly have known he had re-entered the United Kingdom had he not contacted her and although I do not make any finding that he breached the harassment order or committed any further criminal offence, I do consider that it is unlikely that his ex-partner would have known about his return had he not contacted her. Between 2011 and 2015, the Appellant remained unlawfully in the United Kingdom before he sought to regularise his position in August 2015.

25. In summary, the Appellant was convicted of two serious offences, one of harassment and one of possessing a false instrument, both of which resulted in periods of immediate custody. The Appellant's immigration history is an extremely poor one given the numerous times the Appellant either entered unlawfully or sought to do so on occasions in breach of a signed Deportation Order. On other occasions the Appellant remained unlawfully in the United Kingdom for considerable periods without seeking to regularise his status.

26. Having taken into account the Appellant's relationship with his wife who is a Lithuanian national who has come to the United Kingdom to work and clearly has done so and speaks impressive English, recognising that for her to move to Albania would be difficult for her, I nonetheless consider that the Respondent has established that the decision to remove complies with the principle of proportionality under Regulation 21(5)(a) of the 2006 Regulations. In reaching that decision, I take into account that the Appellant is still a relatively young man in good health, how long he has spent in the United Kingdom which amounts to a period off and on of some eleven years but also taking into account the fact that he did not tell his wife initially about his immigration history and that once he did, and his immigration status was uncertain, they chose to marry with the position unresolved. I also consider that the Appellant was not open as to the extent of his family in Albania making reference only to one

brother with whom he had resided but failing to mention until it came out in cross-examination of his wife that he has a mother, sister and other family in Albania too. I find that he sought to play down the extent of his links with Albania which I find are fairly large although I accept that he has a brother and family in the United Kingdom too.

27. It is open to the Appellant's wife as to whether she would wish to relocate to Albania with the Appellant. I was unimpressed with her answer when she said she really had never discussed it with the Appellant as to what would happen if he was returned to Albania and maintained that she did not know what to do. I find that she gave that answer because she didn't wish to state openly what she would do if the Appellant were returned to Albania and that's he must have had some discussions with him about that eventuality. Whether she were to choose to relocate to Albania and continue life with him there or not and wait for the Appellant to make any further applications from Albania is not directly material to my decision.

28. In all the circumstances, I find that despite the Appellant's relationship with his wife and to a lesser extent those with other members of his and her family and other friends, the Respondent has established to the relevant standard that the decision to remove the Appellant complies with the principle of proportionality."

5. At paragraph 1 the judge identified the sole issue to be whether or not removal of the appellant is proportionate in accordance with Regulation 21(5)(a) of the 2006 Regulations. At paragraph 21 he directed himself that the burden of proof is on the respondent to establish that the decision is proportionate.

6. The first ground argues that the judge erred in applying Regulation 21 by focusing solely on proportionality. I am wholly persuaded that the judge materially erred in this respect. The issue was not simply one of proportionality. It was incumbent on the judge to consider the decision in accordance with the principles set out at Regulation 21(5)(a)-(e) and (6) and it is clear from the decision that the judge did not have regard to the factors contained therein. In particular in order for the decision to comply with the Regulations the personal conduct of the appellant must represent a genuine, present and sufficiently serious threat affecting one of the fundamental interests of society and there is no attempt by the judge to address this. There are no credibility findings made by the judge in respect of the appellant's evidence about his conduct. The appellant's propensity to re-offend is clearly an issue taken by the respondent in the decision letter which needed to be addressed by the judge. The judge recorded the appellant's evidence about this, but failed to make clear findings on the matter.

7. The error is material and the decision is set aside. The judge made very limited, if any, findings in relation to the appellant's conduct. There is a need for a re-hearing in order for a judge to make clear and comprehensive credibility findings particularly in respect of the appellant's conduct and future risk and to properly consider the appeal under Reg 21. I accepted Mr Muquit's submissions that the FtT would be the appropriate venue.

8. Mr Muquit urged me to maintain the judge's findings in relation to the appellant's relationship with his wife. At present I can see no reason to go behind those findings but I am not prepared to tie the hands of a future judge who will need to make an assessment of the evidence at the date of the hearing and there is no guarantee that the appellant's position will remain the same as it was in September 2016. It is expected that the parties are clear as to the appellant's immigration history and it is agreed if possible prior to the hearing.

Notice of Decision

The decision of the First-tier Tribunal to dismiss the appeal is set aside and the matter is remitted to the First-tier for a fresh hearing.

Signed Joanna McWilliam Date 3 May 2017

Upper Tribunal Judge McWilliam