Upper Tribunal (Immigration and Asylum Chamber)

Appeal Number: UI-2021-001183
HU/50136/2021
IA/01329/2021

THE IMMIGRATION ACTS

Heard at Field House
On 12 May 2022

Decision & Reasons Promulgated
On 1 August 2022

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

FREI GJASHI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms K McCarthy, instructed by Olivers & Hasani Solicitors
For the Respondent: Ms H Aboni, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Albanian national who was born on 13 September 1991. He appeals, with the permission of Upper Tribunal Judge Stephen Smith, against First-tier Tribunal Judge Aldridge's decision to dismiss his appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant states that he entered the United Kingdom clandestinely in September 2012. In due course, he entered into a relationship with a British citizen named Ansu Rai. He moved in with Ms Rai in October

2018 and they have shared a house with her mother and brother since then.

3. On 22 July 2020, the appellant made an application for leave to remain as Ms Rai's partner. The application was detailed in a letter of the same date from the appellant's solicitors. The letter explained the history of the couple's relationship and stated that Ms Rai worked full time as a sales associate at Harrods, earning more than the Minimum Income Requirement in Appendix FM of the Immigration Rules. It was submitted that the appellant met the requirements for leave to remain as a partner under the Ten-Year Route in that appendix because, amongst other things, there were insurmountable obstacles to the continuation of their family life in Albania. The obstacles were said at that stage to be the pandemic and the importance of Ms Rai retaining her role at Harrods. Various documents were provided in support of the application, including letters from Ms Rai's mother and brother in which it was confirmed that the couple lived with them in Hounslow.

4. The respondent refused the application because she did not accept that there were insurmountable obstacles to family life continuing in Albania or that the appellant's removal would be in breach of Article 8 ECHR.

The Appeal to the First-tier Tribunal

5. The appellant appealed and his appeal came before Judge Aldridge, sitting at Hatton Cross on 15 October 2021. The appellant was represented by Ms McCrathy of counsel, as he was before me, whilst the respondent was represented by a Presenting Officer (not Ms Aboni).

6. The appellant had by that stage filed a skeleton argument and the respondent had undertaken a review. It was apparent from those documents that the central argument in the appeal had matured. The focus of the submission that paragraph EX1 of Appendix FM applied was that the sponsor's mother required extensive care as a result of a car accident she had suffered in 2011 and that it was Ms Rai and the appellant who were best able to provide that care. Without them, it was submitted, she would find herself in considerable difficulty.

7. The judge heard oral evidence from the appellant, the sponsor and the sponsor's mother. He heard submissions from the advocates before reserving his decision.

8. In his reserved decision, the judge found that there would not be insurmountable obstacles to the continuation of family life in Albania and that the appellant's removal would not be in breach of Article 8 ECHR. Since it is the former finding which is under challenge before me, I shall reproduce the paragraphs of the decision in which the judge provided his reasons for concluding that paragraph EX1 did not apply:

> [27] The proposed country of return is Albania. My task is to decide whether the conditions which would be faced amount to insurmountable obstacles to the continuation of family life, recognising that the test is a stringent one. I have

considered EX1 requirements and accept that the relationship is one which is genuine and subsisting. I have heard no evidence to suggest that the appellant would not be able to find work and accommodation in Albania other than his belief that there is little work available in Albania. However, I have heard evidence that the appellant's partner has only recently started her position working in the NHS. I accept that if she were to relocate to Albania it would be difficult for her to find work without speaking Albanian, although I have been provided with no evidence about enquiries regarding employment. I find that there is a particular strength in the relationship between the partner and her mother that she has taken in her care. It is apparent from the evidence documented and provided orally to the tribunal that the appellant is a conduit between her mother and the outside world in the UK. She provides an important service to her mother in respect of providing emotional support, practical support, assistance with intimate issues such a bathing and also acts as a translator for her mother when she attends her necessary appointments with the NHS.

[28] However, I do find that there is nothing that stops the appellant continuing his family life with his partner in Albania. There would, of course, be significant obstacles in respect of language and employment but there is no barrier to their marriage and having their own children. The appellant does have his own family in Albania to assist and I do not accept it has been demonstrated that the partner's mother would be unable to access assistance or that it has been proven that her ailments are exceptional. I do find that if such care was required then it would be expected that she would be in receipt of benefits and attendance allowances. The brother does currently live at the home address and could provide assistance for his mother. In the circumstances, I find that it would be reasonable for the appellant and his partner to make arrangements for the care of the mother. Whilst this may not be the overall plan within the family, it cannot be said to amount to an insurmountable obstacle. The appellant's partner has indicated that if this appeal is unsuccessful then she would remain in the UK. I find that this is her choice rather than an insurmountable obstacle.

[29] I also note that there would be no immigration route for the mother to move to Albania to be with the couple and, in any event, if she did so then she would lose access to her NHS care in the UK. This difficulty can be overcome by her remaining in the UK. The test when considering insurmountable obstacles is a stringent one and I find that the hardship that would result from a move to Albania is such that, as a cumulative whole, it does not amount to an insurmountable obstacle. I do not find that the relationship between the appellant and his partner's mother is such that go beyond normal emotional ties. It is apparent that his role

> in her care is limited to basic care and assistance. They do not speak in the same language and the relationship is of only a limited period.

9. In summary, therefore, the judge concluded that the sponsor's mother could remain in the United Kingdom without the appellant and the sponsor and that alternative arrangements for her care could properly be made. He went on dismiss the residual claims under paragraph 276ADE(1)(vi) of the Immigration Rules and Article 8 ECHR.

The Appeal to the Upper Tribunal

10. There is a single ground of appeal against the judge's decision. It is submitted that the judge erred by failing to apply the law stated in Cathrine Lal v SSHD [2019] EWCA Civ 1925 and in reaching an irrational conclusion that paragraph EX1 was not met. Judge Stephen Smith observed in his decision to grant permission to appeal that:

> It is arguable that the judge adopted an overly narrow approach to what amounts to "insurmountable obstacles" to the relationship between the appellant and his partner continuing in Albania. Arguably, the judge should have taken into account the impact of his findings concerning the dependence of the partner's mother on the partner, at [27], when addressing that issue.

11. In developing that ground of appeal before me, Ms McCarthy submitted that the judge had failed to consider relevant evidence in the form of a letter from the sponsor's mother's GP (Dr Ishaque) and a statement from her son and that the judge had failed also to consider whether the relocation of the appellant and the sponsor would give rise to very serious hardship for the sponsor, who would be required to leave her mother in particularly difficult circumstances.

12. For the respondent, Ms Aboni submitted that the judge had not erred in law, materially or otherwise. The judge had made reference to Dr Ishaque's letter and had taken it into account even if there was no reference to it after [14] of his decision. It was open to the judge to conclude that the sponsor's brother could provide assistance in her absence. There was no evidence before the judge to demonstrate that such alternative arrangements would not suffice and that was the gravamen of his conclusion.

13. In her response, Ms McCarthy emphasised the reasons given by the sponsor's brother for his inability to provide the required care. Much of what was required was emotional support in any event and the local authority would not be able to provide that.

14. I reserved my decision after the submissions.

Legal Framework

15. It is not necessary to explain the framework provided by the Ten-Year Route in Appendix FM of the Immigration Rules. It suffices to note for

present purposes that the arguments before me related solely to paragraphs EX1 and EX2 of Appendix FM, which are (materially) in the following terms:

> EX.1. This paragraph applies if
> (a)…
>
> (b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen […] and there are insurmountable obstacles to family life with that partner continuing outside the UK.
>
> EX.2. 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 in 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.

16. In Cathrine Lal v SSHD [2019] EWCA Civ 1925; [2020] 1 WLR 858, the Court of Appeal held that a two-stage approach was required when considering the exception set out above. It was logical to decide first whether the alleged obstacle to continuing family life outside the UK amounted to a very significant difficulty. If it met that threshold requirement, the question was whether the difficulty was one which would make it impossible for an applicant and their partner to continue family life together outside the UK. If not, the decision-maker had to consider whether, taking account of any steps which could reasonably be taken to avoid or mitigate the difficulty, it would nevertheless entail very serious hardship for the applicant or partner, or both.

Analysis

17. I do not accept the primary submission which was made by Ms McCarthy in her grounds of appeal. The judge cited Cathrine Lal v SSHD and was demonstrably aware of the need to adopt the two-stage approach required by that decision. He considered whether the sponsor would be caused very serious hardship by leaving her mother behind in the UK and he considered whether any steps could reasonably be taken to mitigate that difficulty.

18. The real question, in my judgment, is whether the judge took account of all pertinent evidence when he reached the conclusion that relocation would not cause very serious hardship. In fairness to Ms McCarthy, that point was made squarely in the grounds and featured, quite correctly, at the front and centre of her excellent oral submissions. She contended simply that the judge had failed to consider Dr Ishaque's letter and the sponsor's brother's circumstances when he concluded that alternative arrangements could reasonably be made for the sponsor's mother's care.

19. In his letter of 28 September 2021, Dr Ishaque had stated that the sponsor's mother had been unable to walk for many years after an accident in 2011 and that the sponsor had been her 'Primary Unpaid

Carer' since then. He stated that the sponsor cared for her mother at home, took her to hospital appointments and translated for her as well. He said that the sponsor's mother had recently been bed bound for some weeks and that it had been the appellant and the sponsor who had cared for her during that time. The sponsor had always attended appointments with her mother as it was not possible for her to manage to do so on her own. Dr Ishaque listed the other tasks undertaken by the appellant and the sponsor for her as follows: "give her food, gets groceries, laundry, cooking, cleaning, helps her to walk to and back from the bathroom and garden, offers and prompts with medicine. Applies pain gel on her joints to ease the pain, encourages her to sleep as she has sleeping problems every night due to her anxiety." He also stated that they helped to feed her small meals throughout the day in order to manage her non-diabetic hyperglycaemia, from which she had suffered since 2018. The letter concluded with the following observations:

> I believe that Sarita needs her daughter Ansu and her partner Frei to be there with her at all times. Sarita at 66 years of age, a single mother, who has never been separated from her daughter throughout her life, who has underlying health conditions as mentioned in the letter and on her medical records, a heavy smoker who suffers from depression and anxiety and sleep problems, may not be able to cope without her daughter and future son-in-law by her side to give her the support she will require in her old age.
>
> The type of companionship and care given by Ansu and Frei cannot be replicated by an unfamiliar environment and stranger's care. The ongoing care for her is her best option.
>
> The relationship built up with her future son-in-law, Frei Gjashi, and her loving daughter, Ansu Rai, provides psychological and emotional support. This in itself is helping to keep her functionally stable. The lack of this support from her daughter Ansu and her partner, Frei, could lead to a more rapid decline in Sarita's condition.

20. There is nothing in the judge's decision which suggests that he failed to take account of all that was said in this letter and elsewhere about the sponsor's mother's health. But that is not Ms McCarthy's specific criticism. Her complaint is that the judge failed to take account of Dr Ishaque's opinions that the sponsor's mother 'may not be able to cope' without her and the appellant; that their care could not be replicated by an unfamiliar environment and a stranger's care; and that the removal of their care 'could lead to a more rapid decline' in her condition. That criticism of the judge's decision is made out. There is no reference to those aspects of Dr Ishaque's opinions in the judge's decision. Since they militated in favour of the appellant, and against the conclusion which the judge reached (ie that care could be provided by another), the judge was required to take those opinions into account and to explain why he disagreed.

21. I should emphasise that the judge was not required to agree with what was said by Dr Ishaque. The judge's obligation was merely to engage with the evidence and to give reasons for either agreeing with it or for reaching a different conclusion. Whilst I recall that the FtT is an expert Tribunal charged with administering complex area of the law in challenging circumstances, and that it was under no obligation to recite every facet of the evidence, I am driven to the conclusion that the judge erred in law in this respect. This letter provided evidence which was directly at odds with the conclusion that care could reasonably be provided by another and the judge failed to consider it.

22. I reach the same conclusion in respect of the judge's conclusion that the sponsor's brother might be able to provide care for his mother. At first blush, that conclusion appears reasonable, not least because the sponsor's brother lives as part of the family unit, is of university age, and is clearly present in the house, with his mother, when the sponsor is out at work during the day. At [29] of her skeleton argument before the FtT, however, Ms McCarthy had specifically submitted that the sponsor's brother was not a suitable replacement carer because he would be unable to assist with the 'management of intimate female medical conditions'. The judge recorded that submission at [12]. He seemingly accepted at [27] of his decision that the care provided by the sponsor included 'assistance with intimate issues' but he failed to deal with it when he concluded in the following paragraph that the sponsor's brother could 'provide assistance for his mother'.

23. Ultimately, this is a case in which there was a submission, based squarely on the evidence, that adequate care could not be provided for the sponsor's mother by anybody other than the sponsor and the appellant. That was the situation to which she had grown accustomed and it was, on the appellant's case, the only proper solution to her range of disabilities. The judge was obviously not required to accept that submission but he was required to engage with it, and with the evidence upon which it was based. For the reasons I have given above, I am satisfied that the judge failed to do so and that his decision cannot stand as a result.

24. The appeal was heard and dismissed nine months ago and I do not consider that it would be appropriate to preserve any of the findings of fact made by the judge. The appeal must be considered afresh, with the benefit of any additional medical or other evidence, particularly about the situation of the sponsor's mother. In the circumstances, and having borne in mind paragraph 7.2(b) of the Senior President's Practise Statement, the proper course is to remit the appeal to the FtT for rehearing *de novo* by a judge other than Judge Aldridge.

Notice of Decision

The appellant's appeal to the Upper Tribunal is allowed. The decision of the FtT is set aside in full and the appeal is remitted to the FtT for hearing afresh by a different judge.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

16 June 2022