IN THE UPPER TRIBUNAL Case No: UI-2023-001827

IMMIGRATION AND ASYLUM CHAMBER First-tier tribunal No: HU/56914/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

10th January 2024

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FLAMUR LYBESHA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Ms Alexandra Everett, a Senior Home Office Presenting Officer
For the Respondent: Ms Nadia O'Mara of Counsel, instructed by Duncan Ellis Solicitors

Heard at Field House on 9 October 2023

DECISION AND REASONS

Introduction

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 20 September 2022 to refuse leave to remain in the UK on human rights grounds, either within the Immigration Rules HC 395 (as amended) or outwith the Rules on the basis of exceptional circumstances. The claimant is a citizen of Albania.

2. **Mode of hearing.** The hearing today took place face to face.

3. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal falls to be allowed and the decision of the First-tier Tribunal must be remade. I remake the decision by dismissing the claimant's appeal.

Background

4. The claimant entered the UK, on his account, on 15 January 2019 without leave. He has never had any lawful right to be in the UK.

5. The main basis of his case is that he has family life with his UK citizen partner (the sponsor). They had a religious Nikah ceremony on 29 November 2020 but did not marry until 21 May 2022 in a civil ceremony at Enfield Registry Office.

6. The human rights claim was made on 25 July 2022, based on the claimant's relationship with his sponsor wife. Evidence of the marriage was not submitted with the claim but was provided later.

Refusal letter

7. In his refusal letter, the Secretary of State considered the application under section R-LTRP of Appendix FM but found that the claimant did not qualify, either under the 5- or 10-year route. The application did not fall for refusal on suitability grounds and he met the English language eligibility requirement.

8. The claimant did not meet the immigration status requirement at paragraphs E-LTRP 2.1 to 2.2 because he was in the UK without valid leave, having entered illegally. He met the financial and English language requirements of the Rules.

9. The Secretary of State was not satisfied that the parties had lived together for 2 years either at the date of application or date of decision. The Nikah was on 29 November 2020 and the Secretary of State's decision on 20 September 2022. Evidence of the July 2022 civil marriage had not been provided.

10. Paragraph 276ADE also did not avail him because he had been in the UK for only four years and there was no evidence of 'very significant obstacles' to his integration in Albania if returned.

11. The Secretary of State considered whether paragraph EX.1 availed the claimant, but absent evidence of the marriage, he did not consider that it did. There was no child of the marriage. He also found that there were no exceptional circumstances for which leave to remain ought to be given outside the Rules.

12. The Secretary of State refused leave. The claimant exercised his right of appeal to the First-tier Tribunal.

First-tier Tribunal decision

13. The First-tier Judge allowed the appeal principally on account of the care required by the mother of the claimant's spouse ('the sponsor'), and which the sponsor provided, although she had to make a long journey each day to provide such care. The sponsor's mother was seriously unwell and needed the support of the claimant and sponsor: she was living with the sponsor's sister and her family. Also, the sponsor spoke no Albanian, and would be an outsider in the claimant's country of origin, whereas here as a British citizen she had a good career in the IT industry and was keeping the claimant financially.

14. The First-tier Judge applied *Chikwamba* and *Younas* and allowed the appeal for the reasons given at [12] in her decision:

> "12. It was accepted between the parties that the appellant does meet the requirements of the partner route in the immigration rules with the exception of the immigration status requirement. The issue for me to decide in this case is whether the appellant meets the requirements of EX.1. The appellant's representative submits that there are insurmountable obstacles to the appellant and the sponsor continuing family life out with the UK. As set out in *Agyarko*, insurmountable obstacles means very significant difficulties in continuing family life outside the UK which could not be overcome or which would entail very serious hardship for the appellant or the sponsor. In this case the sponsor is a UK citizen who has a good career. The sponsor is also the main carer for her 75-year-old mother who has recently been in intensive care, is seriously ill, requires care and has limited life expectancy. The sponsor has a lot of family and friends in the UK but relies on the appellant for emotional support. The appellant and the sponsor wish to start a family. The appellant is in touch with his father in Albania. The appellant's father previously had problems in Albania with money. The appellant has been doing some voluntary work while in the UK. He is financially supported by the sponsor. If the appellant returned to Albania and made an application for entry clearance, he would meet the requirements of the immigration rules. The appellant and the sponsor developed their relationship in the full knowledge that the appellant did not have status in the UK. The appellant arrived in the UK in 2019 and only attempted to regularise his stay in 2022. In terms of section 117B, the maintenance of effective immigration controls is in the public interest and little weight should be given to private life or a relationship established when an appellant is in the UK unlawfully. A very strong or compelling case is required to outweigh the public interest in immigration control.
>
> The fact that the appellant would be granted entry clearance if he returned to Albania does not remove the public interest in the maintenance of immigration control. However taking into account the cases of *Chikwamba* and *Younas* this must be weighed against the interference with the appellant's family life. This is a finely balanced case but given facts of this

> case combined with the state of the sponsor's mother's health and the sponsor's pivotal role in looking after her, I find that it would entail very serious hardship for the sponsor and her mother if the appellant was removed to Albania to make an application from there. I accordingly find that the appellant 's private and family life in this case has special or compelling characteristics."

The First-tier Judge found that the requirements of EX.1 of Appendix FM were met and the appeal fell to be allowed.

15. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

16. The Secretary of State in his grounds of appeal argued that the First-tier Judge had not given adequate reasons why the claimant and sponsor could not return and live in Albania, alternatively, why the claimant could not be expected to go to Albania and apply for entry clearance to regularise his stay in the UK. He made various submissions on the evidence before the First-tier Tribunal which were not put to the witnesses, who were not cross-examined even though the Secretary of State was represented before the First-tier Tribunal. He argued that "has elevated the sponsor's role to that of main carer without a full examination of the evidence before them and as such the conclusion reached in this regard is flawed to the extent that it is unreliable." That also was not put in evidence or argument below.

17. The Secretary of State further argued that the First-tier Judge had not identified the hardships relied upon in her decision; and that she had treated paragraph EX.1 as freestanding, contrary to the guidance given by the Court of Appeal in *TZ (Pakistan) and PG (India)* [2018] EWCA Civ 1109 at [41]-[44] in the judgment of Sir Ernest Ryder, Senior President of Tribunals, with whom Lord Justices Moylan and Longmore agreed. Grounds 3 and 4 repeat the same contentions supported by different authorities*: Younas (section 117B(6)(b); Chikwamba; Zambrano)* [2020] UKUT 00129 (IAC) and *R (on the application of Chen vs SSHD)(Appendix FM – Chikwamba – temporary cessation- proportionality) IJR* [2015] UKUT 00189 (IAC)

18. Permission to appeal to the Upper Tribunal was granted by UTJ Smith, who considered that the First-tier Judge's reasons for finding the sponsor to be her mother's main carer were arguably inadequate; that the judge had not considered the 'insurmountable obstacles' test and/or failed to give adequate reasons why they were applicable in this case; and in addition, that the judge had failed to consider the decision of the Court of Appeal in *Alam and Rahman v Secretary of State for the Home Department* [2023] EWCA Civ 30, which the Secretary of State had not relied upon in her grounds of appeal.

Rule 24 Reply

19. The claimant in his Rule 24 Reply argued that the First-tier Judge's reasoning was adequate to support her conclusions, with reference to *MK (duty to give reasons) Pakistan* [2013] UKUT 00641 (IAC), *Shizad (sufficiency of reasons; set aside)* [2013] UKUT 85 (IAC) and *R v IAT ex p Dhaliwal* [1994] Imm AR 387. The First-tier Judge had witness statements from both the claimant and the sponsor, and heard oral evidence from both.

20. The Secretary of State was represented at the First-tier Tribunal hearing and had the opportunity of cross-examining the claimant's witnesses. He had not invited the First-tier Tribunal to make any adverse credibility findings, but had instead argued that EX.1 did not avail them and that the evidence did not amount to exceptional circumstances for which leave to remain outside the Rules ought to be granted.

21. With relation to the 'insurmountable obstacles' test, the First-tier Judge had given herself a proper self-direction and the findings made were open to her on the evidence. The First-tier Judge had undertaken a proper Article 8 proportionality assessment and allowed the appeal both by reference to EX.1(b) and Article 8 outside the Rules.

22. The First-tier Judge had accepted that the case was finely balanced and had found as a fact that the claimant would be admitted, if he returned to Albania to seek entry clearance from there. Her conclusions were neither irrational nor *Wednesbury* unreasonable.

23. As regards the decision in *Alam and Rahman,* the judge had reached a sustainable conclusion. *Alam and Rahman* held that both *Chikwamba* and *Younas* remained good law. The error asserted, even if established, would not be material: see *Anoliefo (permission to appeal)* [2013] UKUT 00345 (IAC).

24. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

25. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal.

26. For the Secretary of State, Ms Everett relied on the grounds of appeal and argued, in short, that there was no evidence of 'substantial hardship' if this claimant were to be returned to Albania. There were no reasons for the 'serious hardship' finding in the First-tier Tribunal decision.

27. For the claimant, Ms O'Mara relied on her amended skeleton argument dated 2 March 2023 and her Rule 24 Reply. The Secretary of State's grounds of appeal did not challenge the First-tier Judge's findings on the evidence: his challenge was only to the finding of fact on the exceptional circumstances test.

28. It had been open to the Secretary of State to cross-examine the sponsor and invite adverse credibility findings, but the Secretary of State had chosen not to do so. The First-tier Judge's decision was short, and arguably her findings were generous, but her reasoning was not inadequate at a level justifying interference by the appellate Tribunal. The various factors which she was required to consider were 'in the mix' and her decision was sustainable.

29. There was evidence and argument before the First-tier Tribunal on the basis of which the findings he made were open to him. The Upper Tribunal could interfere with findings of fact and credibility only where the Judge's reasoning was 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justice Males and Lord Justice Snowden agreed.

30. I reserved my decision, which I now give.

Conclusions

31. The First-tier Judge erred in approaching this appeal on the basis that paragraph EX.1 was the only issue. Both in the refusal letter, and the Respondent's Review, the Secretary of State stated that the claimant did not meet the requirements of the Rules because he had entered and remained in the UK unlawfully and his sponsor wife had been aware of that throughout their relationship.

32. The Secretary of State disputed the claimant's assertion that there were very significant obstacles to his reintegration in Albania, or that there would be 'very significant difficulties of hardship' if he were returned to Albania without his sponsor wife. It is not disputed that she is a British citizen and therefore a qualifying partner as defined in section 117D of the Nationality, Immigration and Asylum Act 2002 (as amended).

33. When approaching the claimant's private and family life claims, the First-tier Judge did not direct herself by reference to Part 5A of the 2002 Act, and in particular to the 'little weight' provisions at sections 117B(4) and (5) thereof, which required her to give little weight to a relationship formed with a qualifying partner established when a person was in the UK unlawfully, or to his private life established when he was in the UK either unlawfully or precariously.

34. On the contrary, the Judge gave decisive weight to the claimant's private life in the UK and to his relationship with his sponsor spouse, and the demands on her in relation to her sick mother.

35. That is a plain error of law and this decision must be set aside and remade.

Remaking the decision

36. The facts of this appeal are undisputed. The claimant entered the UK unlawfully in 2018 and began to live with his now wife in 2020, following their Nikah, marrying her in 2022. She has six siblings in the UK and she gives a lot of help to her sick mother, who lives quite a distance away, with one of her sisters. The couple have no children and it has not been asserted that the section 55 best interests of any child are engaged.

37. Section 117B(1) provides that the maintenance of immigration controls is in the public interest. Section 117B(2) is met: the claimant speaks adequate English. Section 117B(3) is not: he depends on the sponsor financially and is not financially independent. Sections 117B(4) and (5) require me to give little weight to his private life, or his relationship with his wife. Section 117(6) is not engaged as the couple have no children.

38. Taking all of these provisions into account, and treating all of the evidence before the First-tier Tribunal as credible, I do not find that the claimant's private and family life is dispositive of this appeal. He cannot meet the requirements of the Rules, because he was present unlawfully at all material times, and Article 8 outside the Rules does not avail him.

39. The claimant's appeal is dismissed.

Notice of Decision

40. For the foregoing reasons, my decision is as follows:

    The making of the previous decision involved the making of an error on a point of law.
    I set aside the previous decision. I remake the decision by dismissing the appeal.

Judith A J C Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

Dated: 3 January 2024