Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2023-004730
First Tier No: HU/59709/2022
LH/04076/2023

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 6th December 2023	**On 15 January 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE R THOMAS KC

Between

SECRETRY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ALDRIN PIRA
[NO ANONYMITY DIRECTION MADE]

Respondent

Representation:

For the Appellant: Mr M Iqbal of counsel, instructed by Edmans & Co.
For the Respondent: Mr Toby Lindsay, Senior Home Office Presenting Officer.

DECISION AND REASONS

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Introduction

1. This is an appeal by the Secretary of State ('the Appellant') against a decision of First-tier Tribunal Judge Sweet, promulgated on 7th October 2023. Permission to appeal was granted by the First-tier Tribunal on 25th October 2023.

Anonymity

2. No anonymity direction was made by the First-tier Tribunal. Considering the facts of this case and the circumstances of the Respondent, there is no reason for making a direction.

Background

3. Aldrin Pirla ('the Respondent') is Albanian. He entered the UK in 2014 without leave. He met his current partner, Ms Benad (who is British), in 2015 and they now live together.

4. In July 2022, the Respondent made an application to remain in the UK under Appendix FM to the Immigration Rules on the basis of his family life with Ms Benad. The Appellant refused that decision in November 2022. The Appellant accepted the relationship was genuine and the financial requirements (based on Ms Benad's earnings) were met. However, the application was refused because of the nature of the Respondent's entry into the UK and because he had not met the English language requirements. (As to the latter, the Respondent asserts the difficulty is not his linguistic competence, rather the retention of his passport by the Appellant meant that he is unable to present his passport to take the test as is required.)

5. Importantly, given the nature of the grounds of appeal addressed below, the Appellant's refusal letter went on to consider whether paragraph EX.1 of Appendix FM applied:

> You have a genuine and subsisting relationship with your British partner. We note the points you have raised in your application, including that your partner is a britisgh [sic] Citizen and also that your relationship is not accepted by your family. However, the Secretary of State has not seen any evidence that there are insurmountable obstacles in accordance with paragraph EX.2. of Appendix FM which means the very significant obstacles which would be faced by you or your partner in continuing your family life together outside the UK in Albania , and which could not be overcome or would entail very serious hardship for you or your partner. This is because your partner is under no obligation to leave the UK and although you have stated that you are estranged from your family in

> Albania. It is reasonable to suggest that you can locate to a different area in country to that of your family, minimising any contact. It is viewed that you would be able to maintain relationships formed in the UK through modern forms of communication. It is therefore open to you to return to Albania and obtain the correct Entry Clearance to re-join your partner in the UK. Alternatively, it is reasonable to suggest that it is open to your partner to relocate to Albania with you (should he [sic] wish to do so) until you obtain the correct Entry Clearance into the UK. [my emphasis]

6. In summary, the application was refused:

   (i) under Appendix FM paragraph EX.1. on the grounds that it was not accepted that the Respondent and Ms Benad would face insurmountable obstacles in continuing their family life in Albania;

   (ii) under paragraph 276ADE(1)(vi) (now paragraph PL 5.1(b)) on the grounds it was not accepted there would be very significant hurdles to the Respondent's re-integration in Albania;

   (iii) under paragraph GEN.3.2. on the grounds it was not accepted it had been established there were exceptional circumstances such that refusal would result in unjustifiably harsh consequences for the Respondent.

The hearing in the First-tier Tribunal

7. The Appellant was not represented. The Respondent and Ms Bena gave evidence and counsel instructed on their behalf made submissions and provided the tribunal with a detailed and helpful skeleton argument.

8. The *Decision and Reasons* of Fist-tier Tribunal Judge Sweet are just over a page in length: The Appellant's reasons for refusal are rehearsed and the Respondent's case is summarised. The analysis is found in a single paragraph (described by Mr Lindsay as a paragraph that was required to do a good deal of 'heavy lifting'). That reads:

> 7. In my view, there are very significant difficulties in the appellant returning to Albania (though he might succeed in respect of an application for entry clearance from there), because he would be separated from his partner, who needs his constant support for her mental health condition. She would not be able to live in Albania for economic and societal reasons, including limited access to healthcare and violence against women.

9. That lead to the conclusion expressed in one further paragraph that:

> 9. I am persuaded, on the balance of probabilities, that there would be insurmountable obstacles to family life continuing outside the UK and a disproportionate interference with his family / private life if he was separated from his partner and required to move to Albania.

The grounds of appeal to the Upper Tribunal

10. The grounds of appeal amount to an assertion that First-tier Tribunal Judge Sweet failed to provide adequate reasoning. The complaint can be separated as follows:

11. Firstly, that there was no evidence-based reasoning for the finding (in paragraph 7, set out above) that the Respondent would face 'significant difficulties' on return to Albania and his partner would not be able to live in Albania. There was a failure to consider relevant authorities or country guidance material. This led to a failure to (as required by, for example, Budhathoki (reasons for decisions) [2014] UKUT 00341 (IAC)) '*identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons for preferring one case to the other so that the parties can understand why they have won or lost*'.

12. Secondly, that the failure to consider the relevant authorities meant the 'relevant test' has not been given proper consideration. In the grant of permission this was understood to be a complaint, in particular, that no consideration was given to whether it was proportionate to expect the Respondent either to be temporarily separated from Ms Benad while he sought entry clearance or for her to join him temporarily in Albania while he did so. Mr Lindsay expanded upon this ground in his oral submissions.

The hearing

13. Mr Lindsay addressed first the treatment in the judgment of the Respondent returning to Albania with Ms Benad. He relied on the grounds of appeal, developing the submission therein that the conclusion in paragraph 7 - in particular, as to the position that would be faced by Ms Benad - made no reference to any evidence (particularly objective evidence) or to the relevant authorities. One sentence was said to be wholly inadequate. He then addressed the failure to consider the possibility of either temporary separation or temporary location. That, he argued, was clearly identified as an issue in the refusal letter and it amounted to an error of law to fail to consider a key aspect of the test. Even if the Respondent (once he had passed his language test) stood a good prospect of making an application for Entry Clearance, that was only one aspect of the proportionality decision and in any event a full analysis of the Article 8 claim is necessary (Younas (section 117B(6)(b); Chikwamba; Zambrano) Pakistan [2020] UKUT 129 (IAC) and Alam & Anor v Secretary of State for the Home Department [2023] EWCA Civ 30.

14. Mr Iqbal acknowledged candidly the brevity of decision was surprising, but nonetheless sought to argue the decision could be upheld as it met the minimum standard of applying the evidence to the correct test. He argued

that the failure to consider adequately the private life claim in 276ADE(1)(vi) was to the Respondent's disadvantage and could not amount to a material error of law. As to permanent relocation as a couple, the judge had applied (in paragraph 9) the correct "insurmountable obstacles" test in Appendix FM paragraph EX.1 (though he acknowledged it appears the second part of the sentence in that paragraph appears to be referring to a different test). The reference in paragraph 7 to "very significant difficulties" formed part of that test (see EX.2) and the two should be read together. The judge had heard the evidence (paragraph 5-6) and there is a clear inference he had accepted that evidence and formed the view that it was sufficient to meet the standard of proof. As to temporary separation, Mr Iqbal argued that if the Respondent was to return to Albania, the difficulty arising from his illegal entry would no longer be a hurdle and that, as demonstrated by the fact he had given evidence in English at the hearing, he would, once his passport had been returned for the purpose of removal, be able to take and pass the required language certificate. The alternative ground the judge did not consider was not a material failure given that it, in effect, amounted to the category of 'procedural' objection where *Chikwamba* still applied (see *Alam* at paragraph 6: *"Chikwamba is only relevant when an application for leave is refused on the narrow procedural ground that the applicant must leave and apply for entry clearance, and that, even then, a full analysis of the article 8 claim is necessary*.")

Decision on Error of Law

15. Brevity is to be commended. A short decision can demonstrate that the correct test has been applied to the relevant evidence.

16. The Appellant was not represented before the First-tier Tribunal. The inevitable result being the judge was not given the assistance that is to be expected from both the parties to ensure there is a focus on the key issues requiring resolution by the Tribunal. I have considered carefully whether the grounds amount to an attempt by the Appellant to have a 'second bite at the cherry' and have been extremely reluctant to interfere in the decision made.

17. There is, however, a minimum requirement to identify the correct test and to apply the relevant evidence to that test in a way that resolves issues between the parties and demonstrates the evidence relied upon was sufficient to meet the standard of proof. In this case, the Appellant had identified the key areas of dispute in the reasons for refusal. They were not complex and were precisely those likely to arise in a case such as this.

18. I have concluded that the decisions failed to give adequate reasons for the conclusion that the Respondent and his partner would face 'insurmountable obstacles' in continuing their family life permanently in

Albania and this amounted to an error of law. The other relevant tests have also been inadequately identified and addressed, but this is the material error given that it the basis on which it appears the decision was allowed. Whilst unnecessary therefore to decide the point, I have also concluded it was an error of law to fail to consider the proportionality of a temporary interference or a temporary relocation while the Respondent made a claim for entry clearance. Despite Mr Iqbal's helpful and admirable efforts on behalf of the Respondent, I am not persuaded that Younas, Alam and Chikwamba can be read in a way that means the judge was not required, on the facts of this case, to conduct such an analysis as part of the overall assessment – the reasons for refusal go beyond a narrow procedural ground and, in any event, '*a full analysis of the article 8 claim is required*' (Alam).

Re-making the decision

19. Both parties agreed that in the event I found there was an error of law, the appropriate course would be for the matter to be remitted to the First-tier Tribunal with no preserved factual findings. I agree with this approach.

DECISION

The decision of First-tier Tribunal Judge Sweet promulgated on 7th October 2023 involved the making of a material error of law.

The decision is set aside and remitted to the First-tier Tribunal to be heard before a judge other than First-tier Tribunal Judge Sweet.

No anonymity direction is made.

Signed: Richard Thomas Date: 5th January 2024

Deputy Upper Tribunal Judge R Thomas KC