IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004105

First-tier Tribunal No: HU/61177/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 November 2024

Before

UPPER TRIBUNAL JUDGE NEVILLE
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BLENARD ADEMAJ
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr J Collins, counsel instructed by Marsh & Partners

Heard at Field House on 4 November 2024

DECISION AND REASONS

1. Mr Ademaj is an Albanian national. On 4 September 2023 he applied for leave to remain in the United Kingdom, relying on his relationship with his wife, Mrs Stoyanova, and their two young children. While Mr Ademaj has no present basis upon which he can stay in the UK, his wife (and, we assume, their children) are Bulgarian nationals and have limited Leave to Remain (pre-settled status) under the EU Settled Status Scheme. They will subsequently, after completing a five year period of residence in the UK and if they meet the requirements of the Immigration Rules, be eligible to apply for Indefinite Leave to Remain (settled status).

2. In a decision dated 6 September 2023, the Secretary of State refused Mr Ademaj's application. She accepted that he was in a genuine and subsisting relationship with his wife and children, and met the relevant

Immigration Rules' Financial and English Language Requirements, but concluded that he failed to meet the rules' further requirement that he not be in the UK in breach of immigration laws. This meant that his application could only be granted under the rules if, applying paragraph EX.1(b), there were insurmountable obstacles to family life with Mrs Stoyanova continuing outside the UK. The Secretary of State considered that none of the circumstances Mr Ademaj had put forward amounted to insurmountable obstacles. Moving on to paragraph GEN3.2, she then rejected that refusing the application would be:

> …a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application.

3. Mr Ademaj appealed to the First-tier Tribunal, where on 6 June 2024 his appeal came before First-tier Tribunal Judge Craft ("the Judge"). In a decision promulgated on 10 July 2024, the Judge allowed the appeal on the basis that requiring Mr Ademaj to leave the UK would cause such unjustifiably harsh consequences as to be a disproportionate interference with the right to respect for his family and private life afforded by Article 8 ECHR.

4. The Secretary of State applied for permission to appeal to the Upper Tribunal. The grounds of appeal are somewhat diffuse but, when granting permission to appeal, First-tier Tribunal Judge Cartin helpfully drew out the two principal arguments pursued by the Secretary of State:

a. First, that the Judge had erred by proceeding on the mistaken understanding that Mrs Stoyanova had settled status, rather than pre-settled status; and

b. Second, that the Judge's final conclusion concerning Article 8 was inadequately reasoned.

The parties have addressed their submissions by reference to those two grounds, and we structure our decision likewise.

Ground 1

5. The asserted misunderstanding refers to the following part of the Judge's consideration of the consequences of refusing the application:

> 23. The other options involve the family moving permanently to either Albania or Bulgaria. This will mean Mrs Stoyanova giving up her settled status in the UK and the family will face a number of uncertainties which the Respondent accepts are likely to occur but submits would not be insurmountable or result in unjustifiably harsh consequences for the family.

6. Before us, Ms Nolan withdrew any reliance on this ground of appeal, accepting that the isolated erroneous use of the word ‘settled’ could not establish any material error of law. We agree, and the withdrawal of this ground was sensible.

7. It is nonetheless worth observing that, on a fair reading of the decision, the Judge meant to use the word ‘settled’ and was entitled to do so. The Judge was plainly referring to Mrs Stoyanova giving up the her *future* entitlement to settled status should she go to live outside the UK.

Ground 2

Adequacy of reasons – principles

8. Mr Collins rightly urged a cautious approach when considering adequacy of reasons. We respectfully adopt the list of principles set out in the Appendix to *Secretary of State for the Home Department v TC* [2023] UKUT 164 (IAC):

> (1) Reasons can be briefly stated and concision is to be encouraged but FTT decisions must be careful decisions, reflecting the overarching task to determine matters relevant to fundamental human rights and /or international protection.
>
> (2) The evidence relevant to the issues in dispute must be carefully scrutinised but there is no need to set out the entire interstices of the evidence presented or analyse every nuance between the parties.
>
> (3) The reasons for a decision must be intelligible and adequate in the sense that they must enable the reader to understand why the matter was decided as it was, and what conclusions were reached on the ‘principal important controversial issues’.
>
> (4) It is not necessary to deal expressly with every point, but enough must be said to show that care has been taken in relation to each ‘principal important controversial issue’ and that the evidence as a whole has been carefully considered.
>
> (5) The best way to demonstrate the exercise of the necessary care is to make use of ‘the building blocks of the reasoned judicial process’ by identifying the ‘principal important controversial issues’ which need to be decided, giving the appropriate self-directions in law on those issues, marshalling (however briefly and without needing to recite every point) the evidence which bears on those issues, and giving reasons why the principally relevant evidence is either accepted or rejected.
>
> (6) Where there is apparently compelling evidence contrary to the conclusion which the judge proposes to reach that must be addressed.

(7) Where the parties agree on matters, there is no need for this to be rehearsed in any detail within the decision: the reasons must focus upon the issues that continue to be in dispute.

(8) The reasons need refer only to the main issues and evidence in dispute, not to every material consideration or factor which weighed with the judge in their appraisal of the evidence. But the resolution of those issues vital to the judge's conclusion should be identified and the manner in which they resolved them, explained.

(9) The reasoning should enable the losing party to understand why they have lost.

(10) The degree of particularity required depends on the nature of the issues falling for decision and the nature of the relevant evidence, including the extent to which it is disputed.

(11) The reasoning must not give rise to a substantial doubt as to whether the decision-maker erred in law but inferences as to insufficiency of reasons will not readily be drawn.

(12) Experienced judges are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so.

(13) Appellate restraint should be exercised when the reasons a FTT gives for its decision are being examined; it should not be assumed too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it.

9. In this appeal, we would add the need to avoid requiring what are sometimes called "reasons for reasons": see, for example, *Secretary of State for the Home Department v R. (JR (Jamaica))* [2014] EWCA Civ 477 at [10]. When a Judge's assessment of discrete factors includes affording them greater or lesser weight, that reasoning is taken forward to the final decision on where the balance lies. The Judge is not obliged to repeat it.

The issues before the Judge

10. In the First-tier Tribunal, the parties had correctly identified the relevant issues in the Appeal Skeleton Argument and the Respondent's Review and these were endorsed by the Judge at [5]. First, were there insurmountable obstacles? If so, Mr Ademaj would meet the requirements of the Immigration Rules and the appeal would be allowed. Second, if not, would the interference in Mr Ademaj's family life caused by removal be disproportionate? That second issue is phrased as 'unjustifiably harsh consequences' in the rules, but the meaning is the same.

11. As held by the Master of the Rolls in *Lal v Secretary of State for the Home Department* [2019] EWCA Civ 1925, insurmountable obstacles:

> 35. …can take two forms: first, a very significant difficulty which would be literally impossible to overcome, so it would be impossible for family life with the applicant's partner to continue overseas (for example, because they would not be able to gain entry to the proposed country of return); or second, a very significant difficulty which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could be overcome but to do so would entail very serious hardship for one or both of them. […]
>
> 36. In applying this test, a logical approach is first of all to decide whether the alleged obstacle to continuing family life outside the UK amounts to a very significant difficulty. If it meets this threshold requirement, the next question is whether the difficulty is one which would make it impossible for the applicant and their partner to continue family life together outside the UK. If not, the decision-maker needs finally 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 their partner (or both).

12. We do not treat the Court of Appeal as laying down a hard and fast decision-making structure, deviation from which will cause an error of law, but it does set out the matters that a Judge must explicitly or implicitly consider in order to reach a sustainable decision on paragraph EX.1 according to its definition at EX.2. Where those matters are both controversial and material to the outcome, the parties must be able to understand why the Judge decided them in a particular way.

Consideration

13. In his submissions, Mr Collins attempted to trace the Judge's reasoning on insurmountable obstacles through the decision. At [15], the Judge refers to Mr Ademaj's evidence that if he returned to Albania without his family then she would not be able to continue in her current employer, and if they did go with him then they would be presented "with a number of obstacles". At [22] the Judge accepts this. The Judge then refers to the Secretary of State's representative arguing that while the family would face "a number of uncertainties", these would not be insurmountable obstacles.

14. The difficulty is that the Judge makes no finding on whether the obstacles put forward met the threshold of being very significant, nor whether they could be mitigated, nor whether they would entail very serious hardship. For example, the Judge did not address whether Mrs Stoyanova's concerns about safety in Albania and Bulgaria had any objective justification, as held in *Lal* is required:

> 37. …We do not accept, however, that an obstacle to the applicant's partner moving to India is shown to be insurmountable – in either of the ways contemplated by paragraph EX.2. – just by establishing that the individual concerned would perceive the

> difficulty as insurmountable and would in fact be deterred by it from relocating to India. The test cannot, in our view, reasonably be understood as subjective in that sense. To treat it as such would substantially dilute the intended stringency of the test and give an unfair and perverse advantage to an applicant whose partner is less resolute or committed to their relationship over one whose partner is ready to endure greater hardship to enable them to stay together.

15. Despite Mr Collins' attempts to the contrary, we are unable to discern from the decision whether the Judge gave sufficient consideration to the issue of insurmountable obstacles, nor indeed whether he found that they exist.

16. The Judge does then conduct a proportionality assessment, using the balance sheet approach and referring to the fact that section 117B of the Nationality, Immigration and Asylum Act 2002 contains a number of matters that must be taken into account. Nowhere, however, does he set out the weight carried by any particular factor. For example, at [26] the Judge refers to the Secretary of State's concern that Mr Ademaj has never had any lawful leave but, at [27], he records that the current arrangements for the family are stable and would be jeopardised by Mr Ademaj's departure. The individual significance of either in his final assessment is unexplained, nor does the Judge set out what account he has taken of the consideration at section 117B(4)(a) that little weight should be attached to a relationship formed with a qualifying partner established by a person when in the UK unlawfully. This is not remedied by the subsequent conclusion:

> 28. Each case has to be decided on its own facts. After weighing all the relevant facts and representations so clearly, and helpfully placed before me by the advocates (as set summarised above and set out in their written submissions) I am persuaded by Mr Collins' submission that in this case the Appellant has demonstrated that refusal of his application outside the Immigration Rules will give rise to unjustifiably harsh consequences and interference with family / private life which outweighs the well-established and necessary public interest in immigration control. Therefore, the Appellant's appeal succeeds.

17. The balance sheet approach requires, as held by Lord Thomas in *Hesham Ali (Iraq) v Secretary of State for the Home Department* [2016] UKSC 60, "reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest". The Secretary of State is unable to understand in this case why they did so.

18. Just as fundamentally, in this appeal the proportionality analysis is incomplete without the reasoned conclusion on whether there were insurmountable obstacles. Because of their place in the rules, if there were insurmountable obstacles then this would carry dispositive weight in Mr Ademaj's favour. Yet if there were no insurmountable obstacles, an explanation was required as to why refusal was nonetheless

disproportionate given the strength of the family life required of someone who does not meet the requirements of the rules: *Lal* at [68]-[69]; *Agyarko v Secretary of State for the Home Department* [2017] UKSC 11 at [48]. There may be cases where such strong factors are identified in an appellant's favour that no more need be said. That description does not apply to any of the circumstances put forward by Mr Ademaj. There were two of potential significance in Mr Collins' submissions to the Judge, being the loss of Mrs Stoyanova's route to settled status should she leave the UK, and the circumstances behind Mr Ademaj being unable to apply under the EUSS himself. But if either was considered sufficient to outweigh the public interest in effective immigration controls, either by itself or in combination with other factors, then the Judge needed to say so and explain why he rejected the Secretary of State's arguments to the contrary. Notwithstanding the appellate restraint cautioned in the authorities, we consider that the decision is inadequately reasoned.

Conclusion and disposal

19. We uphold the Secretary of State's appeal and set aside the decision. We consider that the appeal ought to be remitted to the First-tier Tribunal for a fresh hearing. Applying the principles set out in the Practice Direction and the Practice Statement, according to the guidance given in *Begum (Remaking or remittal) Bangladesh* [2023] UKUT 46 (IAC), the parties have not yet had a fair consideration of their respective cases. In view of the age of the children, we are also mindful of the potential need for further fact-finding.

Notice of Decision

(i) The decision of the First-tier Tribunal contains a material error of law and is set aside.

(ii) The case is remitted to the First-tier Tribunal at Hatton Cross for re-hearing with no findings of fact preserved, to be heard by any judge other than Judge Craft.

J Neville

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4 November 2024