Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/21328/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 May 2017	**On 7 August 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR SHEKELZEN RUSTEMAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr B Lams of Counsel
For the Respondent: Mr P Armstrong, a Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania who was born on 21 September 1967. He appeals to the Upper Tribunal (UT) with the permission of Upper Tribunal Judge Coker (Judge Coker) given on 4 April 2017. In her brief reasons, Judge Coker considered that Judge of the First-tier Tribunal Turquet (the Immigration Judge) may have failed to consider the relationship between the appellant and [EN], his partner's

son. The appellant has formed a relationship with [JN] who is a British national. They lived as a family unit together with the sponsor's daughter, [E].

Background

2. The appellant entered the UK illegally in 2002 and on 25 August of that year claimed asylum. The claim was refused but, on 13 December 2011, the appellant made a further claim. That claim was on the basis that a number of the appellant's protected human rights would be unlawfully interfered with if he was removed from the UK. On 12 March 2014, he sought an EEA residence card but that application was also refused. Finally, the application to which the present appeal relates was made on 8 September 2014. That application was based on the appellant's protected family and private life but that application was also refused – hence the present appeal.

3. The respondent considered the application in the light of whether EX.1 applied to the application. Since the appellant had no British children in the UK it was decided that the appellant did not meet the requirements of EX1 (a).

4. The respondent recognised the relationship between the appellant and [EN] but also noted that the appellant had no British children and there was no genuine and subsisting relationship with his British partner for the required period of two years. Furthermore, no adequate documentation had been provided to confirm the dissolution of their earlier marriages. Clearly, the appellant did not satisfy the "ten-year route". The respondent also considered the "parent route" but found that the appellant did not meet the requirements of Appendix FM R-LTRPT1.1 (d). The appellant did not have a British child nor was he solely parentally responsible for his partner's children and therefore he failed to qualify for leave under the relevant paragraphs (E-LTRPT2.2 and E-LTRPT2.3 of Appendix FM). The appellant also failed to meet the eligibility requirements to establish a relationship with a British child under EX1 and under D-LTRPT1.3. He did not qualify under the "ten-year route". The respondent also considered the application under the provisions of paragraph 276ADE (1) of the Immigration Rules. However, the appellant had not lived in the UK for the required period and did not qualify. Finally, the appellant considered whether there were any exceptional circumstances which ought to be taken into account to allow the appellant leave to remain in the UK on the grounds that his right to respect for private and family life as contained in Article 8 of the European Convention on Human Rights (ECHR) might be engaged. The respondent also considered her obligations towards the welfare of the appellant's partner's children under Section 55 of the Borders, Citizenship and Immigration Act 2009 (section 55). The respondent noted that [EN] suffered from a form of muscular dystrophy and that the appellant provided care for him. However, despite requesting evidence on 6 May 2015 for a letter to confirm the appellant's caring role for [EN], this had not been forthcoming. There was a letter dated 9 March 2015 from Rainbow Medical Services which sets out that they employed [EN]'s mother and sister as carers and that [JN] had expressed a wish that the appellant should be registered as such. However, the appellant did not provide evidence that he

provided such a level of care to [EN] that this could not be provided by other employees. It was accepted that the appellant "may provide help and assistance to [EN] and his mother" but he had not provided sound evidence that [EN] required him to remain in the UK to continue to provide that role nor had he established that his removal would unlawfully interfere with that relationship. Overall his removal was considered proportionate to the legitimate aim of maintaining effective immigration control and was in accordance with the Section 55 and other duties summarised above. The grant of leave outside the Rules was not considered appropriate and his application for leave to remain was therefore refused.

5. The appellant appealed that refusal of further leave to remain by a notice of appeal dated 5 June 2015. The grounds simply state that the respondent had not addressed the "exceptional circumstances" which existed and the appellant "disagrees" with the "finding made by the defendant".

6. The appeal came before the Immigration Judge sitting at Hatton Cross on 1 September 2016 on 1 September 2016. Having summarised the immigration history she noted the evidence which she had heard through an Albanian interpreter from the appellant, [JN] and [E], his partner's daughter. She fully recorded that evidence in the notes which she took. At the end of the hearing she reserved her decision which she gave only fifteen days later.

7. The Immigration Judge summarised the requirements in the Rules for respect for family and private life as set out in Appendix FM and paragraph 276ADE. In her summary of the case the Immigration Judge noted that the relationship between the appellant and his partner was a "genuine and subsisting" one but that it had only been formed in 2013. She observed the complex care needs of [EN] arising from the presence of muscular dystrophy, a muscle wasting disease. Rainbow Medical Services Limited, who provided night care for [EN], confirmed that they would be prepared to register the appellant as a carer as he provided a lot of care already. The appellant also provided emotional and psychological support as he had a good relationship with both [EN] and [E], [EN]'s sister. It was submitted that the UK was the only country where the appellant and his partner could enjoy a family life together because [JN] could not consider relocating to Albania where her son's complex health needs would not be met. The appellant urged "exceptional circumstances" on the FtT but the Immigration Judge was not persuaded that it was impossible for [JN] not to employ staff from a care agency, as has been referred to above. That the appellant had established a family life in the UK was accepted. However, removal was proportionate to the legitimate aim of maintaining effective immigration controls. The Immigration Judge in her decision set out fully the requirements of the Immigration Rules and summarised recent case law, including the case of **Agyarko** which at that time had not yet been decided by the Supreme Court. The appellant had not satisfied the Immigration Judge that there were indeed insurmountable obstacles to family life continuing outside the UK. She accepted that the appellant had established a private life but he could maintain a private and family life in Albania where he had family members living. There were no

sufficiently compelling circumstances for considering the case outside the Immigration Rules. Dealing with [EN]'s serious health needs, she noted that the appellant had been described as one of the main carers for [EN] and she took account of a letter from the appellant's GP, Dr Jackson, who had stated that [EN] regularly travelled to Albania especially in the winter months so he could be exposed to additional sunshine. It was clear to the Immigration Judge that the appellant and [EN] had a good relationship and it was accepted that he did help his partner and daughter at home with [EN]'s care. However, [EN] had a 24-hour care package in place and the appellant was not an essential part of that package. The Immigration Judge acknowledged that the presence of a disabled child with a serious and wasting disease in the household would be emotionally draining for the appellant and his partner and that he provided her with emotional support. The Immigration Judge looked at the case within the framework of the law and decided that one option was for the appellant to return to Albania and make an application for entry clearance. The circumstances in the appellant's case were neither compelling nor exceptional. The respondent had carried out a full balancing exercise but decided that the appellant's removal was proportionate. The Immigration Judge concluded that the UK would not be in breach of any of its obligations under the ECHR if the conclusion that the Immigration Rules were not met was sound.

Proceedings before the Upper Tribunal

7. The grounds of appeal before the Upper Tribunal state that the Immigration Judge had misunderstood the appellant's case. The appellant had accepted that the Immigration Rules were not met and that was the basis upon which she was invited to determine the appeal. Secondly, the conclusion in relation to the previous marriages not being dissolved was not relevant. Thirdly, there was an error of approach to the question of insurmountable obstacles/failure to consider the evidence fully. The Immigration Judge had pointed out that [EN] does go to Albania for a month every year, but it was not accepted that this would mean that she could live there. The Immigration Judge had been wrong in law to treat the case as one where there were no insurmountable obstacles. The Immigration Judge had adopted the wrong approach. The fact that [EN] could travel, as on some occasions he did, did not mean that his care needs would be adequately met if the family removed to Albania. No funding exists in Albania for such treatment and there were other family members to consider. The Immigration Judge was criticised for not considering the case outside the Rules and failing to take account of evidence to the effect that [EN] would "not survive" in Albania. In addition, [JN] would be likely to become depressed. It was submitted that the suggestion that the appellant could return to Albania and make an application for entry clearance from abroad had not been put to him during the hearing. Accordingly, Mr Lamb's submitted that there was "a real issue of procedural unfairness" regarding that issue.

8. At the hearing on 12 May 2017 both parties were represented. There were a number of difficulties with the documentation, in that Mr Lams did not consider he had seen all the documents that had been put before the FtT and, in particular, the letter

referred to by the Immigration Judge, referred to in paragraph 32 *et seq* in the decision. This necessitated standing the case down twice before it was finally reached at 2:35 p.m. In addition to a substantial appellant's bundle of documents provided for the Upper Tribunal a day or so before the hearing (?) I was also supplied with the original bundle of documents. Mr Lams pointed out that Judge Coker was of the view that it was at least arguable that there were insurmountable obstacles to the return of this family to Albania. Nevertheless, the Immigration Judge had not really considered this issue since the required period of cohabitation for the partner route had not been established. Mr Lams pointed out that the respondent had not been represented at the hearing. Mr Lams emphasised many of the points summarised above that were already made in the FtT. He emphasised that [EN] had extensive needs which would only be fulfilled within the UK, with its advanced healthcare system. It was unrealistic to suggest that the parties could relocate to Albania. In any event, [JN] was born in Kosovo. It was submitted that Immigration Judge had made perverse findings unsupported by the evidence, for example, in paragraph 32 of her decision.

9. By reply, Mr Armstrong pointed out that the Immigration Judge had given anxious scrutiny to the case, going into matters in detail. He pointed out that [EN]'s needs were at the forefront of her consideration of the matter, pointing out that paragraphs 44-45 of the decision contained a significant amount of detail. He referred to page A13 of the bundle of documents filed on the appellant's behalf, which indicated that [EN] would be looked after by a team of professional carers if the appellant were returned to Albania. The refusal suggested that insurmountable obstacles was an issue. However, it was not necessary for the Immigration Judge to deal with it because the appellant fell at the first hurdle, in that he was unable to establish a relationship of sufficient duration with [JN].

10. Mr Lams responded to these submissions by referring to C19 in his bundle, which was a letter from [EN]'s doctor, which suggested that the appellant's involvement in his healthcare needs was "core". Proportionality had not been properly addressed by the Immigration Judge. I was taken to the well-known passage at paragraph 43 in **Agyarko**. In any event, the case was wholly exceptional and should be decided outside the Immigration Rules if necessary.

11. At the end of the hearing I decided to reserve my decision as to whether there was a material error of law. As to ultimate disposal, Mr Lams suggested that a further hearing was necessary at which updated evidence could be given. I pointed out that such evidence should have been filed with the Upper Tribunal and that no application to adduce additional evidence had been made. Mr Armstrong said that I should simply decide the case on the existing evidence as the appellant had a full opportunity to present the facts before the FtT and any error of law could be corrected by re-deciding the case.

Discussion

12. Judge Coker gave permission in this case because she considered it to be arguable that the finding that there were no insurmountable obstacles to the return of this family to Albania was perverse. Mr Lams argues persuasively the appellant's relocation to Albania would have a detrimental effect on the future care needs of [EN]. He also argues equally persuasively, that the whole family could not remove to Albania, given that [EN]'s health needs are closely allied in the advanced health service which people enjoy in this country. In addition, the sponsor, is a UK national. So are [EN] and [E]. They form a family unit together with the sponsor and the appellant.

13. The issue before the UT is whether the Immigration Judge properly took account of the difficult circumstances in this case and came to conclusions that were open to her or whether in fact she erred in misconstruing or misunderstanding the "insurmountable obstacles" test and failed to consider adequately the need for a balancing exercise under Article 8 before reaching her decision.

14. As Judge Martin explained, in her initial refusal of permission to appeal, the appellant could not meet the requirements of the Immigration Rules as he had not been the partner of [JN] for the period required by GEN.1.2 of those Rules. His application could only succeed under Article 8. He had no children by his partner, who had been in the UK since 2001 and had two children by previous relationships, [EN] and [E], both of whom had been in the UK for thirteen years at the date the application was made (4 March 2015). It appears the appellant had been in the UK since 2011 and during his time cohabiting with [JN] had formed a bond with [EN] and his sister, as well as playing an important role in helping with [EN]'s complex care requirements. The appellant himself had entered the UK illegally in 2002, returned to Albania in 2009 and then come back to the UK in 2011, although he had not given a consistent account of his immigration history. He appears to have a poor immigration history with frequent applications to remain on bases which did not have proper foundations.

15. The appellant now seeks to argue that the FtT erred in failing to attach proper and appropriate weight to his role in caring for [EN] and on the basis, that the alternative conclusion that the family could relocate to Albania was not reasonably open to that Tribunal.

16. As to the former case, [EN] has now been in the UK for more than thirteen years according to question h) of the appellant's application, and had an established care regime in place at the point that the appellant entered into his life. There is no doubt that the appellant has a close involvement in his life as well as to the lives of his partner and stepdaughter. The Immigration Judge dealt fully with the extent of the appellant's caring role in her decision at, for example, paragraph 32 *et seq*. This paragraph should not be read out of context, coming as it does after a long summary of the medical and other evidence, including the nature of [EN]'s condition and its

future prognosis. The Immigration Judge took full account of all the case law, including the case of **Agyarko**, which has since been decided by the Supreme Court. I was helpfully reminded of paragraph 43 of that case by Mr Lams in his submissions. That paragraph is concerned with "insurmountable obstacles" which do not, in fact, arise in this case because the appellant did not qualify under the Immigration Rules.

17. The appellant's principal submission is that his role in [EN]'s care and in terms of the support he gives to the wider family unit is so crucial and "core" as to make the Immigration Judge's conclusion, that it was reasonable for the respondent to decide to remove him, perverse. Contrary to this submission, I have concluded that the Immigration Jud properly considered this issue. She reached a conclusion that was open to her on the evidence. The appellant clearly presents [EN] as providing him with a "trump card", which he would not be able to do if [EN] was his own child. It is not to denigrate his important role in the child's welfare or his caring personality. Nor is it to deny that there will be serious consequences for him and negative consequences for the whole family flowing from his removal. However, the evidence did not support the conclusion that he had such an important and caring role, akin to that of a professional carer, that his removal from the UK would seriously damage [EN]'s long-term welfare and that such removal was unjustified.

18. The alternative finding in relation to "insurmountable obstacles" was, so to speak, *obiter dicta* for the reasons given above. The appellant did not meet the requirements of the Immigration Rules in any event. Therefore, it was strictly unnecessary to consider insurmountable obstacles.

19. Had it been necessary to consider insurmountable obstacles, that issue had to be approached in a "practical and realistic" way, rather than referring to those obstacles which would literally make it impossible for family life to continue in the country of origin. It was not altogether surprising that the Immigration Judge concluded at paragraph 32 of her decision that there were "not un-surmountable obstacles to family life continuing outside the UK" given that [JN] came from Albanian speaking Kosovo, both the children, apparently, spoke Albanian (see the application form) and they regularly travelled to Albania. Relocation would, ordinarily, therefore, have been possible. Unfortunately, due to [EN]'s complex health needs, and primarily for economic reasons, this is practically impossible. Unfortunately, the burden of paying for [EN]'s complex health needs falls on the British taxpayer. However, this is [EN]'s right given that he is a British citizen. He is entitled to all the benefits of citizenship. However, I stress, the conclusion on insurmountable obstacles was not one that was strictly necessary since the case could only succeed under Article 8, as the appellant's representatives conceded.

Conclusion

20. I have therefore concluded that the Immigration Judge reached a decision that was open to her on the evidence she had heard. She took account of all the evidence

which she carefully weighed up in this sensitive case. For those reasons, I am unable to find any material error of law in the decision of the FtT.

Notice of Decision

21. The decision of the FtT stands and this appeal by the appellant to the UT is dismissed.

22. No anonymity direction was made by the FtT and I make no anonymity direction.

Fee Award

23. I have dismissed the appeal to the UT and there was no fee award by the FtT and I make no fee award.

Signed Dated 25.5.17

Deputy Upper Tribunal Judge Hanbury