Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: IA/34240/2015

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 30 October 2017	**On 13 December 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE HANBURY

Between

MR ADMIR SHIRA
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Nathan of counsel
For the Respondent: Mr David Mills, a Presenting Officer

DECISION AND REASONS

Introduction and the background

1. The appellant appeals to the Upper Tribunal with the permission of Upper Tribunal Judge Perkins, who considered that there were at least arguable grounds for considering that First-tier Tribunal Judge Bowler (the Immigration Judge) erred by

deciding that the appellant could continue to provide for his children by removing them from school in the Philippines and educating them in Albania. In Judge Perkins' view, there was no evidence to support such finding or reason to say the appellant should have produced evidence to contradict such a proposition. Those grounds were thought to be arguable by Judge Perkins on 11 September 2017.

2 By way of background the appellant, an Albanian national born on 18 August 1986, entered the UK in 2010. He subsequently formed a genuine and subsisting relationship with Ms Baybay, a British citizen of Philippino background. Ms Baybay has two children in the Philippines who are looked after by relatives there and she sends money back to them on a regular basis. There does not seem to be any dispute as to the genuine and subsisting relationship between Ms Baybay and the appellant, nor does there seem to be any dispute as to Ms Baybay's employment in the UK as a nanny. She is said to earn approximately £20,000 per annum net of tax and national insurance from that employment.

3. On 27 January 2017 the appellant's appeal against the respondent's decision to refuse the application for further leave to remain under Appendix FM came before the Immigration Judge. The Immigration Judge gave a lengthy and detailed decision in which she concluded that there was no evidence as to the appellant's siblings' qualifications or work experience. Ms Baybay had longstanding work experience as a well-paid nanny in the UK. Having come to the UK herself in 1995 to look after children of a Qatari family she continued to look after the children of the family ever since. The First-tier Tribunal accepted that the employment details had been correctly given. Unfortunately, Ms Baybay did not speak or read Albanian and it was thought that neither the appellant or Ms Baybay had undertaken any research to find out how easy it would be for a nanny with Ms Baybay's experience to find work in Albania or what salary such a person could expect to achieve. Given the lack of evidence that the Immigration Judge concluded that the appellant had not shown to what extent Ms Baybay would face insurmountable obstacles in Albania in earning sufficient money to look after her children. The original refusal had said very similar things in the final paragraph of the refusal dated 9 November 2015, where the respondent had explained that she considered that the appellant would be able to retain contact with his partner by modern communication means if it was decided they were to live in separate countries. Alternatively, the respondent considered that the partner could relocate as a family unit. The Secretary of State was not satisfied that sufficient evidence had been provided to support the claim that leave to remain should be given on an exceptional basis because, effectively, of the economic disparity between the UK and Albania.

The Upper Tribunal hearing

4. Mr Nathan, who represents the appellant, has submitted on the appellant's behalf that the error was a "glaring one", in the sense that the sponsor who was giving evidence was not cross-examined because the respondent was not represented at the First-tier Tribunal. It was obvious, said Mr Nathan, that there was a massive

economic disparity between the UK and Albania. The arrangement was slightly unusual, in that the sponsor obviously paid for the children out of her income. That income would be lost if she had to go and live in Albania where average incomes would be significantly lower. The evidence from Ms Baybay was not contradicted in any way by anything said or done by the respondent and contrary to paragraphs 25 and 26 of the decision of the First-tier Tribunal oral evidence had been given and it was not correct to say there was no evidence because there was oral evidence and the Immigration Judge could have asked any questions that she desired. However, Mr Nathan acknowledged that there was nothing as far as he was aware to prevent an application being made under the Rules but both parties agreed that this was not a matter before me because what I was concerned about is whether there were insurmountable obstacles within the terms of Appendix FM to EX2 of the Immigration Rules.

5. The respondent submitted by way of response that the error in approach by the Immigration Judge was not made out and she was entitled to look critically at the evidence that had been produced and the question was not one of possibility or impossibility. The question was whether there were insurmountable obstacles and whether this had been shown on the facts of the case. The Immigration Judge properly summarised what had been argued in paragraphs 25 to 27 of her decision and it was open to the appellant's representatives to produce subjective evidence but they have not done so. The burden being on the appellant, the appellant simply had not satisfied the First-tier Tribunal that there were in fact insurmountable obstacles to removal in this case.

6. Mr Nathan responded to say that the grounds were clear. Mr O'Callaghan who had settled the grounds had set out exactly why he said there was substantial economic disparity between the two countries. He explained that the present employment with the employers in north London was stable employment and the sponsor did have "some sort of pension" attached to it although the details are a bit "sketchy". She earnt approximately £340 per month at the time and, no such employment would possibly be available in Albania.

Discussion

7. It is incumbent upon the appellant to show that there was a material error of law such as would fall within Sections 11 and 12 of the Tribunal, Courts and Enforcement Act 2007. The parties were directed on 11 September 2011 by Judge Dawson that any application to produce fresh evidence to be made no later than pointing out that if no application was made within the time set, i.e. no less than ten working days before the hearing. No explanation was given as to why evidence of Ms Baybay's prospects of obtaining employment in Albania had not been produced before the First-tier Tribunal, where both parties were given an opportunity to produce such evidence. The appellant is represented by a reputable firm of solicitors who would be fully appraised of the requirements of the rules. The Upper Tribunal would therefore have to decide the case based on the evidence that was before the First-tier Tribunal.

8. I have to consider whether the Immigration Judge had been correct, in paragraph 25 of her decision, to put the burden on the appellant and his witnesses to produce evidence that Ms Baybay could not obtain employment in Albania. Since the burden rested on the appellant to show that there were insurmountable obstacles to the appellant's integration into the country to which he would be sent if he was to succeed in his appeal, it seemed to me that the burden did indeed rest on the appellant to produce this evidence. It was not for the respondent to show this and therefore it was incumbent on the appellant and his representatives to produce that evidence.

Conclusion

9. I have concluded that although there is clearly substance in Mr Nathan's submissions, I do not agree with them. The Upper Tribunal's function is to determine whether there is a material error of law in the decision of the First-tier Tribunal. This decision appears to have been thorough and careful and it does not contain any material error. It was reached following a review of the authorities. The Immigration Judge clearly had the legal framework in mind when she made her decision. I do not consider in the circumstances that there is any basis for the Upper Tribunal to interfere with that decision. Accordingly, I have decided that the appeal against the decision of the First-tier Tribunal must be dismissed.

Notice of Decision

The appeal is against the decision of the First-tier Tribunal is dismissed. Accordingly, the decision of the First-tier tribunal to dismiss the appeal on human rights grounds stands.

No anonymity direction is made.

Signed Date 23 November 2017

Deputy Upper Tribunal Judge Hanbury

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

Signed Date

Deputy Upper Tribunal Judge Hanbury