



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-000202
First-tier Tribunal No:
EA/50077/2023
LE/00834/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23 April 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BEN KEITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

VICTOR KUTA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant SSHD: Ms Isherwood

For the Respondent: Not represented and not in attendance.

Heard at Field House on 27 February 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department (“SSHD”) against the decision of First-tier Tribunal Judge Shaerf (“the Judge”) dated 14 December 2023 in which the Judge allowed the Respondent’s appeal on Article 8 Grounds.
2. At the outset of the hearing, I read out the email that the Respondent had sent to the tribunal asking for an adjournment:

Dear Sirs,

This is an urgent request to postpone hearing at the Upper Tribunal set for 27/02/2024 at 10 am as I could not find legal representative to represent me at the hearing.

I am writing this email with the help of friends who speak and write English better than me.

I could not set up an online account either and struggle to get help from lawyers.

Until now I asked for help 2 solicitors companies (Duncan Lewis Solicitors) and 1 direct access barrister (36 Public Chambers). They all declined as their capacity is full. If necessary I will submit their reply to me.

My partner will be away for the pre booked trip between 22/3/2024-09/4/2024.

Please arrange this hearing for another day as I am not able fully to prepare the case. I will continue to search for an available legal representative to submit my case.

Kind regards,

Viktor Kuta
EA/50077/2023
Appellant

3. The SSHD submitted that Mr Kuta had been informed of the hearing in good time and that the hearing should proceed. I considered it is in the interests of justice to proceed given: the late notice of the adjournment application, the failure to give reasons as to why Mr Kuta could not attend and the fact that the burden in this case is on the SSHD.
4. Mr Kuta is an Albanian national born 23 December 1998.
5. He arrived in 2017 in the United Kingdom by clandestine means. He came to the attention of the Home Office on 2 December 2022 when he applied for leave to remain on the basis of his private and family life since February 2021 with Timea-Piroska Kiss, a Romanian citizen born on 29 September 1976. She arrived on 21 March 2010 and has settled status under Appendix EUSS to the Immigration Rules.
6. The married on 22 December 2022 and he applied for leave to remain on the basis of their marriage.

Grounds of appeal

7. The SSHD appeals on one ground: *“Failing to give reasons or any adequate reasons for findings on a material matter.”*

8. The grounds run to 21 paragraphs. Ms Isherwood has helpfully clarified the issues. The SSHD submits that the Judge made a material error of law when deciding that EX.1(b) was met and failed to take into account material evidence, in particular the submission and evidence of the SSHD in the refusal letter.
9. The grounds state (reference to the Respondent are to the SSHD):
 7. The Respondent submits the FTTJ has failed to have regard to the substance of the RFRL and Respondent Review, both of which clearly explain the appellant cannot rely on EX.1. (RB p5-8, Respondent Review). Further, in noting the Respondent Review at [16] the FTTJ fails to acknowledge the submissions at para [5-20] of the review. The Respondent maintains, having knowingly entered the UK unlawfully in 2017 in breach of immigration laws, the A fails to meet the requirement of paragraph E-LTRP.2.2. (b) and consequently cannot benefit from consideration under EX.1.
10. I agree Mr Kuta cannot meet the requirements of E-LTRP.2.2. (b) unless he meets EX.1.
11. He has no children so the only matter relevant is EX.1(b):

“(b) the applicant has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen, settled in the UK, or in the UK with protection status, in the UK with limited leave under Appendix EU in accordance with paragraph GEN.1.3.(d), or in the UK with limited leave as a worker or business person under Appendix ECAA Extension of Stay in accordance with paragraph GEN.1.3.(e), or in the UK with permission as a Stateless person, and there are insurmountable obstacles to family life with that partner continuing outside the UK.”
12. The test is therefore “insurmountable obstacles”.
13. The grounds continue:
 8. The FTTJ confirms the oral evidence of the appellant’s wife states (emphasis added):

“If the Appellant had to return to Albania, she would wait for him in the United Kingdom and would endeavour to give him financial assistance in Albania but it would not be easy.
14. That is the sum total of “insurmountable obstacles” or undue harshness under EX.2.
15. Mr Kuta also raised issues about fear on return to Albania for the first time in the FTT. It is unfortunate that the SSHD was not represented but

the SSHD submits that this was a new issue that had not been considered previously and was wrongly considered by the Judge. In any event the SSHD submits this did not meet the insurmountable obstacles test. The judge stated:

“The Appellant will face difficulties on return alone to Albania because of the length of his absence and to some degree the hostility of his family as he indicated in oral evidence.”

16. Those matters have not been tested and it is unclear from the reasoning how this could meet the insurmountable obstacles test.

17. The judge on permission stated:

“Given that the Appellant has never had any valid leave in the UK, it is arguable that the Judge has erred in law by failing to give adequate reasons in finding that there are insurmountable obstacles to family life or that the appellant would face difficulties amounting to very significant obstacles on his return to Albania to seek entry clearance to the UK for the following reasons:- (a) the oral evidence given by the appellant’s wife on the day with the hearing (paragraph 15 of the Decision & Reasons) states that she would wait for the Appellant in the United Kingdom and would endeavour to give him financial assistance if he were to return to Albania on a temporary basis but this was not considered by the Judge when coming to his decision; (b) in failing to address the conflict of evidence in that the Appellant said he is in regular contact with his parents and siblings in Albania but for the first time in oral evidence claimed that he left Albania because his parents were not happy as he has avoided marrying a local girl chosen by them and would now face some degree of hostility on return; (c) by failing to provide adequate reasons why this temporary separation would amount to very significant obstacles and (d) why the appellant’s wife could not continue to live in the United Kingdom working and studying and why the Appellant could not return to his family home and seek”

18. I agree with those observations and in my judgment there are inadequate reasons for the conclusion that the case met the insurmountable obstacles test. On consideration of the evidence before me I find there is an error of law.

19. The Judge does not properly reasons the insurmountable obstacles test. Not only that it seems to me that the facts found that the wife would be able to stay in the UK and the other evidence presented are not properly reasoned as to how that meets the test.

20. I therefore find an error of law.

21. Having considered the lack of reasoning this case requires full hearing on the evidence. Considering the Presidential Guidance this case should be reheard by the First Tier Tribunal.

Notice of Decision

1. There is a material error of law and the decision of the First Tier Tribunal is set aside.
2. The case is to be reheard before the First Tier Tribunal.

Ben Keith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

27 February 2024