Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/07549/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 25 August 2017	**On 19th September 2017**

Before

DEPUTY UPPER TRIBUNAL JUDGE RAMSHAW

Between

MR KJ
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr H Allison, Allison Solicitors
For the Respondent: Mr L Tarlow, Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original Appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

2. The appellant is a national of Kosovo whose date of birth is [ ] 1994. The appellant arrived in the United Kingdom on 16 June 2010 as an unaccompanied minor. He claimed asylum on 2 July 2010. His asylum claim was refused on 26 August 2010 but he was granted discretionary leave until 9 April 2012. He did not appeal against the refusal of his asylum claim.

3. On 4 April 2012 the appellant made an application for further leave to remain in the United Kingdom. The Secretary of State refused the application for further leave on 4 December 2014 and his appeal was certified. However, after an application for judicial review of that decision and the signing of a consent order, it was withdrawn and a fresh decision made on 23 June 2016. It was against this decision to refuse his claim that the appellant appealed to the First-tier Tribunal. The appellant confirmed that the appeal on asylum grounds was withdrawn and the appeal would proceed on human rights grounds only.

The appeal to the First-tier Tribunal

4. In a decision promulgated on 24 February 2017 First-tier Tribunal Judge Talbot dismissed the appellant's appeal. The Tribunal found that the appellant did not meet the requirements of the Immigration Rules. The Tribunal found that there were no insurmountable obstacles to the appellant and his wife continuing their family life in Kosovo and that there were not very significant obstacles to the appellant's integration into Kosovo. The judge considered the appellant's Article 8 private and family life outside of the Immigration Rules and found that it would not be disproportionate to remove the appellant.

5. The appellant applied for permission to appeal against the First-tier Tribunal's decision. On 16 June 2017 First-tier Tribunal Judge Brunnen granted permission to appeal on 3 of the 4 grounds of appeal. The appellant renewed his application for permission to appeal on the remaining ground and on 10 July 2017 Upper Tribunal Judge Kebede granted the appellant permission to appeal so that all grounds may be argued.

The appeal before the Upper Tribunal

6. The grounds of appeal assert that the judge made insufficient findings in respect of insurmountable obstacles. It is submitted that the judge failed to grapple with the specific fears raised in the witness statement of Mrs J and the supporting evidence. Reference is made in particular to crime that she would be constantly targeted, civil disorder in Kosovo, not being able freely to earn a living or live there, health in grave danger because of a widespread shortage of medicines and other essentials, Crimean Congo haemorrhage fever is endemic in Kosovo. It is asserted that given the issue, specific reasons itemised by Mrs J in her witness statement and the supporting evidence from the Foreign & Commonwealth Office it was

incumbent on the judge to provide a degree of particularity of reasoning and that the generalised findings are insufficient to dispose of the issue.

7. It is asserted that the judge in balancing the factors outside of the Immigration Rules noted that there are significant balancing factors the first of which was the basis of the appellant's claim for asylum which the judge concluded he considered it highly likely that the appellant's claim of blood feud was simply an attempt to secure his stay in the UK. The judge had no jurisdiction to make a finding on the asylum claim or the basis of the asylum claim of the appellant. The asylum appeal had been withdrawn. It is asserted that the judge's finding was unsustainable in view of the evidence. At its highest the evidence before the judge was a factually unresolved but withdrawn asylum appeal. It was not open to the judge to resolve the asylum appeal or the basis of the asylum claim. The judge's finding was not open to him to make on the evidence and therefore rendering his findings perverse and unsustainable.

8. It is asserted that the judge having set out the proper standard of proof in paragraph 14 of the decision nevertheless adopted a higher standard than that required when assessing the proportionality of the removal of the appellant in concluding that he was not satisfied that this significantly tilts matters in the appellant's favour. It is submitted that to establish a balance of probability the pendulum of evidence does not have to swing significantly in favour of the appellant. It appears from the judge's conclusion that there was a swing in favour of the appellant but that it was not significant. The adoption of a standard of proof that the tilt in favour of the appellant had to be significant for him to be successful was an error of law. It is submitted that this error of law is material because it is on this basis that the determination was ultimately decided.

9. It is submitted that there was no evidence to justify the finding of fact made by the judge that the appellant's immigration status was precarious when he established his private and family life in the UK. No reason has been given for that finding. Reliance is placed on the case of **Rhuppiah v SSHD [2016] EWCA Civ 803**, in particular paragraph 44. It is submitted that the errors are individually or collectively material.

10. In oral submissions Mr Allison submitted that the task of the judge was to deal with the concerns of Mrs J. The judge was required to deal with each point and to engage with the concerns raised by Mrs J in her witness statement and with the Foreign & Commonwealth Office guidance. He referred to paragraph 10 of Mrs J's witness statement where she expressed concern about the advice given by the Foreign & Commonwealth Office. She was concerned about the great danger and the level of crime. He submitted that she would be assumed to be carrying large amounts of cash and therefore be a target for criminals.

11. He submitted that she would be going to Kosovo as a foreigner because her accent when speaking Albanian would be very different because she has lived in the United Kingdom all her life. The judge has not considered

the explanation that when visiting Kosovo she was with her family. He submitted that it is clear from the Foreign & Commonwealth Office report that the health system is poorly funded. In essence Mr Allison's submissions were that any woman going to Kosovo as a foreigner would face insurmountable obstacles in integrating.

12. With regard to the assessment outside the Immigration Rules he submitted that the adverse findings with regard to the asylum appeal at paragraph 26 were not open to the judge on the evidence. The judge has taken this into account in the balancing exercise and therefore this is a material error of law. This infected the judge's proportionality assessment.

13. With regard to the precarious immigration status he submitted that the judge had made it clear that the appellant was in the UK lawfully. The appellant's leave could not be considered to be precarious because he had been granted discretionary leave to remain. Discretionary leave to remain that was granted before 2012 led automatically to settlement and therefore the appellant could not be considered to have considered his leave in the United Kingdom to have been precarious. He submitted that all this information was in the public domain even if it was not brought to the judge's attention. The judge would have known that the appellant was granted discretionary leave to remain from the Reasons for Refusal Letter. The appellant had come to the United Kingdom as a child and that if granted discretionary leave at no point could the appellant have thought his leave was precarious. When undertaking the proportionality assessment the judge applied the wrong standard of proof by referring to the delay requiring to have been significant. This together with the asylum finding was core to the weight that the judge gave to the appellant's case and tainted the proportionality exercise.

14. Mr Tarlow relied on the Rule 24 response and submitted that in essence the grounds of appeal and submissions amount to a disagreement with the findings of the judge. He submitted that the appeal did not proceed on the basis of the asylum claim. The judge correctly dealt with insurmountable obstacles referring to **Agyarko** in the Court of Appeal, now approved in the Supreme Court. The judge gave adequate reasons between paragraphs 20 to 22 referring to aspects of the claim such as the language ability, the qualifications, the fact that the appellant can work.

15. The conclusions of the judge at paragraph 26 were ones that were open to him. Any error regarding use of the word significantly would not be a material error of law but in any event what the judge was saying was that he was not satisfied that this assisted the appellant's case. Although there might be elements of hardship for the appellant's wife to go to Kosovo the very stringent test of insurmountable obstacles requires something significantly more than hardship.

16. In reply Mr Allison asserted that the judge gave no reason for finding that the appellant's private life was established when his immigration status

was precarious. The evidence before the judge was that the appellant came to the UK when he was 15 and sought asylum which was refused but he was granted discretionary leave to remain for two and a half years. The judge appears to have misconstrued how the word precarious is interpreted in the European and domestic law. Reference is made to **Agyarko [2015] EWCA Civ 440** at paragraph 28.

17. The judge's task is to provide reasons why the appellant's immigration status throughout his stay was precarious or for imputing the requisite knowledge that the appellant knows or should have known that he has no right to be in the UK. Reference is made to **Rhuppiah v SSHD [2016] EWCA Civ 803**. Unlike the appellant in **Rhuppiah**, who came to the UK as a student a condition of which was the intention to return at the end of the course, the appellant sought refuge in the UK as an asylum seeker and there is no condition and requirement of such applicant to have a temporary intention to stay in the United Kingdom. The issue is whether a child of 15 could be imputed with the knowledge that he had no right to stay in the United Kingdom. The appellant was granted discretionary leave to remain in the UK and the Secretary of State has a continuing policy that recipients of such discretionary leave leads to settlement.

Discussion

18. The hurdle that the appellant must surmount to satisfy the test that there are insurmountable obstacles to him and his wife integrating into Kosovo is a stringent test and a high hurdle to overcome.

19. In **R (on the application of Agyarko) (Appellant) v Secretary of State for the Home Department (Respondent) [2017] UKSC 11 the court held:**

> 43 …"Insurmountable obstacles" is, however, the expression employed by the Grand Chamber; and the court's application of it indicates that it is a stringent test. In Jeunesse, for example, there were said to be no insurmountable obstacles to the relocation of the family to Suriname, although the children, the eldest of whom was at secondary school, were Dutch nationals who had lived there all their lives, had never visited Suriname, and would experience a degree of hardship if forced to move, and the applicant's partner was in full-time employment in the Netherlands…
>
> 44…The expression "insurmountable obstacles" is now defined by paragraph EX.2 as meaning "very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner." That definition appears to me to be consistent with the meaning which can be derived from the Strasbourg case law.

20. The judge in this case carefully considered all the evidence. The judge set out from paragraph 16:

"16. I shall start by considering the evidence submitted by and on behalf of the appellant. I note that there is a quantity of supporting evidence regarding the appellant's private and family life in the UK. This includes letters and character references from friends and family members of the appellant and his wife; letters from his old school and evidence of his educational qualifications; evidence of voluntary work he has undertaken. There are also photographs of the appellant and his wife, their marriage certificate and evidence of their cohabitation in the form of a council tax bill. I have no reason to challenge any of this evidence. I am satisfied that the appellant and his wife have given a true account of their private and family life in the UK. I note also that the appellant's life in the UK has significantly changed since he made his application for further leave in 2012, which is hardly surprising given the amount of time that has elapsed since then. The most important change of course is his marriage and this raises key Article 8 issues relating to his family life in the UK.

17. … With regard to the immigration status requirements, the appellant's immigration status is not that of a visitor; he was not granted leave for a period of six months or less; and he is not on temporary admission or in breach of immigration laws.

18. The appellant would therefore have to show that paragraph EX.1 applies. … The expression 'insurmountable obstacles' is defined at EX.2 as

> *'the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK and which could not be overcome or would entail very serious hardship for the applicant or their partner.'*

19. The key issue is whether there are insurmountable obstacles to the appellant and his wife continuing their family life in Kosovo. In assessing this, I have taken note of the jurisprudence regarding this expression and including the Court of Appeal case of **Agyarko [2015] EWCA Civ 440** …

20. On the one hand, I note that that appellant has lived in the UK for a period of some six and a half years during a formative period of his life and has integrated well into the country in terms of friendship, studies, qualifications and marriage to a British citizen. His wife has lived in the UK from the age of 1 and all her close family live here too. On the other hand, the appellant still has his mother and brother in Kosovo and it is where he lived up to the age of 15, which is still the majority of his life. His wife, although British, was born in Kosovo, still has extended family living there and has visited Kosovo with her family. She speaks Albanian as well as English. Both of them therefore have continuing links with Kosovo and could therefore expect to enjoy some form of emotional and practical (if not financial) support on their return. The appellant is a qualified plumber and clearly this is a transferable skill which could help him to find work in Kosovo even if he needs to obtain some additional local qualifications or certification. I take into account the concerns expressed by Mrs J about poor economic circumstances in Kosovo and the prevalence of crime and I

> accept that the general quality of life is likely to be lower than in the UK. I turn finally to the oral evidence that Mrs J's brother has cancer. This was not referred to in her witness statement and it appears that the appellant's representative was not even aware of the matter. It was not backed up by any supporting evidence, no details were given regarding the diagnosis or prognosis, and there was also no indication of the appellant's closeness to her brother and any specific element of dependency. In the absence of further evidence on this matter, I cannot give it great weight.
>
> 21. After taking into account all these factors and bearing in mind that EX.1(b) constitutes a stringent test, I am not satisfied that there are 'insurmountable obstacles' to the couple continuing their family life in Kosovo. I conclude that the appellant does not come within Appendix FM.

21. The judge has clearly considered and taken into account all the evidence. A judge does not have to particularise every piece of evidence. The judge has referred to the evidence and submissions regarding the appellant's wife's evidence and the FCO travel advice in paragraphs 4, 10 and 13. There were no specific characteristics identified that would make the appellant's wife particularly vulnerable. Mr Allison's submissions were that any woman going to Kosovo as a foreigner would face insurmountable obstacles in integrating. In this case the judge, when reaching his decision, specifically refers to the concerns expressed by the appellant's wife. It is of note that the appellant's wife has visited her extended family in Kosovo and speaks Albanian. She would not be going to Kosovo as a lone woman as she would go with the appellant. It is not the task of the judge (as submitted by the appellant) to set out how any obstacles can be overcome. The burden is on the appellant to demonstrate that there are insurmountable obstacles. The findings of the judge were ones that were open to him and it is clear that the evidence was fully considered and adequate reasons were given

22. With regard to the incorrect standard of proof the judge set out:

> "With regard to the delay in the Home Office's decision-making, I am not satisfied that this significantly tilts matters in the appellant's favour, …"

23. The judge is not departing from the standard of proof (as set out correctly by the judge in paragraph 14). On the facts of this appeal, which was solely concerned with private and family life, the delay is a factor he has accrued to his advantage. The judge is simply recording that the delay did not make a difference to the outcome.

24. The appellant asserts that the judge had no jurisdiction to determine his asylum claim and that his findings infected the proportionality assessment. The judge set out the following:

> "Firstly, I note that the appellant came to the UK as an unaccompanied minor in 2010, claiming that he was in mortal danger on return because of a blood feud against him (which would continue until no men were left alive in

> the family). The Home Office did not accept his claim of a blood feud and refused his asylum claim. The appellant has now dropped his claim and in seeking to resist his removal, he now no longer relies on it in this appeal. In the absence of any explanation for this, I consider it highly likely that the appellant's claim of a blood feud was simply an attempt to secure his stay in the UK. "

25. The judge has not 'determined' the appellant's asylum claim. To do so the judge would have had to reach a decision on whether or not the appellant was entitled to protection as a refugee. The appeal was against the respondent's refusal of his asylum claim as well as the private and family life claim. As recorded by the judge at the start of the hearing the appellant confirmed that he had withdrawn his asylum appeal. The reason for withdrawing the asylum appeal was not relevant and therefore the judge ought not to have speculated as to why the appeal had been withdrawn. The judge also ought not to have factored this into the proportionality balancing exercise. However, this was only one factor taken into consideration and I do not consider, on the facts of this case, that this error was material. In **Agyarko** when explaining how a court or tribunal should consider whether a refusal of leave to remain was compatible with Article 8 the Supreme Court made it clear that the critical issue was generally whether, giving due weight to the strength of the public interest in removal, the article 8 claim was sufficiently strong to outweigh it. In **SS (Congo) (Appellant) v Entry Clearance Officer, Nairobi (Respondent [2017] UKSC 10** the court (referring to the case of Huang) confirmed:

> "Failure to qualify under the rules is not conclusive; rather it is (in Lord Bingham's words) - "… the point at which to begin, not end, consideration of the claim under article 8. The terms of the rules are relevant to that consideration, but they are not determinative."" (para 6)

26. In this case the First-tier Tribunal found that the appellant did not meet the requirements of the Immigration Rules. This is the starting point. There were no specific factors relevant to the circumstances of the appellant or his wife that had not already been considered under the Rules that would indicate that their claim under Article 8 was sufficiently strong to outweigh the public interest in removal of the appellant. The judge having considered in detail all the factors relevant to the appellant and his wife under the Rules clearly considered those factors weighing in favour of the appellant when undertaking the proportionality exercise. The reasoning and findings of the judge were:

> (i) "I shall consider together the overlapping issues as to whether there are compelling circumstances justifying a grant of leave outside the Rules and whether any interference with the appellant's Article 8 rights would be proportionate to the legitimate aim of the respondent in the maintenance of immigration control.
>
> 26. I accept that there would be an element of hardship to the appellant in having to return to Kosovo after spending so long in the UK. There would be an even greater degree of hardship in his wife having to

relocate to Kosovo, which clearly is a foreign country to her, as she has effectively spent all of her life in the UK. This would require a major adjustment on her part. However, there are significant balancing factors. Firstly, I note that the appellant came to the UK as an unaccompanied minor in 2010, claiming that he was in mortal danger on return because of a blood feud against him (which would continue until no men were left alive in the family). The Home Office did not accept his claim of a blood feud and refused his asylum claim. The appellant has now dropped his claim and in seeking to resist his removal, he now no longer relies on it in this appeal. In the absence of any explanation for this, I consider it highly likely that the appellant's claim of a blood feud was simply an attempt to secure his stay in the UK. So far as his life in the UK is concerned, I note that under Section 117B(5), little weight should be given to a private life which was established at a time when his immigration status was precarious. (Although S.117B(5) does not extend to the issue of family life, it is relevant to note that the appellant's relationship with his wife was also established at a time when his stay was precarious.) When considering both 'compelling circumstances' and proportionality, I also take into account that the appellant's wife does have an option of remaining in the UK and waiting for her husband to make an entry clearance application under the Immigration Rules. With regard to the delay in the Home Office's decision-making, I am not satisfied that this significantly tilts matters in the appellant's favour, especially given the fact of his having arrived in the UK on the basis of an unsubstantiated asylum claim that he has now withdrawn.

27. Taking all of the above factors into account, I conclude that there are no compelling circumstances to support an Article 8 claim outside the ambit of the Immigration Rules. Furthermore, any interference with the appellant's private and family life (and that of his family member) would be proportionate to the Secretary of State's legitimate aim. …"

27. There was no material error of law in the judge's proportionality balancing exercise.

28. The appellant asserts that the judge is required to explain why the appellant's immigration status is precarious. That is incorrect. The starting position is that where a person does not have leave to remain in the UK on a permanent basis then generally their leave will be precarious. In **Deelah and others (section 117B – ambit) [2015] UKUT 00515 (IAC)** the Tribunal held that the adjective "precarious" in section 117B(5) of the 2002 Act does not contemplate only, and is not restricted to, temporary admission to the United Kingdom or a grant of leave to remain in a category which permits no expectation of a further grant. In **Rhuppiah** it was held in the context of section 117B, the relevance of precariousness of immigration status was the effect it had on the extent of protection which should be afforded to private life for the purposes of the Article 8 proportionality balancing exercise. The more that an immigrant should be taken to have understood that his or her time in the host country would be comparatively short or would be liable to termination, the more the host State was able to say that a fair balance between the rights of the

individual and the general public interest in the firm and fair enforcement of immigration controls should come down in favour of removal when the leave expired (paras 30 – 34). The appellant argues that he had no expectation that his leave was precarious. It was argued that the respondent has a continuing policy that recipients of such discretionary leave leads to settlement. I was referred to the Home Office Asylum Policy Instruction – Discretionary Leave, version 7.0 of 18 August 2015. None of these arguments appear to have been made before the First-tier Tribunal judge instead it is argued that this information is all in the public domain and the judge should have inferred this as the reasons for refusal letter set out that the appellant had been granted DLR. The judge cannot be expected to have taken such issues into account in the absence of any evidence or submissions. This is not an obvious point in the 'Robinson' sense. Whilst, as is made clear in **Rhuppiah**, some immigrants with leave to remain falling short of ILR could be regarded as being very settled indeed and as having an immigration status which is not properly to be described as 'precarious' the appellant could not have had any legitimate expectation when he entered the UK that he would be allowed to settle here permanently. His asylum claim was refused and he withdrew his appeal against that decision. He was granted 20 months discretionary leave to remain. He knew that he was required to apply for further leave which he did in 2012. In **Rhuppiah** it was held that although courts should have regard to the consideration that little weight should be given to private life established when immigration status was precarious, it was possible to override such guidance in exceptional cases where the private life had a special and compelling character. As set out above there were no special factors identified in this case. There was no material error of law in the judge's application of the factors in s117B.

29. There were no material error of law on the First-tier Tribunal decision.

Notice of Decision

The appeal is dismissed. The decision of the Secretary of State stands.

Signed P M Ramshaw Date 17 September 2017

Deputy Upper Tribunal Judge Ramshaw