Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/12666/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2018	**On 15 January 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE ESHUN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR SIMON [P]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Miss J Elliott-Kelly, Counsel

DECISION ON ERROR OF LAW

1. The respondent has been granted permission to appeal the decision of First-tier Tribunal Judge Steer allowing the appeal of the respondent on human rights grounds.

2. For ease of reference the respondent will from now on be referred to as the applicant.

3. The applicant is a citizen of Albania born on 22 August 1992. He entered the UK in 2013, without leave to enter. He lived with his brother, a British citizen, and his

family. In June 2014, the applicant met [NC], a British citizen born on 16 August 1989. They began a relationship, then began to cohabit in October 2014 and married on 28 April 2018. They live together with Miss [C]'s mother.

4. The judge found that the applicant met the relationship requirement under EX.1(b) because by the time the application was made in January 2017, the applicant had cohabited with his partner since October 2014, a period of over two years.

5. In his witness statement dated 24 July 2018, the applicant confirmed that he entered the UK, illegally, and with the intention to have a better life. He had completed school in Albania and was finding it hard to make a decent living. His mother-in-law was suffering from terminal cancer and her health was deteriorating daily. She lived with the applicant and his wife in the property that she rented from the council. Both the applicant and his wife provided care for the mother-in-law.

6. The applicant's wife worked full-time as a SENT teaching assistant. Her salary was £17,000 per annum. The applicant said he could not return to Albania and apply for entry clearance from there, as they could not meet the financial requirements. The applicant confirmed that there was NHS support available to care for his mother-in-law, but his wife considered it to be her responsibility. His wife had no Albanian heritage and did not speak Albanian.

7. He said his brother-in-law was living in the UK and could care for his own mother. However, his brother-in-law had his own problems and no responsibility towards his mother and had his own children and was separated from his wife who did not let him see his children and was in a court dispute with him.

8. The judge at paragraph 32 held that paragraph EX.1(b) can apply because the applicant had cohabited with his partner for two years by date of application on 16 January 2017.

9. At paragraph 33 the judge cited paragraph EX.2 which defines insurmountable obstacles. The judge did not however make any findings as to whether the applicant satisfies the insurmountable obstacles test.

10. The judge's findings are set out at paragraphs 34 and 35. At 34 the judge gives reasons why she finds that the applicant has established a family life between him and his mother-in-law as required by **Kugathas v SSHD [2003] EWCA Civ 31**. At paragraph 35 the judge finds that there are exceptional circumstances which render refusal of leave to remain a breach of Article 8 ECHR. She finds that refusing leave to remain and removing the applicant from the UK would result in unjustifiably harsh consequences for the applicant, given the relationships that he has developed in the UK. Refusal would result in unjustifiably harsh consequences for the applicant's partner. She would have to choose between relocating to Albania, and so no longer living with her mother, as she battles her terminal medical condition, or remaining in the UK and being without her husband who is providing essential physical and

emotional support for his partner and her mother. Further the applicant's mother-in-law would lose the support that she has from the applicant at this very difficult time in her life. This could have direct consequences for her physical and mental health and indirect consequences, given the likely impact of the applicant's removal on her daughter.

11. I find that the judge erred in law for the following reasons. I find that the judge failed to give consideration to insurmountable obstacles which has been found by the Court of Appeal in **TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109** to underpin the wider proportionality exercise (paragraphs 27, 28 and 34 of **TZ and PG**). In particular no assessment was made by the judge of the factors set out in Section 117B of the Nationality, Immigration and Asylum Act 2002. Miss Elliott-Kelly accepted that the judge did not expressly make any findings in respect of Section 117B and the judge would have had to find that the applicant and his wife could not meet the minimum income level. That was why the judge leap frogged to consider exceptional circumstances because of the needs and impact on the mother-in-law should the applicant be removed from the UK.

12. I find that the judge erred in law in failing to make findings in respect of Section 117B. I also find that in considering exceptional circumstances, the judge failed to factor in the fact that the mother-in-law has a son who is capable of caring for her and the fact that there was NHS support available to care for her.

13. In her own skeleton argument in respect of ground 3, Miss Elliott-Kelly submitted that the assessments of insurmountable obstacles and whether there are exceptional circumstances are not identical. She went on to say that because the assessments are not identical the judge was obliged by the Secretary of State's own Rules and policy guidance to consider the question of whether there would be unjustifiably harsh consequences not only for the applicant and his wife but also for the mother-in-law, so that there were exceptional circumstances. However, it is apparent from the decision that the judge failed to consider Section 117B; it was also not apparent that the judge was considering the policy guidance.

14. Miss Elliott-Kelly said in her skeleton argument that in reaching the ultimate conclusion that there are exceptional circumstances which render refusal of leave to remain a breach of Article 8, the judge did not rely solely or even mainly on either the fact that the applicant's partner does not speak Albanian, nor that the skills she has gained in the UK would not assist her in finding employment in Albania. Had the judge done so there would arguably have been an error of law in line with the Supreme Court's application of the analysis above to the facts of the cases before it in **Agyarko**.

15. I find that it was precisely for those reasons that the judge found at paragraph 35 that paragraph GEN3.21 applies and then goes on to make the finding that there are exceptional circumstances which render refusal of leave to remain a breach of Article 8 ECHR. Consequently, I find that the judge erred in law.

16. Although not in the grounds, I considered Mr. Tufan's submission that it is questionable whether, for the reasons given by the judge, that the applicant's relationship with his mother-in-law meets the definition of family life under the **Kugathas** test.

17. For the above reasons, I find that the judge's decision cannot stand. I set it aside in order for it to be remade.

18. The applicant's appeal is remitted to Hatton Cross for rehearing by a judge other than First-tier Tribunal Judge S J Steer.

No anonymity direction is made.

Signed Date: 28 December 2018

Deputy Upper Tribunal Judge Eshun