Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number IA/52582/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 9 December 2014	**On 23 September 2015**

Before

Deputy Judge of the Upper Tribunal I. A. Lewis

Between

Betim Zullufi
(Anonymity direction not made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation
For the Appellant: Mr. S. Ashworth of Counsel instructed by Shah Law Chambers.
For the Respondent: Ms. J. Isherwood, Home Office Presenting Officer.

DECISION AND REASONS

1. This is an appeal against the decision of First-tier Tribunal Judge Colvin promulgated on 19 March 2014 dismissing the Appellant's appeal against a decision of the Respondent dated 2 December 2013 to refuse to vary leave to remain and to remove him from the UK pursuant to section 47 of the Immigration, Asylum and Nationality Act 2006.

Background

2. The Appellant is a national of Kosovo born on 20 February 1987. He entered the UK on 12 August 2012 with leave to enter as a visitor. On 4 January 2013 he applied for leave to remain as the partner of his wife Ms Arlinda Krasniqi (a British citizen born in Kosovo). The Appellant and his wife were married on 17 December 2012 in London; their's was, however, a pre-existing relationship, and they had become engaged at a ceremony in August 2012 in Kosovo. His application was refused for reasons set out in a 'reasons for refusal' letter dated 2 December 2013; a Notice of Immigration Decision was served consequently.

3. The Appellant appealed to the IAC.

4. It was conceded before the First-tier Tribunal that the Appellant could not satisfy the requirements of the Immigration Rules; the appeal was argued on Article 8 Grounds. The First-tier Tribunal Judge dismissed the appeal for reasons set out in his decision. In particular the Judge did not accept that the Appellant was in a genuine and subsisting relationship with Ms Krasniqi.

5. The Appellant applied for permission to appeal which was initially refused by First-tier Tribunal Judge Lloyd on 24 April 2014, but subsequently granted by Upper Tribunal Judge Peter Lane on 21 May 2014.

6. The Respondent has filed a Rule 24 response dated 9 June 2014 resisting the challenge to the decisions of the First-tier Tribunal.

7. The matter initially came before me on 9 July 2014 and was adjourned with Directions: (see Notice of Adjournment & Directions sent on 10 July 2014). Without deciding the issue of error of law I indicated that "*I was troubled in respect of the First-tier Tribunal's finding that "the Appellant has not shown to a balance of probabilities that [he was in] a genuine and subsisting relationship"*", my concern relating "*in part to the fact that the Respondent appeared to accept that the relationship was genuine and subsisting in the 'reasons for refusal letter' of 2 December 2013, yet the Judge appeared in part to place adverse weight on the Appellant's failure to produce particular evidence to demonstrate the relationship was genuine and subsisting: e.g. see determination at paragraph 31 and 32*" (paragraph 3 of the Notice of Adjournment & Directions). I indicated "*The main – but not exclusive - focus of the resumed hearing will likely be whether or not, taking the Appellant's case at its highest as to a genuine and subsisting marital relationship, there are compelling circumstances not sufficiently recognised under the Rules that warrant the grant of leave to remain outside the Rules on human rights grounds*" (paragraph 2). The case was adjourned to permit the filing of further evidence in order to establish the extent to which the Judge's error may have been material – and in particular whether there were compelling circumstances not sufficiently recognised under the Immigration Rules.

8. Further evidence has now been filed by the Appellant - although most of this goes to the question of the genuineness of the marital relationship that was put in issue by the decision of the First-tier Tribunal, rather than specifically adding to the issue of 'compelling circumstances'. I also heard oral evidence at length from the Appellant, and Ms Krasniqi, and Ms Krasniqi's mother Arjeta Krasniqi, details of which are set out in my record of proceedings which is on file.

Consideration

9. Aspects of the Appellant's and Ms Krasniqi's account of their developing relationship and courtship are summarised at paragraphs 7 and 9-10 of the decision of the First-tier Tribunal. Amongst those matters I note in particular the following: although in mid-2012 they had discussed becoming engaged, the initial plan was then to marry after 2 to 3 years; the couple became engaged a few days prior to the Appellant travelling to the UK – he had obtained his visit visa prior to the engagement party; when the Appellant came to the UK he had just completed his first year at university in Kosovo; "*he planned just to visit the UK*" (paragraph 7); similarly "*It was not their intention to marry when the appellant came on a visit visa*" (paragraph 11).

10. I pause to note that in his oral evidence the Appellant stated that he failed his first year university exams and would not have been admitted to the second year until he had passed such exams. Any intention to continue with his studies was abandoned after he had spent some time in the UK with Ms Krasniqi. The Appellant added that in addition to his studies he "*was also working in my father's business*" in Kosovo. His father sent money for him to the UK "*as and when I need it*". (The Appellant also stated that he had employment prospects in the UK: if he were permitted to work there was a job available to him in his uncle's car wash business; in the meantime "*if I really need money*" his uncle could help him financially, although this had not arisen.)

11. The Appellant also stated in answer to my questions by way of clarification that he had been planning on staying in the UK at the most for a month, and had intended to return and carry on his life, by which he meant continuing to work in his father's business and "*maybe*" getting back to his university studies. As regards Ms Krasniqi, the plan was to get married when she had completed her studies and to stay in touch in the meantime by her visiting Kosovo as often as she could and otherwise to be in touch through Facebook and by telephone.

12. The Appellant was asked if prior to their marriage he and/or his partner had sought any advice as to the immigration position consequent upon marriage. He was initially confused in his answers and I am satisfied that he mixed up the advice that he sought after the marriage with the concept of seeking advice prior to the marriage. He was nonetheless vague as to whether he had ascertained the position prior to the wedding, although

declared himself to have been "*very positive*" and thought that he would be granted a stay in this country.

13. In contrast under cross-examination Ms Krasniqi stated that she was aware at all times that there were requirements that would need to be met including financial requirements: she had known this even prior to the engagement. She also stated that she had discussed immigration issues with the Appellant before the marriage. In light of her answers I am driven to the conclusion that the Appellant was deliberately evasive in his answers as to his knowledge of the immigration position prior to marriage. I find that this couple knew full well when they got married that the fact of their marriage would not avail them in immigration terms under the Rules.

14. In the covering letter to the Appellant's application, dated 4 January 2013, his representatives explain that Ms Krasniqi, a British citizen, was studying and working part-time at a dispensing chemist; the relationship was described as "*very happy, strong and loving*" and it was asserted that the Appellant wished to remain in the UK because he "*cannot be apart from her*". Discretionary leave was sought on "*compassionate, compelling and exceptional grounds and Article 8*": the Appellant was said to be of good character, and could be supported by his family and wife in the UK without recourse to public funds; his wife relied on him for emotional support, they loved each other "*immensely*", and the Appellant "*would not be able to survive without her*".

15. I pause to note that all that was really being said of substance in the application was that the Appellant and his wife had a good marital relationship. I struggle to see that this could possibly be an exceptional circumstance: it would be a rare couple who would not characterise their marital relationship as strong and loving some three weeks after the date of their marriage ceremony.

16. In the Notice of Adjournment & Directions, in respect of the contended 'compelling circumstances' of the Appellant's case I identified as potentially relevant the contents of paragraph 5 of the Determination (relating the Appellant's case as advanced), and paragraph 15 of the Appellant's Skeleton Argument before the First-tier Tribunal. The relevant passages are in these terms:

    (i) "*[The Appellant) and his wife enjoy a genuine and subsisting relationship and cannot live without each other. The exceptional circumstances are that his wife would not be able to meet the Entry Clearance financial requirements because she is still studying. It would also be unreasonable to expect her to relocate to Kosovo as her immediate family are in the UK and she is presently studying and working. He is presently being supported by his wife and his parents in Kosovo.*" (Determination at paragraph 5); and

    (ii) "*The Appellant is married to a British citizen, and, further, that there are in this case insurmountable obstacles to their family life continuing in Kosovo… [T]he Appellant's impeccable immigration*

history, his level of integration in the UK and his close ties and connections with his family, friends and his community." (Appellant's Skeleton Argument at paragraph 15).

17. Again it seems to me that the mere fact of a genuine and subsisting relationship cannot amount to an exceptional circumstance. Something extraordinary by way of interdependence would need to be demonstrated to turn a genuine marital relationship into an exceptional circumstance - perhaps, by way of example, where one partner was severely disabled.

18. Nor do I hesitate to observe that in my judgement the fact that the Entry Clearance requirements cannot be met cannot constitute an exceptional circumstance – a matter that was also asserted in the Appellant's witness statement of 6 February 2014 (paragraph 9). If the inability to satisfy the financial requirements were an exceptional circumstance it would effectively nullify that aspect of immigration control.

19. Further, a 'good' immigration history is only a neutral factor, not a positive factor, in any consideration of proportionality: whilst a poor immigration history may be an adverse factor, an applicant cannot expect favourable treatment by reason of simply having respected the Rules and the law. Similarly in respect of the absence of a criminal record.

20. Nothing particularly different was advanced before me by way of documentary and oral evidence.

21. Whilst I do not doubt the genuineness of the marital relationship, it seems to me plain that the application and appeal contain assertions of considerable hyperbole: I do not for a moment accept, for example, that the Appellant could not "*survive*" without cohabiting with his partner in the UK.

22. Furthermore, references to the strength of the Appellant's private life in the UK in an application made some 5 months after his entry, and based only on general assertions, are without merit. So far as private life built up during the period of the processing of the application and appeal, I remind myself of provisions of section 117B(5) of the Nationality, Immigration and Asylum Act 2002 – "*Little weight should be given to private life established by person at a time when the person's immigration status is precarious*" – and duly accord little weight. In my judgement nothing has been shown in any of the evidence before the Tribunal that would suggest any different approach should be taken to private life on the facts of this particular case.

23. Moreover, the effect of the Respondent's decision is no more than that this couple must revert to their original plan of the Appellant joining his wife in the UK at some point after the completion of her studies when she is in a position to sponsor him in accordance with the Rules on the basis of full-time employment. I do not see it as a hardship that should sound significantly in any proportionality balance that this couple must now go

through the steps that they had originally planned to take even at the time of the Appellant's departure from Kosovo for what it is said was intended to be only a visit. The Appellant has extensive family in Kosovo: for example at section 6.17 of his FLR(O) application form signed on 3 January 2013 he indicated that his parents, 4 brothers and other relatives were in Kosovo. (See also covering letter dated 4 January 2013.) In so far as he may need a support network – and there is no obvious reason why the Appellant as a young able-bodied man should need support from other persons – I find that it is more likely than not that one is available to him. I bear in mind that work is available to him through his father, and also that his father has financially supported him whilst he is in the UK.

24. I have considered whether, in the alternative, rather than pursuing the original plan, Ms Krasniqi could now join her husband in Kosovo.

25. In this context – and indeed generally throughout my deliberations - I recognise and take into account Ms Krasniqi's studies in the UK. Clearly, if she were to relocate to Kosovo to reside with her husband then this would disrupt her studies. However, it seems to me that this is an un-likely scenario: the reality is in the event of a refusal, and if the couple wish to make a home in the UK, Ms Krasniqi will remain in the UK to be in a position to sponsor her husband – relocating to Kosovo would likely put her in a position where he would be unable to meet the financial requirements of entry clearance. Indeed when asked under cross-examination what would be the obstacle to setting up home in Kosovo, the Appellant responded that his wife could not live there because she is planning to find a job in the UK and that her family was in the UK. Neither of these matters are actual obstacles to establishing a marital home in Kosovo, but are expressions of, understandable, preference.

26. Ms Krasniqi, for her part, stated in her evidence that she was not prepared to move as the UK was "*all she had known*", and that her husband knew that: it was obvious to her that the marital home would be in the UK because she had always lived there. Again this is essentially an expression of preference rather than an identification of an insurmountable obstacle to establishing a marital home in Kosovo. In this context, whilst I place only minimum weight upon it, it is not irrelevant to note that the Ms Krasniqi is originally from Kosovo, speaks the language, visits annually for a two week holiday, and has extended family members including grandparents and an aunt living in Kosovo. It is not a country with which she is entirely unfamiliar although I accept that she does not, as she said, "*feel at home there*".

27. In this regard the case is essentially put on the basis that Ms Krasniqi has lived in the UK for most of her life, is a British citizen, has family members in the UK to whom she is close, and is currently studying.

28. I do not consider that these matters, either individually or cumulatively, amount to exceptional circumstances not recognised under the Rules. As regards length of residence and citizenship it is to be note that the Rules

at paragraph EX.1 have as one of its premises that the applicant's partner may be a British Citizen: it follows that nationality in itself cannot be determinative of Article 8 rights. Moreover, moving away from the country of a person's nationality is a far from unusual circumstance in the modern world. Whilst the type of society that one moves into, and including such matters as its relative affluence, cultural freedoms, healthcare facilities, may be relevant considerations in evaluating the practicalities of relocation, there is no evidential basis on the facts of this particular case to demonstrate that the Appellant and his wife would face any practical difficulties in establishing a home together, or would face any circumstances amounting to a barrier or that would involve any undue hardship. As regards the relinquishing of the life established in the UK by Ms Krasniqi, it is again to be recalled that inherent in the wording of EX.1, is that an applicant's partner will be settled in the UK. It follows that the relinquishing of a settled life in the UK is not in itself inevitably to be equated with an insurmountable obstacle or an exceptional circumstance: something more is required. In this context I do not find that there is anything particular, or significant, or remarkable, in the fact that the Appellant's partner is studying.

29. It was asserted during the course of the oral evidence that the Appellant provided emotional support to his wife in respect of her studies, and it was suggested by him that if he were to return to Kosovo "*she may lag behind in her studies and suffer from stress*". I accept that separation may cause upset, and that in making their original plans they may have underestimated the extent of their emotional attachment - which perhaps only manifested once they began to see each other freely in the UK. However, I am not prepared to accept without more that such upset would prevent Ms Krasniqi from completing her studies if she so wished to do.

30. Whether or not Ms Krasniqi would now abandon her studies to take up full-time employment the sooner to support an application for entry clearance, or continue with her studies with a view to improving her employment prospects at the end of such studies, is essentially a choice for her in consultation with her husband and bearing in mind potential earning capacity under the alterative scenarios. In this context I remind myself that the attempt to secure leave to remain in the UK in itself represented a change of choice on the part of the couple – the original plan having been for the Appellant to return to Kosovo after the visit to the UK. The choices that the Appellant and Ms Krasniqi make are subject to the strictures of immigration control, they do not have, as of right, a completely free choice in such matters and they cannot circumvent immigration control by asserting any such right of free choice.

31. Accepting – as I do – that this is a genuine relationship, and taking the Appellant's case at its highest – i.e. that there was a genuine post-entry change of plan as opposed to a manipulation of immigration control to secure entry as a visitor when it was all along intend to seek to remain as a partner - the reality of this case is that the Appellant and his wife quite simply find themselves in a position where they do not meet the

requirements of immigration control. Whilst they have attempted to suggest exceptional compassionate circumstances, their case is not obviously distinguishable from that of any other married couple (or cohabitees or civil partners), who do not meet the requirements of the Rules. The premise of the case is really no more than that the fact that they are genuinely married and committed to each other should be enough to secure leave to remain. That is unsound in principle and essentially nullifies the system of immigration control put in place by the state to protect the wider public interest. This is a case that, on the evidence before me, cannot succeed under Article 8.

32. For the avoidance of any doubt I accept that the first two **Razgar** questions are to be answered in the Appellant's favour. There is no issue between the parties in respect of the third and fourth **Razgar** questions. The fifth **Razgar** question – proportionality – is to be answered in the Respondent's favour. In this latter regard I have had consideration to the public interest requirements pursuant to section 117B of the 2002 Act, and in this regard in particular note the requirements of financial independence and that little weight should be recorded accorded to private life established when immigration status is precarious.

33. On the particular facts of this case, I find that the Immigration Rules provide a complete answer to the Appellant's case under Article 8. I am not persuaded that there are exceptional circumstances in this case which would result in unjustifiably harsh consequences if the Appellant were removed from the UK. I find that the Respondent's decision to remove the Appellant from the UK does not breach his, or anybody else's human rights.

34. I recognise that the impact of the Respondent's decision – and indeed my decision on appeal – is likely to be perceived by some, including Ms Krasniqi, as an infringement on the liberties of a British citizen. Whilst it is the case that a British citizen is at liberty to marry whomsoever he or she wishes (subject to widely accepted restrictions with regard to age, co-sanguinity, and polygamy), it is indeed the case that the scheme of immigration control that operates in the UK does not give a British citizen an absolute right to live with a chosen spouse in the UK. The Immigration Rules provide quite specific restrictions. The most particular restrictions are financial: this is no surprise to Ms Krasniqi who was aware of such restrictions even prior to the marriage. Nor is it the case that Article 8 of the ECHR provides a ready route to circumvent the requirements of the Rules.

35. Nonetheless I accept that the First-tier Tribunal Judge's approach to the question of the genuineness of the marital relationship was in error of law in that he relied upon the absence of materials in circumstances where the basis of the Respondent's decision did not indicate that it would be necessary for the Appellant to produce any further materials in respect of the genuineness of his relationship. Having had the benefit of hearing the evidence of the Appellant and his wife I have little hesitation in concluding

that that was a material error in that it is clear to me that this is a genuine marital relationship.

36. In all the circumstances I consider it appropriate to set aside the decision of the First-tier Tribunal and to remake the decision in the appeal. However, for the reasons already given the appeal, which is only pursued on human rights grounds, does not succeed under Article 8 and accordingly is dismissed.

Notice of Decision

37. The decisions of the First-tier Tribunal contained an error of law and is set aside. I remake the decision in the appeal.

38. The appeal is dismissed.

Deputy Judge of the Upper Tribunal I. A. Lewis18 September 2015