Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/11596/2016**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23 January 2018	**On 29 January 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE FROOM

Between

ZEQIR MAHMUTAJ
(NO ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, Counsel
For the Respondent: Mr P Nath, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is from Deçan in what is now recognised by the UK and many other countries as the Republic of Kosovo, although the appellant's nationality is recorded as Serbian. He married his wife, Ms Rudima Berisha, in Deçan in 1990. They have no children. The appellant fled the war and claimed asylum in Germany but his application was refused in 1995 and 1997. He arrived in the UK on 23 September 1998 and claimed asylum under a false name (Beqir Berisha). His wife was his dependant. Asylum was refused and his appeal dismissed. He made further representations but it came to light he had used a false name and he was removed to Kosovo on 20 January 2005. His wife remained in the UK. He returned to the UK and entered illegally on 28 July 2005. He has remained here

ever since. His wife was granted settlement and subsequently naturalised as a British citizen on 19 October 2011.

2. On 11 December 2015, the appellant made an application for leave by completing form FLR(FP). His application was refused on 15 April 2016 with a right of appeal. The reasons for refusal can be summarised as follows:

   - The application failed under the ten-year partner route because the test in paragraph EX.1(b) of Appendix FM of the rules, that the appellant would face insurmountable obstacles[1] to family life continuing outside the UK, was not met;
   - The application failed under the ten-year private life route because the test in paragraph 276ADE(1)(vi) of the rules, that there would be very significant obstacles to the appellant's integration into Kosovo, was not met; and
   - The circumstances of the application did not amount to exceptional circumstances so as to warrant a grant of leave outside the rules.

3. The appellant appealed to the First-tier Tribunal on article 8 grounds. His appeal was heard by Judge of the First-tier Tribunal McGrade on 14 September 2017 at Taylor House, London. The appellant and his wife gave evidence, as well as a number of their close friends.

4. In a decision promulgated on 6 October 2017, Judge McGrade dismissed the appeal. He found as fact the appellant and his wife had put down strong roots in the UK and enjoyed close friendships. The appellant had worked as a painter and in property maintenance. His wife was employed as a chef. Ms Berisha visited Kosovo[2] in 2017.

5. The Judge found the decision engaged article 8 but it was a proportionate decision. He accepted that, with the exception of the six months he had spent in Kosovo after being removed there in 2005, the appellant had not lived in Kosovo for 24 years. However, he had spent the first 35 years of his life there and he concluded at [17] that there were not very significant obstacles to the appellant's integration there. He then considered whether there were compelling circumstances which would warrant a grant of leave outside the rules. He noted the appellant had spent 19 years, save for six months in 2005, in the UK and he was married to a British citizen. They had a genuine and subsisting relationship. The fact they had no children favoured the appellant's case because it meant they had no other close family members. Ms Berisha was extremely reluctant to return to Kosovo, at least to the Deçan area. The appellant was taking medication for depression but there was no medical evidence to show he was at a high risk of suicide.

6. The Judge concluded at [30] that the appellant's "appalling immigration history" outweighed these matters notwithstanding the fact the decision would have

[1] The RFRL erroneously refers to "very significant obstacles".
[2] It was agreed the Judge's reference to Albania was a slip of the pen.

"significant consequences" for his relationship with his wife and the fact she was now a British citizen.

7. The appellant sought permission to appeal on two grounds. Firstly, the Judge had failed to give adequate reasons for his conclusion that paragraph 276ADE(1)(vi) was not met. Secondly, the Judge failed to provide a properly structured analysis of proportionality and, in particular, failed to consider whether it was reasonable for the appellant's wife to relocate to Kosovo, applying *VW (Uganda) v SSHD* [2009] EWCA Civ 5[3].

8. Permission to appeal was granted by the First-tier Tribunal. The grant makes clear that the Judge considered the first ground arguable. The grant also appears to endorse the point that it was arguable Judge McGrade had failed to consider whether it was reasonable to expect Ms Berisha to relocate to Kosovo with the appellant.

9. I heard submissions from the representatives as to whether the First-tier Tribunal Judge had made an error of law in his decision.

10. Ms Reid made two points. Firstly, she argued the Judge had not given reasons for finding there were not very significant obstacles to the appellant's reintegration in Kosovo. In particular, he had not included in his assessment the appellant's mental health difficulties. The appellant had explained that he would have no life in Kosovo and his home had been destroyed. Secondly, in finding the public interest outweighed the appellant's interests in enjoying his family life in the UK, he had not started by considering whether the rules were met. Specifically, he had not considered whether there were insurmountable obstacles to family life continuing in Kosovo. He had found the appellant's wife could return to Kosovo but he had not provided reasons for that finding.

11. Mr Nath pointed out the correct test was no longer as explained in *VW (Uganda)*, as relied on in the grounds seeking permission to appeal, but was now as explained in *R (Agyarko) v SSHD* [2017] UKSC 11. He said the Judge had dealt sufficiently with paragraph 276ADE(1)(vi) in relation to the appellant. In relation to family life, there were no insurmountable obstacles to family life continuing in Kosovo and the Judge's conclusion was sustainable. Ms Reid reiterated that the decision did not contain any proper consideration of Appendix FM.

Error of law?

12. Having carefully read the decision and considered the arguments put forward by the representatives I have concluded that the decision of the First-tier Tribunal

[3] At paragraph 24, Sedley LJ stated as follows: "*EB (Kosovo)* now confirms that the material question in gauging the proportionality of a removal or deportation which will or may break up a family unless the family itself decamps is not whether there is an insuperable obstacle to this happening but whether it is reasonable to expect the family to leave with the appellant."

does not contain any material errors of law such that it must be set aside. The appeal is therefore dismissed. My reasons are as follows.

13. Dealing firstly with paragraph 276ADE(1)(vi), the meaning of the similar provisions in relation to deportation appeals found in section 117C(4) of the 2002 Act and paragraph 339A of the rules were considered in *SSHD v AK (Sierra Leone)* [2016] EWCA Civ 813. Sales LJ said at paragraph [14] that the "*idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.*" In *Treebhawon and Others (NIAA 2002 Part 5A – compelling circumstances test)* [2017] UKUT 00013 (IAC), McCloskey J, in re-making the decision, said the "very significant obstacles" test was clearly an elevated threshold. Mere hardship, mere difficulty, and mere upheaval or inconvenience, even where multiplied, will generally be insufficient (see [37]).

14. At [16] the Judge noted that the appellant relied on paragraph 276ADE(1)(vi). He then decided the issue as follows:

> "I have accepted the Appellant was born in Deçan and lived there for the first 35 years of his life. He married his wife there. He returned there in January 2005 and remained there for a period of six months. During that six-month period, he lived with friends and relatives. I accept that, with the exception of that six-month period, he has not lived in Kosovo for more than 24 years. However, I am unable to conclude that there would be very significant obstacles to the Appellant's integration into the country to which he would have to go if required to leave the United Kingdom."

15. The reasoning is concise but adequate. The test imposes an elevated threshold and it was sufficient for the Judge to say that, despite not having lived there for 24 years, the fact the appellant had resided there for six months before returning (illegally) to the UK showed he would be able to reintegrate. He noted the appellant had been able to stay with relatives and friends in Kosovo. The appellant had lived most of his life in Kosovo. The appellant would not therefore be without support and he would be able to participate meaningfully in day-to-day life. He did not lack familiarity with the language, culture and way of life in Kosovo. At [24] he noted the appellant was familiar with Kosovo and that the medical evidence did not suggest a severe mental health condition. I see no error of law of the kind described by Ms Reid.

16. Turning to the other ground pursued by Ms Reid, the correct approach to article 8 in cases of precarious family life has been the subject of definitive guidance in the judgment of Lord Reed in *Agyarko*. His Lordship explained that the test of insurmountable obstacles, as used in paragraph EX.1 of Appendix FM of the rules and later defined in paragraph EX.2, was taken from the jurisprudence of the ECtHR:

> "42. In *Jeunesse*, the Grand Chamber identified, consistently with earlier judgments of the court, a number of factors to be taken into account in assessing the proportionality under article 8 of the removal of non - settled migrants from a contracting state in which they have family members. Relevant factors were said to include the extent to which family life would effectively be ruptured, the extent of the ties in the contracting state, whether there were "insurmountable obstacles" in the way of the family living in the country of origin of the non - national concerned, and whether there were factors of immigration control (for example, a history of breaches of immigration law) or considerations of public order weighing in favour of exclusion (para 107).
>
> 43. It appears that the European court intends the words "insurmountable obstacles" to be understood in a practical and realistic sense, rather than as referring solely to obstacles which make it literally impossible for the family to live together in the country of origin of the non - national concerned. In some cases, the court has used other expressions which make that clearer: for example, referring to "un obstacle majeur" (*Sen v The Netherlands* (2003) 36 EHRR 7, para 40), or to "major impediments" (*Tuquabo - Tekle v The Netherlands* [2006] 1 FLR 798 , para 48), or to "the test of ' insurmountable obstacles' or 'major impediments'" (*IAA v United Kingdom* (2016) 62 EHRR SE 19, paras 40 and 44), or asking itself whether the family could "realistically" be expected to move (*Sezen v The Netherlands* (2006) 43 EHRR 30, para 47). "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: see paras 117 and 119."

17. Clearly, the reasonableness test advocated in the grounds seeking permission to appeal is no longer apposite. I agree with Mr Nath on this point and Ms Reid did not seek to persuade me otherwise. Rather, she argued the Judge had erred by not identifying the insurmountable obstacles which existed on the facts of the case.

18. Returning to the Judge's decision, it is unlikely there could be a material error simply because the Judge failed to frame his decision on the question of whether there were insurmountable obstacles within the rules or outside the rules because, as explained in *Agyarko*, the rules are in line with Strasbourg jurisprudence on the point.

19. The argument that the appellant's wife could not accompany him to Kosovo does not show the threshold of insurmountable obstacles has been reached. The Judge was entitled to find that, whilst the appellant's wife would not wish to resettle in Deçan, where she had bad experiences during the war, she is not a refugee and she voluntarily visited Kosovo last year in order to attend a wedding.

20. The Judge gave weight to the public interest and considered the factors set out in section 117B of the 2002 Act. As Lord Reed explained, it is perfectly legitimate to take account of breaches of immigration law weighing in favour of exclusion. I see no error in this aspect of the Judge's decision either.

NOTICE OF DECISION

The Judge of the First-tier Tribunal did not make a material error of law and his decision dismissing the appeal is upheld.

No anonymity direction is made.

Signed Date 24 January 2018

Deputy Upper Tribunal Judge Froom