Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: EA/02701/2019

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 25th January 2022	**On 10th June 2022**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

ALBAN NDREGJONI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Alban Ndregjoni, in person
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Albania. On 8th April 2016 he applied for a permanent residence card as confirmation of a retained right of residence in the UK under the Immigration (European Economic Area) Regulations 2006. In a decision dated 4th October 2016 that application was refused because the applicant had failed to provide evidence that he met the relevant requirements of the Regulations. The appellant was subsequently served with a statement of additional grounds under s120

Nationality, Immigration and Asylum Act 2002 inviting him to set out any additional grounds relied upon. The appellant responded on 15th March 2019 and claimed that his removal would be in breach of the Article 8 ECHR rights of the appellant and his partner. On 21st May 2019, the appellant was served with a decision to remove him from the UK in accordance with s10 Immigration and Asylum Act 1999 giving rise to a right of appeal.

2. The appellant's appeal was heard by First-tier Tribunal Judge Howorth ("Judge Howorth") on 10th January 2020. The appellant was represented by counsel, and it was conceded on behalf of the appellant that the appellant could not succeed under the Immigration (European Economic Area) Regulations 2006. The appellant relied solely on Article 8. The appeal was allowed on Article 8 grounds for reasons set out in a decision promulgated on 23rd January 2020.

3. It was common ground between the parties at the hearing of the appeal before the First-tier Tribunal that the appellant and his partner, Vikki Brauer, are in a genuine and subsisting relationship. Judge Howorth found that the relationship has existed since August 2013 and the appellant, and his partner have lived together since 18th February 2015. Judge Howorth referred to the medical evidence relating to the appellant's partner and concluded that the decision to remove the appellant from the UK is disproportionate.

4. The respondent was granted permission to appeal by First-tier Tribunal Judge McClure on 19th February 2019. The appeal was heard by Upper Tribunal Judge Rintoul on 7th December 2020 and the decision of Judge Howorth was set aside for reasons set out in a decision promulgated on 22nd of December 2020. Upper Tribunal Judge Rintoul directed the decision will be remade in the Upper Tribunal. He also directed:

> "3. The appellant must provide up-to-date evidence about Ms. Brauer's medical conditions as the letter from the GP of 27 March 2019 says that he has not seen Miss Brauer for two years and that letter will be nearly 2 years old at the date of the next hearing.
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> 4. Any medical evidence must set out
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> (i) the medical conditions Ms Brauer suffers from;
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> (ii) what treatment is given for the conditions;
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> (iii) what the effect would be if the treatment was not available;

> 5. At the next hearing, the upper Tribunal will be assisted by evidence about
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> (i) what care Mr Ndregjoni gives to Ms Brauer
>
> (ii) why that care could not be provided by anyone else"

5. The appeal was listed for hearing before me on 29th June 2021. The appellant and his partner attended that hearing and were not represented. They claimed that although they had attended the 'Error of Law' hearing before Upper Tribunal Judge Rintoul on 7th December 2020 when an oral decision was handed down, they did not receive a copy of the written decision that was sent to the appellant by post on 22nd December 2020. They had not therefore considered the matters set out in the 'Notice of Decision & Directions' section of the decision and in particular, had not provided the relevant evidence regarding the health of the appellant's partner. Furthermore, the appellant said that at the hearing before the FtT, his partner's mother and sister gave evidence. They had not attended because the appellant had not appreciated that they are required to attend. I was invited to adjourn the hearing so that the relevant evidence is before the Tribunal before it remakes the decision.

6. Giving the appellant the benefit of the doubt, I adjourned the hearing so that the appellant had a final opportunity to ensure that all relevant evidence is before the Upper Tribunal before a decision is made. For the avoidance of any doubt, I provided the appellant with a copy of the decision of Upper Tribunal Judge Rintoul, and I drew the appellant's attention to the directions made regarding the requirement for medical evidence and the evidence that will assist the Tribunal reach its decision. I indicated to the appellant that in the event that the appellant fails to file and serve evidence in support of his appeal, it is likely that the Tribunal will determine the appeal on the evidence before it, on the next occasion.

7. The matter was relisted for a resumed hearing before me on 25th January 2022. The appellant attended with his partner and three further witnesses. The appellant was again unrepresented. I was informed that he had sent the evidence relied upon to the respondent in a number of separate emails, but the appellant had not appreciated that copies should also have been sent to the Upper Tribunal. Mr Bates was able to

forward the relevant emails to my clerk and arrangements were made for the documents relied upon by the appellant to be printed. At the end of the hearing before me, the appellant provided me with the original of the bundle that he has prepared, because it contains clearer copies of the documents relied upon.

Background

8. The appellant arrived in the UK on 27th July 2006. He has a lengthy immigration history and was previously entitled to a residence card under the EEA Regulations because of his previous marriage to an EEA national. That marriage ended when a decree absolute was issued on 15th January 2014.

9. As I have said, before First-tier Tribunal Judge Howorth it was common ground that the appellant and his partner, Vikki Brauer, a British citizen, are in a genuine and subsisting relationship. Judge Howorth found that the relationship had existed since August 2013 and the appellant, and his partner have lived together since 18th February 2015. Mr Bates did not invite me to go behind those findings.

10. The appellant does not claim that he is able to meet the requirements for leave to remain on family and private life grounds set out in Appendix FM and paragraph 276ADE(1) of the immigration rules. The issue in this appeal is whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellant or his family and, whether refusal of leave to remain is in all the circumstances, disproportionate.

The evidence

11. I have before me:

    a. The respondent's bundle.

    b. An appellant's bundle comprising of 92 pages previously sent to the First-tier Tribunal by the appellant's representatives under cover of a letter dated 15th July 2019. I refer to this as "the appellant's bundle".

c. An ‘Addendum appeal bundle’ comprising of 40 pages previously sent to the First-tier Tribunal by the appellant’s representatives under cover of a letter dated 25th October 2019. I refer to this as “the appellant’s addendum bundle”

d. An ‘Addendum bundle’ comprising of pages 1a to 16a previously sent to the First-tier Tribunal by the appellant’s representatives under cover of a letter dated 6th January 2020. I refer to this as “the appellant’s second addendum bundle”

e. A further bundle of documents prepared by the appellant in readiness for the hearing of the appeal before me. I refer to this as “the appellant’s third addendum bundle”

The appellant

12. I referred the appellant to the two witness statements that he has previously made. The appellant confirmed that he signed the witness statements dated 12th July 2019 and 6th January 2020, and that the statements had been read by him prior to them being signed. The appellant confirmed that the content of the statements is true and correct to the best of his knowledge and belief. The appellant confirmed that he has not made any further witness statements and that he had nothing further to add.

13. In cross-examination, the appellant confirmed that his partner is currently in receipt of universal credit. In addition, she receives some other benefit associated with her health, which amounts to £200 to £300 each month. Although he cannot recall precisely what benefit she receives, he said that it was something like a ‘Personal Independence Payment.’ The appellant confirmed that he is still in contact with his family in Albania, which comprises of his mother, father, siblings, and a number of uncles and aunts. He confirmed that his parents live in Tirana. He said that his partner tries to communicate with them but has to use ‘Google Translate’ to assist in communication. He was asked whether he has looked into the treatment that may be available to his partner in Albania. He said he has provided his mother with a list of the medicines that are currently prescribed to his partner. He said his mother went to the hospital and was told that only two of the medicines would be available. He could not recall which two. He was asked

whether there is any evidence from the hospital confirming that only two of the medicines are available in Albania. He said that he did not think it would be possible to get that in writing. The appellant said that even during the winter, his partner uses fans to cool herself down, but she would not be able to keep a fan on all the time in Albania, with the very high temperatures there. It was suggested by Mr Bates that the average temperature in Albania rarely reaches 30°C and the average temperature in Tirana during the summer is 25°C. The appellant said that his partner sweats because of her illness and is known to sweat even when the temperature is very low. He said that a high temperature would be a problem for her. The appellant said that when he was on remand in 2019 for a period of 4 to 5 months charged with an offence of which he was later acquitted, his partner lived on her own, but had the support of her family. The appellant said that she regularly visited him a number of times each week. She was assisted by her family with the visits but found it difficult to manage on her own.

14. Mr Bates reminded the appellant that he had previously applied for entry clearance as a spouse and was out of the UK for a period of 4 to 5 months while that application was processed. He was asked why he could not make a similar application now. The appellant said that in 2005, he was advised to go back to Albania and make an application for entry clearance to join his partner and child. This time, he was advised to simply make the application for leave to remain and he was not advised to make an application for entry clearance. The appellant said that he has never passed an English language test in the UK for immigration purposes, and he last worked in roofing construction, and washing cars. He was asked whether he would be able to live with his family in Albania whilst an application for entry clearance is made and decided. The appellant said that if that is the last option, he could do that, but would be separated from his partner. He accepted that his partner's family would help and support her. He said that although he believes his partner could accompany him to Albania, her health would suffer.

15. Mr Bates asked the appellant about his children from his previous relationship. He confirmed he has a son and daughter aged 16 and 15. He said that he does not have any contact with them and is unable to

have contact until they are 16. When asked what it is that prevents contact, the appellant said that his ex-wife is against him having contact. He said that he had made an application through the courts two or three years ago, but it was decided in his ex-partner's favor, and he is now only allowed to see his children when they are 16, and when they want to see him. He said that the last time that he spoke to his children was over a year ago, and his son told him that he is not ready to see the appellant.

Vikki Sharon Brauer

16. Vikki Brauer ("Ms. Brauer") is the appellant's partner. I referred Ms. Brauer to the three witness statements that she has previously made. Ms. Brauer confirmed that she signed the witness statements dated 15th July 2019, and 6th January 2020 *(erroneously dated 6.1.2001)* and that the statements had been read by her. She confirmed that she has made another statement that is unsigned but appears at page 1 of the appellant's addendum bundle. Ms Brauer confirmed that the content of those statements is true and correct to the best of her knowledge and belief. Ms. Brauer confirmed that she has not made any further witness statements. Asked if there was anything she wishes to add, she said that she would not be able to get the treatment she currently receives through the NHS, in Albania. She said that she suffers from Hidradenitis Suppurativa, a chronic inflammatory skin condition. She has provided a letter dated 12th July 2021 from Dr Scrivens at Broom Leys Surgery, enclosing a patient summary and a printout of the consultations she has had with a clinician. As set out in the patient summary printed in July 2021, Ms Brauer confirmed she is currently prescribed Hydroxocobalamin 1mg/1m solution (*1ml every 3 months)*, Dermol 500 lotion (*to use a soap substitute)*, Epimax Cream *(to apply as needed)*, Omeprazole 10mg (*one capsule once or twice a day)*, and Escitalopram 10mg tablets *(one daily)*. Ms Brauer said that about two weeks ago, she was also prescribed Propranolol, a beta blocker, and Flucloxacillin, an antibiotic used to treat skin infections. She was not aware of the precise doses of the medications recently prescribed. Ms. Brauer said that she has made enquiries about the availability of her medication in Albania, through the appellant's parents. She has been told that only two items of medication are available on a prescription in Albania, and she will be

unable to receive all of the medications that she requires because they are not available without charge. She said that she has no evidence of that before the Tribunal.

17. In cross-examination Mr Bates asked Ms. Brauer whether she has made any enquiries to find out whether it is possible to get more than one prescription, if only two items of medication are available on a prescription. She said she had not made that enquiry. As to income, Ms. Brauer said that she does not receive any 'Personal Independence Payment' but is in receipt of Universal Credit that includes an additional amount for 'limited capacity for work.' Ms. Brauer said that when the appellant was being held on remand in 2019, she received assistance from her family, but all her family now work, and the support they can provide is limited. She said that even the support available from her nephews and nieces will be limited. When she was asked about the climate in Albania and how it might affect her, she said that even now, in the middle of winter, she is sweating. She said her condition is difficult to manage, and she regularly has to go to the doctors because boils occur on her skin, and it is very unpleasant to live with.

Sheila Brauer

18. Sheila Brauer is the mother of the appellant's partner, Vikki Brauer. I referred Sheila Brauer to the statement that she has previously made, and which is to be found at pages 5 to 7 of the appellant's bundle. She confirmed that she signed the witness statement dated 4th July 2019, and the statement had been read by her. I also referred her to an undated hand-written letter that appears in the appellant's third addendum bundle. She confirmed that is a letter written by her to support the appeal before me. She confirmed that the content of her statement and letter is true and correct to the best of her knowledge and belief.

19. In cross examination, Sheila Brauer confirmed that she works from 8am to 3:45pm, and from about March, she is able to do overtime and start earlier so that she works between 6:00am and 3:45pm, Monday to Friday. There is sometimes further overtime available on Saturdays. She said that when the appellant was on remand in 2019, the family struggled because she herself suffers from arthritis. They rallied around,

but it was hard because they all work. She said that her daughter Kerry, works at the same place as her, and they work the same hours. Her other daughter, Lisa, works different shifts at Morrisons. She said that all of her grandchildren work and leave home at about 7:30am. Her grandson's work longer hours during the summer because they are roofers. When asked why the family could not rally around again if the appellant had to return to Albania to make an application for entry clearance, Shelia Brauer said that the family is not around much during the day, and there would be no one around to make sure that Vikki is okay. She said that none of them would be able to have too much time off work. She said that if the appellant is required to return to Albania, she does not know how her daughter will cope.

Lisa Brauer

20. Lisa Brauer is the sister of the appellant's partner, Vikki Brauer. I referred Lisa Brauer to her statement which is to be found at pages 9 to 12 of the appellant's bundle. She confirmed that she signed the witness statement dated 3rd July 2019, and that the statement had been read by her. I also referred her to an undated hand-written letter that appears in the appellant's third addendum bundle. She confirmed that is a letter written by her to support the appeal before me. She confirmed that the content of her statement and letter is true and correct to the best of her knowledge and belief. She had nothing to add.

21. In cross-examination, she confirmed that she and her children had helped Vikki Brauer in 2019 when the appellant was being held on remand in 2019. She said that they all now work full-time with day jobs.

Kerry Brauer

22. Kerry Brauer is the sister of the appellant's partner, Vikki Brauer. I referred Kerry Brauer to her statement that is to be found at pages 13 to 16 of the appellant's bundle. She confirmed that she signed the witness statement dated 3rd July 2019. I also referred her to an undated hand-written letter that appears in the appellant's third addendum bundle. She confirmed that is a letter written by her to support the appeal

before me. She confirmed that the content of her statement and letter is true and correct to the best of her knowledge and belief. She had nothing to add.

23. In cross examination, she confirmed that she works 34 hours each week with her mother. Her hours of work are 8am to 3:45pm Monday to Thursday and 8am to 2:30pm on Fridays. She has two children, aged 12 and 16, both of whom attend school. She too helped the appellant's partner in 2019, when the appellant was being held on remand, but she was unable to drive her sister around. She provided support by telephoning her sister regularly, approximately once every two to three days. She said that she also saw and visited her sister regularly, because they live up the road from each other and the family is "in and out of the houses." She said that her sister can sometimes be a bit awkward and likes to be left alone. She confirmed that if her sister needed help, she was always there for her, and would remain there for her, subject to her own work commitments. She said that she in fact relies upon her sister, Vikki, to drive her to hospital appointments and other places she needs to attend, every one or two weeks. She said that sometimes the appellant drives and sometimes, if her sister is feeling well, she drives.

The submissions

24. The parties' submissions are a matter of record and there is little to be gained by me setting out the submissions at any length in this decision. Broadly stated, Mr Bates submits there is nothing in the evidence before the Tribunal to establish that the requirements of Appendix FM and paragraph 276ADE of the immigration rules are met. As for paragraph 276ADE(1)(vi) of the rules, he submits the appellant clearly has family living in Tirana. He submits it is clear that the appellant could return to Albania and that he will continue to have the support of his family, with whom he remains in contact. Mr Bates submits there is no evidence capable of establishing that the minimum income requirements or English Language requirements set out in Appendix FM are met. As far as the appellant relies upon Section EX and the exceptions to certain eligibility requirements for leave to remain as a partner, it has been accepted that the appellant has a genuine and subsisting relationship

with a partner who is in the UK and as a British citizen. The issue is whether there are insurmountable obstacles to family life with his partner continuing outside the UK.

25. Mr Bates submits the focus of the appellant's claim is the health of his partner and although the burden rests with the appellant, the evidence regarding her health and the treatment that she requires is limited. There is no evidence that the medications that are prescribed to the appellant's partner are not available in Albania, and if it is the case that only two medications can be prescribed on a prescription, it is unclear whether more than one prescription might be available. Mr Bates submits the evidence before the Tribunal fails to establish that the medical support required by the appellant's partner would not be available to her in Albania. In Albania, the appellant would have the opportunity to work and support his partner. The appellant refers to the climate in Albania and its impact on the health of his partner, but, Mr Bates submits, the only recent evidence before the Tribunal is the letter from Broom Leys Surgery dated 12th July 2021, in which Dr Scrivens states; "*Having to move to a different country and leave her family would greatly affect her mental health and the heat would exacerbate her medical conditions".* Dr Scrivens does not elaborate and provide any evidence of the particular difficulties that the appellant's partner might face. The respondent does not accept that the climate in Albania is so severe that it would have a significant impact on the appellant's partner. Mr Bates submits the maximum temperature in the summer is below 30°C and akin to a hot summer day in the UK. Mr Bates submits there is nothing to establish that there are insurmountable obstacles to family life between the appellant and his partner continuing outside the UK.

26. As to Article 8 and a proportionality assessment outside the immigration rules, Mr Bates submits the appellant's relationship with his partner was formed at a time when the appellant's immigration status was precarious. There was no certainty that the relationship could continue in the UK. He submits that in accordance with s117B(4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), the Tribunal must attach little weight to a relationship performed with a qualified partner that is established by a person at a time when the

person is in the UK unlawfully. Mr Bates submits it is open to the appellant to return to Albania and make an application for Entry Clearance. He has done it before, and there is no reason for him not to do that again. The evidence before the Tribunal is that the family of the appellant's partner are close, and they clearly support each other. They supported the appellant's partner for a number of months when the appellant was on remand in 2019, and they would do so again, if she chose not to travel to Albania with the appellant. Mr Bates submits making an application for entry clearance might not be the preferred choice, and it might be harsh, but the refusal of leave to remain is not disproportionate.

27. In reply, the appellant said that he feels like England is his home country and not Albania. He said that he could not take his partner to Albania with the health problems that she has, and away from her family. He said that although he could take her to Albania with him, it is impossible for him to take her away from her own family and it is better for her to have her family close to her. He said that he has previously made an application for entry clearance, but the problem now is that he must consider all the expenses associated with making an application. He said that it is possible that his partner would also keep changing her mind and there could be problems when they are in Albania because being away from her family, might impact on her mental health. He urged me to allow his appeal.

Findings and Conclusions

28. In reaching my decision I have had regard to all the evidence before me, whether or not it is referred to. I have had regard, in particular to the evidence set out in the witness statements of the appellant, his partner and members of her family. I have also considered the limited medical evidence before me. I have had the opportunity of hearing the oral evidence of the appellant and his witnesses and seeing their evidence tested in cross-examination.

29. In considering the oral evidence, I recognise that there may be a tendency by a witness to embellish evidence because although the core of the claim may be true, he/she believes that by embellishing their evidence, the claim becomes stronger. I also remind myself that if a

Court or Tribunal concludes that a witness has lied about one matter, it does not follow that he/she has lied about everything. A witness may lie for many reasons, for example, out of shame, humiliation, misplaced loyalty, panic, fear, distress, confusion, and emotional pressure. I have been careful not to find any part of the account relied upon, to be inherently incredible, because of my own views on what is or is not plausible. On the whole I find the appellant and his witnesses to be credible. They were clear and consistent in the evidence that they gave, and I am quite satisfied that they were genuinely seeking to assist the Tribunal reach its decision. They did not hesitate in their answers, and they were in my judgment, quite candid and honest in their responses. Where they express a view or belief, I am quite satisfied that it is a genuinely held view or belief.

30. It is uncontroversial that the appellant and his partner, Vikki Brauer, are in a genuine and subsisting relationship. Judge Howorth found that the relationship has existed since August 2013 and the appellant, and his partner have lived together since 18th February 2015. The relationship has endured and having had the opportunity of hearing from the appellant, and the witnesses called, I find the appellant enjoys family and private life with his partner and Article 8 is plainly engaged. I find that the decision to refuse the appellant leave to remain has consequences of such gravity as to engage the operation of Article 8. I accept that the interference is in accordance with the law, and that the interference is necessary to protect the legitimate aim of immigration control and the economic well-being of the country. The central issue in this appeal is whether the decision to refuse leave to remain is proportionate to the legitimate aim.

31. In a human rights appeal, although the appellant's ability to satisfy the immigration rules is not the question to be determined, it is capable of being a weighty factor when deciding whether the refusal is proportionate to the legitimate aim of enforcing immigration control. As set out by the Court of Appeal in TZ (Pakistan) [2018] EWCA Civ 1109, compliance with the immigration rules would usually mean that there is nothing on the respondent's side of the scales to show that the refusal

of the claim could be justified. At paragraphs [32] to [34], the Senior President of Tribunals confirmed that where a person meets the rules, the human rights appeal must succeed because 'considerable weight' must be given to the respondent's policy as set out in the rules.

Paragraph 276ADE(1)(vi) of the immigration rules

32. For the avoidance of doubt, I have considered whether the appellant is entitled to lave to remain on private life grounds under paragraph 276ADE(1)(vi) of the immigration rules. That is, he is aged 18 years or above, has lived continuously in the UK for less than 20 years, but there would be very significant obstacles to the appellant's integration into Albania. The phrase 'insurmountable obstacles', involves a stringent test, to be interpreted in a sensible and practical, rather than a purely literal way. The phrase "very significant" equally connotes an "elevated" threshold, and as Underhill LJ noted in Parveen v SSHD [2018] EWCA Civ 932, that test will not be met by "mere inconvenience or upheaval". In the end, the task of the Secretary of State, or the Tribunal, in any given case is simply to assess the obstacles to integration relied on, whether characterised as hardship or difficulty or anything else, and to decide whether they regard them as "very significant".

33. The appellant first arrived in the UK in July 2006 when he was 27 years old having lived in Albania prior to his arrival in the UK. He is able to speak Albanian and on his own account, he retains familial links to Albania. The appellant confirmed in his evidence before me that he is still in contact with his family in Albania, which comprises of his mother, father, siblings, and a number of uncles and aunts. He said that his partner also communicates with them, albeit she has to rely upon 'Google Translate' to assist in communication. The appellant will not be without emotional or practical support. Although the appellant has now spent a number of years in the UK, I find that any difficulties that he might encounter would be short lived, while he settles back in, and secures employment. I am entirely satisfied he is enough of an insider in terms of understanding how life in Albania is carried on and that he has a capacity to participate in it. Quite simply, there is nothing in the

evidence before the Tribunal that establishes that the stringent test set out in paragraph 276ADE(1)(vi) is met.

Section EX of Appendix FM of the immigration rules

34. In Agyarko –v- SSHD [2015] EWCA Civ 440, the Court of Appeal considered the requirement in the Immigration Rules, Appendix FM s.EX.1(b), that there be "insurmountable obstacles" preventing an applicant from continuing their relationship outside the UK. Sales LJ said:

> 21. The phrase "insurmountable obstacles" as used in this paragraph of the Rules clearly imposes a high hurdle to be overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding than a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom.
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> 22. This interpretation is in line with the relevant Strasbourg jurisprudence. The phrase "insurmountable obstacles" has its origin in the Strasbourg jurisprudence in relation to immigration cases in a family context, where it is mentioned as one factor among others to be taken into account in determining whether any right under Article 8 exists for family members to be granted leave to remain or leave to enter a Contracting State: see e.g. *Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34* , para. [39] ("… whether there are insurmountable obstacles in the way of the family living together in the country of origin of one or more of them …"). The phrase as used in the Rules is intended to have the same meaning as in the Strasbourg jurisprudence. It is clear that the ECtHR regards it as a formulation imposing a stringent test in respect of that factor, as is illustrated by Jeunesse v Netherlands (see para. [117]: there were no insurmountable obstacles to the family settling in Suriname, even though the applicant and her family would experience hardship if forced to do so).
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> 23. For clarity, two points should be made about the "insurmountable obstacles" criterion. First, although it involves a stringent test, it is obviously intended in both the case-law and the Rules to be interpreted in a sensible and practical rather than a purely literal way: see, e.g., the way in which the Grand Chamber approached that criterion in Jeunesse v Netherlands at para. [117]; also the observation by this court in *MF (Nigeria) v Secretary of State for the Home Department [2013] EWCA Civ 1192; [2014] 1 WLR 544* , at [49] (although it should be noted that the passage in the judgment of the *Upper Tribunal in Izuazu v Secretary of State for the Home Department [2013] UKUT 45 (IAC); [2013] Imm AR 453 there referred* to, at paras. [53]-[59], was making a rather different point, namely that explained in para. [24] below regarding the significance of the criterion in the context of an Article 8 assessment).
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> 24. Secondly, the "insurmountable obstacles" criterion is used in the Rules to define one of the preconditions set out in section EX.1(b) which need to be satisfied before an applicant can claim to be entitled to be granted leave to remain under the Rules. In that context, it is not simply a factor to be taken into account. However, in the context of making a wider Article 8 assessment outside the Rules, it is a factor to be taken into account, not an

absolute requirement which has to be satisfied in every single case across the whole range of cases covered by Article 8 : see paras. [29]-[30] below.

35. The 'insurmountable obstacle' relied upon by the appellant and his partner is the health of the appellant's partner and the on-going treatment that she receives and requires. The appellant and his partner live together at the same address. I accept the evidence of the appellant's partner that she suffers from Hidradenitis Suppurativa, a chronic inflammatory skin condition. Her claim is supported by the letter dated 12th July 2021 from Dr Scrivens and the patient summary provided within her medical records. I also accept her evidence that she is currently prescribed Hydroxocobalamin 1mg/1m solution, Dermol 500 lotion, Epimax Cream, Omeprazole 10mg and Escitalopram 10mg tablets. I am quire prepared to accept the evidence of the appellant and his partner that the inflammatory skin condition causes Ms. Brauer a good degree of discomfort and that she requires the lotions and tablets prescribed to manage the symptoms. I do not accept however that the appellant's partner suffers from any physical or mental health conditions such that she is not able to independently carry out activities of daily living. There is a paucity of evidence before me regarding any care required by Ms. Brauer and provided by the appellant. The appellant states in his witness statement that Ms Brauer needs his support and that he worries she will harm herself. He tries to do as much as he can at home to take the pressure off Ms. Brauer. He states he does all the domestic tasks because she is not able to, most of the time. She does not like going out or seeing people and some days, she will sleep all day. There is nothing in the medical notes and records that was drawn to my attention to suggest she requires assistance to carry out activities of daily living. Her sister Kerry Brauer said in evidence that Vikki Brauer can sometimes be a bit awkward and likes to be left alone. At its highest, I accept the inflammatory skin condition she has, causes her discomfort and is likely to have some impact upon her physical and mental health, sometimes causing her to lack motivation.

36. There is no evidence before me that the medications required by Vikki Brauer would not be available to her in Albania. In his evidence before me, the appellant said that he has provided his mother with a list of the medicines that are currently prescribed to his partner. He said his

mother went to the hospital and was told that only two of the medicines would be available. Ms. Brauer's evidence was that she has made enquiries about the availability of her medication in Albania, through the appellant's parents. She has been told that only two items of medication are available on a prescription in Albania, and she will be unable to receive all of the medications that she requires because they are not available without charge. There appears to be some confusion as to precisely what the appellant's parents have said about the availability of the medication, but either way, I have no reliable evidence before me regarding the medication and treatment that may be available to the appellant's partner in Albania. I am not satisfied that only two of the medications (*which the appellant was unable to identify)* are available. Equally, I am not satisfied that Ms. Brauer would only have access to two of the medications because only two are provided on one prescription. I have no evidence before me that if more than two medications are required, they cannot be set out on more than one prescription. I find that the medication prescribed to Ms. Brauer would be available to her in Albania, and that she would have access to any treatment she requires. The medical evidence before me is very limited, but I find that Ms Brauer could access the health service in Albania, albeit the service may not be to the same standard as in the UK. On the evidence before me, I am not satisfied on balance, that there are insurmountable obstacles to the appellant's family life with his partner continuing outside the UK. I do not accept that the exception to the eligibility requirements for leave to remain as a partner are met.

37. I have considered Appendix FM GEN.3.2 and whether there are exceptional circumstances which would render refusal of entry clearance a breach of Article 8 because such refusal would result in unjustifiably harsh consequences for the appellant, his partner and her family. I have already found that there are no insurmountable obstacles to the appellant's family life with his partner continuing outside the UK. If the appellant's partner does not join him in Albania, the appellant will be separated from his partner but that is entirely a matter of choice. The appellant and his partner were previously separated when the appellant was held on remain in 2019. The appellant and his partner maintained

contact and the appellant's partner was supported by her family. Although the refusal of leave to remain will impact upon the appellant's ability to see his partner and her family as often as they might like, I am not satisfied that the refusal of leave to remain results in unjustifiably harsh consequences for the appellant, his partner and the wider family. The family has demonstrated its ability to provide support and maintain their close relationships when the appellant was held on remand previously. Having heard the evidence of the witnesses I am satisfied that this is a close and loving family and that they all pull together to support and assist each other whenever necessary. I accept individuals have their own work commitments and will not be able to provide constant care and support for Ms Brauer, but I find that is not necessary. They pulled together to support the appellant's partner in 2019, and I have no doubt they would do so again. It follows that in my judgment, the appellant cannot meet the requirements of the Immigration Rules. The appellant does not therefore qualify for leave to remain under the immigration rules.

Whether refusal of leave to remain is nevertheless disproportionate

38. I have carefully considered whether the decision to refuse the appellant leave to remain is nevertheless disproportionate. The ultimate issue is whether a fair balance has been struck between the individual and public interest; GM (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1630. Section 117A(2)(a) of the 2002 Act requires me to have regard to the considerations listed in section 117B in considering the public interest question. The public interest question is, in turn, defined in section 117A(3) as being the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2). There is, however, an element of flexibility within this provision. In Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58, at [49], Lord Wilson observed that the provisions of section 117B cannot put decision-makers in a strait-jacket which constrains them to determine claims under Article 8 inconsistently with the article itself.

39. In Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60, Lord Reed emphasised that the failure to meet the requirements of the Immigration Rules is a relevant and important consideration in an Article 8 assessment because the Immigration Rules reflect the assessment of the general public interest made by the responsible minister and endorsed by Parliament. In making my assessment, I attach particular weight to this important consideration.

40. I have considered whether it would be disproportionate to require the appellant to return to Albania to make an application for entry clearance; Chikwamba v Secretary of State for the Home Department [2008] UKHL 40. In Kaur v Secretary of State for the Home Department [2018] EWCA Civ 1423. Holroyde LJ, said at [45], (emphasis added):

> "I have quoted in paragraph 26 above the passage in which Lord Reed (at paragraph 51 of his judgment in Agyarko) referred to Chikwamba. It is relevant to note that he there spoke of an applicant who was certain to be granted leave to enter if an application were made from outside the UK, and said that in such a case there might be no public interest in removing the applicant. That, in my view, is a clear indication that the Chikwamba principle will require a fact-specific assessment in each case, will only apply in a very clear case, and even then will not necessarily result in a grant of leave to remain."

41. The immediate difficulty for the appellant here is that I simply do not have the evidence before me to establish that he would be certain to be grated leave to enter if an application were made from outside the UK. The appellant has not completed an English Language test and on the evidence before me, it seems unlikely that the appellant meets the English language requirement in the Immigration Rules. The fact that the appellant has some understanding of the English language and may be able to speak the language sufficiently fluently to communicate with his partner does not answer the specific requirements in the Immigration Rules. In any event, there are other requirements that must be met including a financial requirement, but there no evidence before me to establish that the relevant requirements are met. In the circumstances, unlike in Chikwamba, the appellant does not have "every prospect of succeeding" in an application for entry clearance from abroad. I simply cannot be satisfied that the appellant is certain to be granted leave to enter if an application were made from outside the United Kingdom.

42. In Younas (section 117B(6)(b); Chikwamba; Zambrano) [2020] UKUT 129 (IAC) the Upper Tribunal summarised the position in the judicial head note in these terms:

> "An appellant in an Article 8 human rights appeal who argues that there is no public interest in removal because after leaving the UK he or she will be granted entry clearance must, in all cases, address the relevant considerations in Part 5A of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') including section 117B(1), which stipulates that 'the maintenance of effective immigration controls is in the public interest'. Reliance on Chikwamba v SSHD [2008] UKHL 40 does not obviate the need to do this."

43. In reaching my decision, I have had regard to the public interest considerations set out in s117B of the Nationality, Immigration and Asylum Act 2002. The maintenance of immigration control is in the public interest. The appellant has acquired some English language skills, albeit he does not have an English language qualification. He does not work but is supported by his partner and her family in the UK. These are however nothing more than neutral factors in my assessment of proportionality. Section 117B(4) provides that little weight should be given to a private life or a relationship with a qualifying partner that is established by a person at a time when they are in the United Kingdom unlawfully. On 10th March 2010, the appellant was issued with an EEA residence card that was valid until 13th March 2015. His entitlement to that residence card arose from his previous marriage, which ended with the decree absolute issued on 15th January 2014. Judge Howorth previously noted that at the time the appellant entered into a relationship with Ms. Brauer, the EEA national sponsor (*the appellant's previous partner)* was not working, and as such the appellant was not lawfully in the UK. The appellant and his partner have been in a relationship since August 2013 and have lived together since February 2015, but throughout the majority of that time, the appellant has been in the UK unlawfully.

44. In his evidence, the appellant and his partner stress that the appellant's removal from the United Kingdom would have an impact upon the health of the appellant's partner. Vikki Brauer, her mother and her sisters gave evidence to the effect that it would be "very hard" for her to either live apart from the appellant or to accompany him to Albania. The appellant, however, has lived in Albania for a number of years,

speaks the native language, has family in that country and is familiar with the local way of life. The appellant and Ms. Brauer are capable of overcoming any difficulties that arise from relocation, or indeed separation.

45. In my final analysis, having considered all the evidence before me in the round, and although I have accepted the refusal of leave to remain will interfere with the appellant's family and private life, in my judgement, the interference for the purposes of the maintenance of effective immigration control is proportionate and, it follows, lawful.

46. It follows that I dismiss the appeal.

Notice of Decision

47. I dismiss the appeal on the basis that the refusal of leave to remain does not breach section 6 Human Rights Act 1998 (based on Article 8 ECHR).

48. No anonymity direction is made.

Signed **V. Mandalia** Date 31st May 2022

Upper Tribunal Judge Mandalia