IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004502

First-tier Tribunal No: HU/50344/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

19th January 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

FITIE SHEHI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Nasim, instructed by Legal Rights Partnership
For the Respondent: Mr T Melvin, Senior Presenting Officer

Heard at Field House on 9 January 2024

DECISION AND REASONS

1. The appellant appeals with the permission of Deputy Upper Tribunal Judge Lewis against the decision of First-tier Tribunal Judge Plowright ("the judge"). By his decision of 11 September 2023, the judge dismissed the appellant's appeal against the respondent's refusal of her human rights claim.

Background

2. The appellant is a citizen of Albania who was born on 25 September 1971. She married an Albanian gentleman called Shkelqim Shehi in Albania in 1992. They have three adult children. Mr Shehi came to the UK in 2001 and claimed asylum as a Kosovan national. He was refused asylum but granted Indefinite Leave to Remain under the Legacy Programme in 2010. He naturalised as a British citizen in November 2012.

3. In 2014, the respondent was alerted to the sponsor's deception as to his nationality. She eventually decided in 2021 to deprive him of his citizenship. I do

not know whether there was an appeal against that decision, but it is immaterial. What matters for present purposes is that he was granted Discretionary Leave to Remain on 13 June 2022, valid until 30 November 2024. Mr Nasim asserted before me without demur from Mr Melvin that this status was granted in recognition of the sponsor's ability to satisfy paragraph 276ADE(iii) of the Immigration Rules on account of his residence in the UK for more than two decades. That certainly seems likely to be the case.

4. Turning now to the appellant, her immigration history may be stated more shortly. She entered the United Kingdom unlawfully in August 2022 and she made an application for leave to remain as Mr Shehi's spouse on 8 November 2022. The application was refused under Appendix FM of the Immigration Rules because:

(i) Mr Shehi is not settled or British (E-LTRP 1.2)
(ii) The appellant was present in the UK without leave (E-LTRP 2.2)
(iii) There were no insurmountable obstacles to the couple living in Albania(EX1(b))

5. Given the focus of this appeal, it is not necessary to say anything more about the refusal letter except that the respondent did not consider there to be any reason to grant leave to the appellant outside the Immigration Rules with reference to Article 8 ECHR.

The Appeal to the First-tier Tribunal

6. The appellant appealed to the First-tier Tribunal and her appeal was heard by the judge, sitting in Birmingham, on 1 September 2023. Mr Nasim represented the appellant then as he does before me. The respondent was represented by a Presenting Officer (not Mr Melvin). The judge heard oral evidence from the appellant and the sponsor and submissions from the advocates before reserving his decision.

7. In his reserved decision, the judge noted that it was accepted that the appellant could not meet the requirements of the Immigration Rules. He nevertheless considered whether there were insurmountable obstacles to the couple living in Albania because it was relevant to his assessment of Article 8 ECHR. Having reminded himself of Lal v SSHD [2019] EWCA Civ 1925, the judge reached this conclusion, at [14]:

> The appellant is 51 years old and her husband is 57 years old. Up until 2022, the appellant lived in Albania, so for the majority of her life. Up until 2000, when the appellant's husband would have 28/29 years old he also lived in Albania, therefore for a substantial period of his life. The appellant's husband has been living in the UK for the last 23 years and he has family and friends in the UK however, both he and his wife speak Albanian. It is not suggested that either the appellant or her husband have any serious health issues. Whilst I understand that they would prefer to live in the UK together I have taken into account all the above matters and I do not find that they amount to insurmountable obstacles to the appellant's family life with her husband continuing in Albania.

8. At [15], the judge turned to consider whether the respondent's decision brought about the 'unjustifiably harsh consequences' required to demonstrate that the interference with family life was a breach of Article 8 ECHR. The judge made the following findings in that respect:

> [16] The appellant points to the fact that her husband has been living in the UK for the last 23 years. He works in the UK and he has family and friends in the UK. Although I was told that they have two adult children living in the UK, I was not given any more information about them. I have no doubt though that in 20-3 years, the appellant's husband has built up a life for himself in the UK and does not want to return to Albania. It was also pointed out to me that, given the appellant's husband has only limited leave to remain in the UK, the appellant could not meet the entry requirements for leave to enter under appendix FM, because she does not meet the definition of a 'partner'.
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> [17] However, the appellant has no lawful leave to remain in UK and she came to the UK without any leave to enter the UK, in order to be with her husband, which was in my judgement an attempt to circumvent the immigration rules.
>
> [18] Therefore both the appellant and her husband have always known that she has no lawful leave to remain in the UK and could have no expectation that she would be allowed to remain in the UK given that they knew this and the fact that they could continue their relationship in Albania, I find that there would not be unjustifiable harsh consequences for the appellant or her husband if the appellant were to be removed from the UK.
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> [19] I have gone on to consider, outside of the rules whether any of the above factors would mean that the refusal of the appellants appeal would amount to a disproportionate interference with her right to a family life with her husband in the UK. However, I find that the refusal would not be cause, although he does not want to, the appellants husband can move to Albania to be with his wife.

9. The judge therefore dismissed the appeal on Article 8 ECHR grounds.

The Appeal to the Upper Tribunal

10. The appellant's solicitors advanced a single ground of appeal in the application for permission. It was that the judge had failed to address the appellant's argument that the sponsor would forfeit his limited leave to remain and his opportunity to apply for ILR in the event that he relocated to Albania with the appellant. It was submitted that this was a mandatory consideration in light of what was said by the Court of Appeal at [34]-[35] of GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630; [2020] INLR 32.

11. I heard submissions from Mr Nasim and Mr Melvin. Mr Melvin had also filed a short skeleton argument in which he invited me to uphold the decision of the First-tier Tribunal. I do not propose to rehearse the submissions here; I will consider what was said during my analysis of the grounds of appeal.

Analysis

12. It was said in the appellant's submissions to the Secretary of State that the sponsor had only limited leave to remain and that he would place that in jeopardy if he accompanied the appellant to Albania. The appellant's solicitors actually submitted that 'by reason of this factor alone [...] there are insurmountable obstacles to the couple continuing their family life overseas.' That submission was supported by reference to GM (Sri Lanka) v SSHD.
13. The Secretary of State took that submission into account in his decision, noting that the sponsor would have been aware that the appellant entered without leave and that the parties 'should have been aware of the possibility that family life might not be able to continue in the UK'. The respondent did not accept, for these and other reasons, that there were insurmountable obstacles to the family life continuing in Albania or, ultimately, that the refusal gave rise to unjustifiably harsh consequences.

14. The same submission was made in reliance on GM (Sri Lanka) v SSHD in the appellant's skeleton argument before the First-tier Tribunal, at [13](iv) of that document.

15. In GM (Sri Lanka) v SSHD, the Court of Appeal (Green and Simler LJJ) gave guidance on the approach to be adopted to cases in which it is said that removal would give rise to a breach of Article 8 ECHR in its family life aspect. At Section D of its judgment, the court set out some 'General points about the proportionality test'. Then, from [33] onwards, it turned to the specific criticisms made of the FtT's decision and to its conclusions about those argument. At [34], it considered the submission made by the appellant that the FtT had failed to consider a relevant matter, which was the nature of the rights which the family members would have to relinquish in order to leave the UK and live with the appellant in Sri Lanka. At the time of the hearing before the FtT, the sponsor and the children had DLR. Having considered the learning on that question at [34], the court held at [35] that the judge in the FtT had erred in failing to 'analyse or weigh the nature and relevance of the legacy rights held by the appellant and the children as part of the proportionality exercise'.

16. Mr Nasim submits that the judge in the instant appeal fell into the same error and that I am bound to accept that the nature and relevance of the sponsor's DLR was a mandatory consideration in the Article 8 ECHR analysis. For the respondent, Mr Melvin submitted that what was said by the Court of Appeal at [34]-[35] was *obiter* and that I am accordingly not bound to follow it.

17. I struggled at the hearing to understand the basis upon which Mr Melvin made that submission. As I said to him, it seemed to me that the Court of Appeal had given five reasons for concluding that the decisions of the FtT and the UT in that case were vitiated by legal error and were to be set aside. The conclusions reached at [34]-[35] comprised the first of those reasons and were evidently one of the determinative reasons for the decision. It could not be any clearer that what was said at [34]-[35] was part of the ratio decidendi of the decision. It seems that Mr Melvin might have been somewhat wrongfooted by the discussion of relief at the end of the judgment. It was recorded there that the sponsor had been granted ILR after the decisions below and this caused the court to allow the appeal altogether (ie without remitting to the Upper Tribunal) in order that the Secretary of State could consider the circumstances of the family as a whole and take a fresh decision on the Article 8 ECHR claim. I cannot for my part see any

reason why that discussion as to relief would render *obiter* all that had gone before, however, and I reject Mr Melvin's submission insofar as he maintained it.

18. It is quite clear that the judge was aware that the sponsor has only limited leave to remain. There is reference to that fact throughout the decision. What is missing, with respect the judge, is any engagement with the submission made by the appellant in reliance on GM (Sri Lanka) v SSHD. I am not able to discern any attempt to analyse or weigh the relevance of the sponsor's DLR as part of the proportionality exercise. I am satisfied that Mr Nasim is correct in his submission that this was a necessary aspect of the proportionality assessment and that the absence of it from the judge's 'balance sheet' represents an error of law.

19. It remains to consider Mr Melvin's submission that this point could not have made a difference to the outcome of the appeal, however. In considering that question, I remind myself that the test is whether the decision on the appeal would inevitably have been the same but for the error: IA (Somalia) v SSHD [2007] EWCA Civ 323, applying the approach set out by Moses LJ in Detamu v SSHD [2006] EWCA Civ 604.

20. In my judgment, this single point could not have made any difference to the otherwise cogent analysis undertaken by the judge. The appellant entered the United Kingdom unlawfully shortly after the sponsor had been granted limited leave. The judge was amply entitled to find that she had set out to circumvent immigration control. She was unable to meet the Immigration Rules and, as the respondent had noted in the decision under challenge, the sponsor would have been aware in sponsoring the application that one of the possible outcomes was that he would have to consider whether to leave the UK in order to continue their family life in Albania. The family life was rekindled in the UK at a time when the appellant was present unlawfully.

21. What the appellant sought to do was to present the Secretary of State (and the FtT) with a *fait accompli.* It is clear from the authorities, most notably R (Agyarko) v SSHD [2017] UKSC 11; [2017] 1 WLR 823, at [54], that it will be only be in the most exceptional circumstances that there will be a breach of Article 8 when a state is confronted with a *fait accompli* such as this. Whilst it is correct to assert that the sponsor will place his status in the UK in jeopardy if he follows the appellant to Albania, and whilst that is a relevant matter in the assessment of proportionality, it is a consideration in this case which was simply incapable of making any material difference to that assessment, given the public interest factors ranged against the appellant. Even giving that point its proper significance, the outcome of a lawful proportionality assessment in this case is abundantly clear.

22. In the circumstances, I find that the error into which the judge fell was immaterial to the outcome of the appeal and the appellant's appeal is dismissed.

Notice of Decision

The appellant's appeal is dismissed. The decision of the FtT dismissing her appeal stands.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

12 January 2024