Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03357/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 21 August 2017	**On 22 August 2017**

Before

Upper Tribunal Judge Southern

Between

MUHARREM NELI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Raw, counsel instructed by Kilby Jones, Solicitors
For the Respondent: Ms Z. Ahmad, Senior Home Office Presenting Officer

DECISION

1. The appellant has been granted permission to appeal against the decision of First-tier Tribunal Judge Turquet who, by a determination promulgated on 11 May 2017, dismissed his appeal against refusal of his human rights claim, the appellant having asserted that there would be an impermissible infringement of rights protected by Article 8 of the ECHR if he were not granted leave to remain to enjoy his private and family life with his wife, a British citizen, in the United Kingdom. The application made by the appellant that led to the decision under appeal in these

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proceedings was made on form FLR(FP) and on it the applicant indicated that he wished it to be considered under the Partner Route.

2. The judge summarised the appellant's immigration history and history of immigration applications as follows:

> "The appellant came to this country illegally in 1999. Although he was an Albanian national he made an asylum claim as a Kosovan. His application was refused in 2000 but he did not leave. He was removed on 22.4.4004. On 10.11.2004 he was refused a visa on the basis of his relationship with Donna Louise Woodward, although he claims that he based it on that relationship because Peppy (his wife) did not have indefinite leave to remain in the UK at that time. His application for leave to enter the UK as the partner of Pepe Christiane Prabowo was refused on 22.2.2006. Disregarding the fact that he had been refused entry clearance twice, he entered the UK unlawfully 2006 and spent 10 years illegally in the country before making the present application.
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> On his application form, when asked at question 4.9 if he had ever been refused a visa for any country including the UK, the No box was ticked. When asked at question 4.10 if he had ever been deported, removed or otherwise required to leave any country including the UK in the past 10 years the No box was ticked."

3. The judge explained why, as this meant that the appellant could not meet the suitability requirements of the applicable immigration rules, this was an application that the respondent was correct to refuse:

> "The requirements for limited leave to remain as a partner are set out in R-LTR 1.1. R0LTR 1.1(d) provides that (i) the applicant must not fall for refusal under S-LTR Suitability Leave to Remain; (ii) the applicant meets the requirements of E-LTRP.1.2-1.2 and 2.1 and 2.2. and paragraph EX.1 applies....
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> S-LTR.2.1 provides that the applicant will normally be refused on grounds of suitability if any of the paragraphs S-LTR.2.2-2.4 apply. S-LTR.2.2 states "Whether or not to the applicant's knowledge (a) false information, representations or documents have been submitted in relation to the application including false information submitted to any person to obtain a document used in support of the application; or (b) there has been a failure to disclose material facts in relation to the application". In this case the appellant's form did not disclose the fact that he had been refused two visas, even though there was a specific question asking if this had happened. I find that there was a failure to disclose a material fact relating to whether he was refused a visa."

4. As the judge had observed, that meant that the Suitability Requirements of the rule were not met, whether or not the failure to disclose was with the appellant's knowledge. This meant that the application fell to be refused on the basis that the Suitability Requirements had not been met:

> "At the hearing, Mr O'Callaghan (counsel for the appellant) stated that the appellant's representatives had told him on the phone that the error on the form was theirs. The appellant in his statement had said the caseworker made a mistake. In the event that someone employed by the solicitor had completed the form incorrectly, I find it reasonable to expect a statement from the firm or the relevant person to have attended the hearing. The drafted grounds of appeal submitted by the appellant's solicitors do not make any mention of it being their fault that the visa refusals were not disclosed. In any event S-LTR 2.2 states whether or not the failure to disclose material facts was to the applicant's knowledge and in this case the appellant had signed the declaration on the application form stating that the information in the form was accurate and that he was aware that it was an offence to make a statement or declaration that he knew to be false or did not believe to be true. I find that as a material fact was not disclosed, the present application is one that would normally be refused on grounds of suitability. I find that as the application falls to be refused under Sections S-LTR he does not satisfy the requirements of R-LTR 1.1(d)(i)"

5. Next, the judge found that, in any event, the application fell to be refused on the basis that the appellant did not meet the Eligibility Requirements of the rules. This was because he was in the United Kingdom in breach of immigration rules so that he could not satisfy E-LTRP2.2 and he could not meet the requirements of EX.1 because absent were the insurmountable obstacles to family life with his partner continuing outside the United Kingdom.

6. In explaining why she arrived at that conclusion, the judge noted that:

> "The appellant is aged 37, who speaks Albanian, the language of his home country. His parents live there. He has not given any satisfactory explanation why he would be unable to seek employment in his country of birth, where he lived until he was 19 and where he lived from 2004 to 2006. He spent his childhood and formative years there.
>
> The appellant's wife is now a British citizen. However, she is of Indonesian ethnicity. She has learned to speak English. She has not put forward any satisfactory explanation why she could not learn Albanian, especially as the appellant would be able to help her. It is claimed she would have difficulty finding employment. She is a nursery nurse and no information has been provided from Albania of research undertaken into finding the possibilities of employment. The appellant's family are in Albania and would be in a position to offer support whist the appellant

> and his wife settle into life in Albania. I do not find that the appellant has demonstrated that there are insurmountable obstacles and that the "high hurdle" has been overcome…"

The reference to a "high hurdle" to be confronted was taken from a reference by the judge to *Agyago* [2015] EWCA Civ 440 in which, the judge noted:

> "Sales LJ stated "the phrase "insurmountable obstacles" as used in this paragraph (EX.1) of the Rules clearly imposes a high hurdle to overcome by an applicant for leave to remain under the Rules. The test is significantly more demanding that a mere test of whether it would be reasonable to expect a couple to continue their family life outside the United Kingdom."

7. There are two grounds upon which the appellant sought permission to appeal. The first ground is that the judge "acted unreasonably" in rejecting the appellant's application for his failure to declare in the application form the two entry clearance refusals and his removal in 2004. The grounds assert that:

> "The First Tier Judge rejected the explanation for the sole reason that the appellant's solicitor had neither provided a statement, nor attended the hearing… it was nevertheless incumbent upon the FTJ to have given some weight to the representations of a solicitor, an officer of the court, which were conveyed to the First Tier Tribunal by a member of the Bar. The First Tier Judge gave no weight to the instructions that were relayed to the court by counsel and thereby adopted an erroneous and unreasonable approach to the evidence."

The grounds continue by complaining that the judge was wrong to find that the asserted error by the solicitor was not significant because the appellant had himself signed the declaration on the form to the effect that the information contained within was accurate.

8. There are several difficulties with that ground. First, there is no specific finding of fact made by the judge, anywhere in her decision, that this was a deliberate misrepresentation by the appellant. To that extent, the grounds are simply wrong to assert that the sole reason for rejecting the appellant's account was the absence of evidence from the appellant's solicitors. Certainly, the judge was sceptical about the appellant's claim that he was unaware of the fact that the refusals had not been disclosed, because he had himself signed the declaration at the end of the form to the effect that the information provided was true to the best of his knowledge. The judge recorded the submission made to the effect that this was an error by the solicitors but observed that, in any event the appellant failed to meet the suitability requirement whether or not the failure to disclose was to his knowledge. As I have said above, the judge then went on to explain why the application failed also on the basis of the failure to meet the Eligibility Requirements.

9. Secondly, we now have a witness statement from the solicitor who assisted the appellant in completing the form. In that statement she confirms that it was her who completed the form. Addressing the question posed on the form as to whether the appellant had previously been refused a visa, she explained why she ticked the box indicating a negative answer:

> "I did ask the appellant this question and he did answer no hence I ticked this box. However we do not sit next to the client to read the question whilst we speak and I do believe he could have genuinely misheard me thus causing me to make an error in completing this form."

The solicitor added that the applicant has since confirmed that he would have answered "yes" if he had properly understood the question that had been read out to him. Thus, this was not an error by the solicitor at all. She completed the form precisely in accordance with the instructions given to her by her client.

10. A further difficulty with this ground of challenge is that it requires the Tribunal to accept that the fact of the appellant having signed a declaration to the effect that the information provided in completing the form is correct is completely meaningless and that nothing whatsoever flows from the fact of that declaration having been signed by the appellant. If that were so, then taken to its logical conclusion, despite the significant nature of this particular form in terms of national interest considerations, this would mean that no weight could properly be placed upon such a declaration on any official application form. A further example serves to illustrate that this cannot be correct. The certificate signed by a witness in criminal proceedings whose statement is introduced into evidence pursuant to section 9 of the Criminal Justice Act 1967 is no different, the witness certifying under his own signature the contents of a witness statement not written or typed by himself, as will usually be the case, are true and that he risks prosecution if he says in it anything he knows to be false or does not believe to be true. As with the form with which we are concerned in this appeal, it is inconceivable that the signatory of such a declaration could or should be excused liability for it on the basis that he had not bothered to read the information that he had certified to be correct.

11. For the appellant, Mr Raw submitted that the judge fell into error in failing to give appropriate weight to the confirmation by counsel for the appellant that he had spoken to the solicitor that it was her who had made the mistake in giving the wrong answer. Ms Ahmed submitted that the judge was plainly entitled to reach the view he did. There was no mention in the grounds of appeal of a mistake by the solicitor; the appellant had himself signed the declaration that the information

provided was true and there was no evidence filed by the solicitors to confirm that the error was theirs.

12. Ms Ahmad is plainly correct. As I have observed above, we now know that, despite the vocabulary used by the solicitor in her statement, she made no mistake at all and so the judge was clearly correct to reject the suggestion that the error was that of the solicitor. That disposes of the first ground, which falls away both because of the absence of a specific finding of fact to the effect that the non-disclosure was something that occurred with the knowledge of the appellant and because if, properly understood, it is implicit in the finding articulated by the judge that she did find the appellant knowingly made a false statement, that was a rational and lawful finding open on the evidence.

13. Mr Raw did not pursue the second ground, recognising that permission to appeal was granted only in respect of the first ground, discussed above. However, for the sake of completeness, I record that this ground complains that the reasoning of the judge, reproduced above at paragraph 6, leading to the finding of fact that there were no exceptional circumstances or insurmountable obstacles preventing the appellant's wife from relocating to Albania with her husband disclosed material legal error. It is not altogether easy to draw from that ground the nature of the legal error said to have been made by the judge. This ground expresses disagreement with the reasoning and findings of the judge and categorises her conclusion as unreasonable but there is nothing at all unreasonable, irrational or unlawful about the logic and reasoning that led to this conclusion.

14. This was a fact-based assessment for the judge to make and, having heard oral evidence and submissions from both representatives, she was best placed to do so. She directed herself correctly in law, had regard to all that the parties chose to put before her, left out of account no material consideration and gave clear, cogent and legally sufficient reasons for arriving at conclusions that were plainly open to her on the evidence. In short, her conclusion is unassailable.

Summary of decision:

15. First-tier Tribunal Judge Turquet made no error of law, material or otherwise, and her decision to dismiss the appeal is to stand

16. The appeal to the Upper Tribunal is dismissed.

Signed

Upper Tribunal Judge Southern
Date: 21 August 2017