



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/01577/2018
PA/01581/2018

THE IMMIGRATION ACTS

Heard at Liverpool
on 14 August 2018

Decision & Reasons promulgated
on 17 September 2018

Before

UPPER TRIBUNAL JUDGE HANSON

Between

DETJON [X]
LEDIONA [O]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Schwenk instructed by Karis Solicitors Limited.

For the Respondent: Mr C Bates – Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellants' appeal with permission a decision of First-Tier Tribunal Judge Chambers promulgated on 14 May 2018 in which the Judge dismissed the appeals on protection and human rights grounds.

Background

2. Both appellants are citizens of Albania. The first appellant was born on 11 July 1988 and the second appellant, his partner, on 24 March 1989. They have a dependent child born in the United Kingdom on 18 January 2015.
3. The Judge sets out the immigration history followed by the factual account of the appellant which the Judge summarises in the following terms at [8 - 14] of the decision under challenge:
 8. The First Appellant said that after going to Albania after his deportation from the UK he worked as a mechanic. Because of an association with a close friend Rigels Rajku a well-known rap artist in Albania known as "Noizy"; the Appellant got involved in music tours in Albania and abroad. The role of the First Appellant was to get the atmosphere going at Noizy's gigs. Noizy's group was called OTR (On Top of the Rest). Another rap artist in Albania Arkimed Lushaj known as "Stresi" had at one time been a member of another group run by Noizy called TBA. However Stresi left TBA. Stresi set up a rival group called "Butuesi". The groups run by Noizy and Stresi became violently opposed to each other. Violent clashes occurred. In 2012 the first appellant was attacked by members of the Stresi group. He sustained a very serious injuries including stab wounds and was hospitalised. When the First Appellant was in hospital he was warned by members of their group that the Stresi group would attack him again.
 9. As a result of the Second Appellants relationship with the First Appellant she was also harassed and attacked by the Stresi group. She was followed and threatened. On an occasion in 2012 she was at a concert when she was grabbed by a man. The Second Appellant and a friend she was with hit the man until he ran away.
 10. In another incident in March 2013 the Second Appellant was stared at by a man in a bar and then followed by him and struck on the head with an object she believed to be a can.
 11. In another incident in May 2013 the Second Appellant was in the presence of Stresi and his friends in a bar when she was called names; asked where the First Appellant was and her phone taken from her. The Second Appellants car was vandalised.
 12. In December 2013 she was assaulted by Stresi and another boy. She was pushed grabbed and punched. The attackers threatened to take her life if she reported the matter.
 13. In another incident in February 2014 the Stresi gang tried to get the Second Appellant into a car at knifepoint. She screamed and with members of the public around managed to get away.
 14. The Second Appellant fled to the UK to join the First Appellant. The Second Appellant has been disowned by her father a well-known lawyer. The wider family have also disowned her. They feel ashamed that she has had a child outside marriage.
4. Having considered the reasons for refusal and the oral and documentary evidence, the Judge sets out his findings of fact from [30] of the decision under challenge which can be summarised in the following terms:

- a. The first appellant's standing came about as a result of his association with Noizy and any adverse attention the first appellant received came about solely on account of this association. The central dispute was to do with a disagreement between Stresi and Noizy. Violent clashes between the two groups ensued. This is evidenced in the objective information. The tribunal accepts on the totality of the evidence that the First Appellant was attacked by Stresi's gang and seriously injured and hospitalised. The tribunal also accepts the Second Appellant, on account of her relationship with the first appellant, became an imputed Noizy supporter/anti-Stresi and was attacked by members of the Noizy faction [30].
- b. There is no believable evidence to show the claimed links between Noizy and the police/officialdom in Albania [34].
- c. Although during the time Noizy lived in London he is said to have developed a passion for fighting and, it is said, took up street fighting at which he was undefeated, it was not established that Noizy did any such thing in the UK. He seeks to betray himself in that way as part of his image. This does not mean it is true [35].
- d. Instances of various confrontations between Noizy and the Albanian police contain sparse details with vague translations and of uncertain provenance and could simply be part of Noizy's publicity machine to portray him as a gangster and above the law which may not reflect the truth [36].
- e. Noizy appears like many other Hip Hop/rap performers to have run-ins with rival groups/bands but the objective evidence shows the authorities have on occasions intervene at least to investigate Stresi. It might be that Stresi portrays himself as a gun/drug runner but it is not shown that he is in fact engaged in such activities [37].
- f. The authorities have intervened in a violent clash between OTR and another singer HELLO. The police appear to have arrested people from the OTR side.
- g. It is not shown that the authorities were ever given an adequate opportunity by either appellant to investigate and take action. Not complaining or leaving the jurisdiction after complaining did not give the authorities a fair opportunity to investigate. They would have needed evidence/witness statements to found a case [39].
- h. It is not shown the authorities are sympathetic to violent outbursts from Hip Hop and rap performers. It is not shown in particular they have sought to protect Stresi. It is not demonstrated that a complaint was made to the police authorities by the Second Appellant and there is no confirmation from Noizy or any other member of his group that the first appellant was or now continues to be in any danger from the Stresi side [40].

- i. Noizy and Stresi remain in Albania. It is not shown Noizy enjoys corrupt police protection [41].
 - j. The appellants have been out of Albania for some considerable time. It is not established there is any current interest in either of them. The violent attacks they refer to came through the actions of nonstate agents in a situation akin to gang warfare. The appellant encountered problems on account of his association with Noizy who remains in Albania and who lends no support to the appeal. It is not established Stresi enjoyed special immunity from prosecution and there is evidence the police are not sympathetic to the criminal activities of rap groups [42].
 - k. There are instances of the police investigating and prosecuting clashes between rival rap groups. Although the objective material shows corruption in Albania is rife it does not follow that in every instance where police protection might be sought the police will not adequately investigate and prosecute. The respondent's position that it is not made out to the authorities in Albania would be unable or unwilling to offer the appellant protection is a valid one. It is not established on any evidence that the police have refused to help; rather the appellants had not pursued the remedy of complaint to the police and the authorities in general [43].
5. The appellant sought permission to appeal in which it is asserted the Judge made a mistake of fact material to the decision to dismiss the appeal and made unclear findings. Permission to appeal was granted by another judge of the First-Tier Tribunal on 13 June 2013; the operative parts of the grant been in the following terms:
- 3. The grounds argue that the Judge made a number of findings that were incorrect or contradicted by the evidence. The Judge had not assessed the risk to the Second Appellant, the Judge had not considered article 8 properly including the second Appellants mental health issues.
 - 4. The First Appellant's credibility has to be assessed against an immigration history containing significant amounts of deception. Whether the points raised assist the Appellants is a matter for debate but the points raised particularly in respect of the Second Appellant are arguable and the Judge does not appear to have considered the child's best interests.

Error of law

- 6. The Judge clearly accepts the core of the claim that the first appellant was attacked and injured and that the second appellant suffered as a result of an imputed association with the Hip Hop artist known as Noizy.
- 7. The grounds assert the Judge made an error of fact between [34 - 37] when assessing the risk to the appellant and political connections of Noizy when the appellant's case was that the person with the political connections was Stresi. The appellant asserts the Judge got the wrong person. Mr Schwenk submitted that it

was not possible to infer that the Judge meant the opposite and that the appellant was entitled to know why the claim had been rejected and that if the Judge looked at the evidence properly it could make a material difference.

8. In looking for a connection between Noizy and politicians in the objective evidence the Judge was arguably looking for something that the appellant did not seek to rely upon or assert existed. The finding at [34] in which the Judge found there was no believable evidence to show the claimed links between Noizy and the police/officialdom may be factually correct, as the appellant's claim was that Stresi had those links. A lot of the information in the appellant's appeal bundle referred to Stresi and his alleged offences including discharging firearms in a public place, having automatic weapons near a school, various drug offences, escape from custody, and material relating to the lack of any investigation/convictions despite numerous run-ins with officials that it was submitted by the appellant led to the conclusion that in a society as corrupt as Albania Stresi is protected.
9. Mr Schwenk referred to evidence in the bundle supporting the appellant's claim in relation to Stresi's character supporting the assertion regarding escape from custody, attack on the police, involvement with drugs and alleged double standards being shown in relation to court proceedings and punishment given to Stresi and others; indicating a degree of impunity enjoyed by this individual.
10. It is further submitted as evidence the Judge assessed the appellant's claim by reference to the wrong person that in [41] the Judge refers to Rigels Rajku enjoying corrupt police protection when this is not Stresi. If that was a reference to the person the appellant claimed he faced a real risk from on return, this is a further example of an error of fact.
11. In relation to the second appellant, the Judge accepted an imputed risk as a result of her association with the first appellant. At [9] of the grounds the appellant writes:
 9. At the hearing the Respondent, in submissions, stated that had the appeal just being the Second Appellant on her own she would succeed. The risks to a single female with a child with no family support was such that the Respondent would have invited the FTTJ to allow her appeal. The Respondent stated that it was only due to the fact that she would be returned with her Partner that the case stood to be dismissed. Not only has the FTTJ, in assessing asylum/article 8, failed to consider the submissions but also, as set out above, has failed to consider the effect of return on the Second Appellant as the victim of a serious sexual assault. The couple have a young baby now and it is submitted that the Article 8 claim ought to have been considered. The Second Appellant stated that she had no family support, as they never approved of her partner. It is submitted the FTTJ needed to do more than state [45] '*circumstances do not arising (sic) under which it is appropriate to consider Article 8...*'
12. It was argued the Judge needed to make clear findings in terms of what he accepted had occurred to the second appellant and in relation to her ability to return and/or availability of a sufficiency of protection. It is argued there was also the need to consider the question of internal relocation.
13. It is not disputed the Judge does not undertake a full assessment pursuant to Article 8 ECHR. At [45] the Judge writes

Neither Appellant establishes that they come within the Immigration Rules. Camas Circumstances do not arising under which it is appropriate to consider Article 8 of the European Convention on Human Rights. The appeal suppose Appellants are dismissed.

14. The appeal is a human rights appeal and although an ability to satisfy the Immigration Rules is the correct starting point it is arguable that the failure to consider and adequately reason why circumstances do not arise requiring consideration of the matter outside the Immigration Rules means the appeal on article 8 ECHR grounds is still outstanding and in relation to which the Judge will be required to consider section 55 and the best interests of the child. This may be important in this case where, even if the second appellant is not entitled to a grant of international protection or leave under the Rules, in light of the experiences she had in Albania and events that occurred to her set out in her witness statement, including rape, she may be entitled to remain on another basis. This element needs to be properly considered even if the result is ultimately as the Judge found.
15. Mr Bates does not dispute that the Judge failed to deal with article 8 but submitted the issue is the materiality of the failure. Mr Bates argued this is a very young child and that it had not been established that the article 8 claim was a material element. The child was not a qualifying child and they will be returned as a unit, so family life continues, with there being no private life outside the family. Mr Bates accepted in relation to the second appellant there was evidence of mental health problems, but it was argued this was very limited with no evidence of PTSD or problems caring for the child.
16. In relation to article 8 and the best interests of the child, I do find the failure of the Judge to properly assess this aspect to be a material issue. The Judge was required to determine each and every aspect of the appeal that was relevant to the claim. The Judge would, arguably, have been entitled not to determine the article 8 claim if the appeal had been allowed on protection grounds as there will be no interference in any protected family or private life but this did not happen and this is a case where the second appellant relied upon a number of subjective aspects that needed to be taken into account and on which proper findings need to be made. As Mr Bates submitted, the Judge accepted the second appellant had been ill-treated, which must include the allegation of rape. This remains a ground of appeal yet to be determined.
17. In relation to the protection element; Mr Bates submitted that even though the Judge appears to have made a mistake in confusing the two main protagonists referred to by the appellant, such mistake is not material. Mr Bates referred to [35] where it is recorded the appellant's own barrister submitted the key to identifying Noizy's corrupt arrangements for protection was the fact that despite regular run-ins with the authorities he was not prosecuted by the authorities, together with other submissions relating to Noizy. It may be that the appellant's barrister did make submissions in such terms and may have been partly responsible for any confusion that arose, but any judge will be expected to have sufficient understanding of a case to know who the key players are.
18. The finding by the Judge in relation to sufficiency of protection; that if the appellants had not told the police of their experiences the police cannot be

criticised for failing to investigate them is an arguably sustainable claim. The finding the appellant faces no ongoing risk is submitted by Mr Bates also to be a sustainable claim, but this may be questionable if the evidential basis for arriving at such a conclusion is infected by an arguable material error based upon a mistake of fact.

19. The difficulty with Mr Bates' submission is that the clear error in relation to the names of the individuals concerned cannot be remedied solely by swapping those names around and concluding that any error made is not material as the Judge clearly assessed the evidence and made sustainable findings. It was submitted at [35] there is reference to Noizy living in London and findings made in relation to the same whereas the evidence showed it was Stresi who lived in London.
20. This this is a decision by a very experienced Judge who, for some reason, appears to have made a mistake of fact when assessing the merits of this appeal.
21. In E and R [2004] EWCA Civ 49 the Court of Appeal said that "a mistake of fact giving rise to unfairness is a separate head of challenge in an appeal on a point of law, at least in those statutory contexts where the parties share an interest in co-operating to achieve the correct result. Asylum law is undoubtedly such an area." The Court of Appeal set out the ordinary requirements for a finding of unfairness as follows:
 - i) There must have been a mistake as to an existing fact including a mistake as to the availability of evidence on a particular fact;
 - ii) The fact or evidence must have been established, in the sense that it was uncontentionous and objectively verifiable;
 - iii) The appellant (or his advisors) must not have been responsible for the mistake; and
 - iv) The mistake must have played a material (not necessarily decisive) part in the Adjudicator's reasoning.
22. Applying the requisite test, it appears an uncontested fact there has been a mistake as to an existing fact. It appears beyond doubt that the fact has been established, namely the correct name of the individual relied upon by the appellant in relation to his claim to face a real risk on return to Albania which is uncontentionous and objectively verifiable from the evidence provided to the First-Tier Tribunal. It is not made out the appellant is responsible for the mistake even if his representative mixed up the names in his submissions, and it is arguable that the mistake may have played a material part in the Judge's reasoning.
23. It is also important to appreciate that in any appeal justice has not only to be done but must be seen to be done. As submitted by Mr Schwenk the appellant is entitled to know why his appeal was dismissed and to be reassured that the decision-maker has not only considered the evidence with the required degree of anxious scrutiny but also given adequate reasons in support of findings made.
24. I find that the error fact is material to the decision to dismiss the appeal and set aside the protection claim. I find that the appeal on human rights grounds remains outstanding having not been adequately determined by the Judge.
25. In light of the fact that extensive fact-finding is required it is appropriate in all the circumstances, having regard to the Presidential Guidance, for the matter to be

remitted to the First-Tier Tribunal sitting at Manchester to be heard afresh by a judge other than Judge Chambers.

Decision

26. **The First-tier Judge materially erred in law. I set aside the decision of the original judge. I remit the appeal to the First-Tier Tribunal sitting at Manchester to be heard by a judge of that Tribunal nominated by the Resident Judge, other than Judge Chambers.**

Anonymity.

27. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 13 September 2018