



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/02992/2020

THE IMMIGRATION ACTS

**Heard at : Field House
On: 13 June 2022**

**Decision & Reasons Promulgated
On: 23 June 2022**

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

ERVIN MUJA

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr J Trussler, instructed by Turpin & Miller Solicitors

For the Respondent: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Albania, born on 16 January 1977. He arrived in the UK on 15 November 1999 and claimed asylum the same day. He claimed to be a Kosovan national who had been arrested, detained and beaten by the Serbian authorities as a result of his involvement in political activities in Kosovo and who was at risk of persecution on return. His claim was refused on 16 November 2000 and he lodged an appeal against the decision which was subsequently treated as abandoned as he did not attend the appeal hearing.

2. Nothing further happened until the appellant's case was reconsidered and, on 23 July 2010, he was granted indefinite leave to remain under the legacy

programme subsequent to written representations made by his legal representatives on his behalf dated 12 April 2010 and 24 May 2010. Those representations, made in the same identity as a Kosovan national, referred to his fear of persecution on the same basis as previously and in addition asserted that a decision to remove him from the UK would breach his Article 8 human rights with respect to the family and private life he had established in this country.

3. On 23 August 2010 the appellant applied for a travel document which was issued on 6 October 2010. On 16 September 2013 he applied for naturalisation as a British citizen, but his application was refused on 10 February 2014 on the grounds of delay in providing documentary evidence. On 8 October 2015 the appellant made an application for a travel document which was refused on 22 February 2016. All applications were, again, made in the appellant's identity as a Kosovan national.

4. On 8 September 2016 the appellant's indefinite leave to remain was revoked under paragraph 76(2) of the Nationality, Immigration and Asylum Act 2002 as it was discovered that he had acquired that leave by deception, having claimed to be Kosovan when he was in fact Albanian. In the decision revoking the appellant's indefinite leave the respondent stated that the appellant's Albanian nationality was discovered when checks were instigated with the Albanian authorities after he had submitted his application for naturalisation as a British citizen. The appellant's representatives subsequently disclosed his true nationality when they sent the respondent his valid Albanian passport confirming his identity as an Albanian citizen on 7 June 2016. The respondent considered that indefinite leave would not have been granted had the respondent's true identity been known as he would have failed to meet the requirements for good character under the legacy programme. The respondent considered that whilst the initial deception occurred 17 years previously when the appellant claimed asylum, he had maintained the deception in his subsequent applications in 2010 and 2015 for a travel document, in 2013 in his application for naturalisation and in 2015 when he applied for a biometric resident permit.

5. On 15 September 2016 the appellant was served with a removal notice. On 17 October 2016 he applied for leave to remain on private and family life grounds, but his application was refused with an out of country appeal on 6 October 2017.

6. On 24 December 2019 the appellant made a human rights claim in an application for leave to remain on the basis of his family life with his partner. The respondent refused his claim in a decision of 5 February 2020. In that decision, the respondent considered that the suitability provisions in paragraph S-LTR.1.6 of Appendix FM applied as a result of the appellant's use of deception for the purposes of being granted asylum which called into question his character and conduct. The respondent also considered that paragraph S-LTR.4.2 of Appendix FM applied as the appellant had made false representations for the purpose of obtaining a previous variation of leave and discretion was not exercised in his favour. The respondent considered further

that the appellant did not meet the eligibility relationship requirements as his partner and child were residing in Albania and not the UK and it was not accepted that he and his partner intended to live together permanently in the UK. Further, the eligibility immigration status requirement was not met as he had been without leave since 8 September 2016, when his indefinite leave to remain was revoked. As for the private life provisions in paragraph 276ADE(1) it was considered that the appellant's claim fell for refusal on suitability grounds, even though it was accepted that he had lived in the UK for 20 years for the purposes of paragraph 276ADE(1)(iii). The respondent did not accept that there were any compelling or exceptional circumstances outside the immigration rules.

7. The appellant appealed against the respondent's decision and his appeal was heard in the First-tier Tribunal on 12 May 2021 by Judge Grey. It was conceded by the respondent at the hearing that paragraph S-LTR.6 did not apply, in light of the Upper Tribunal decision in Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope) [2020] UKUT 376. The respondent maintained the concession that paragraph 276ADE(1)(iii) applied and the only issue was therefore suitability under paragraph S-LTR.4.2. Before the judge, the Home Office Presenting Officer relied upon the travel document application made in October 2010 as being the relevant application for the purposes of S-LTR.4.2. The appellant argued that a travel document application did not fall within the applications specified in paragraph S-LTR.4.2 and that the suitability provisions therefore did not apply. It was argued that the grant of indefinite leave under the legacy scheme was made unilaterally by the Secretary of State under her policy and not as a result of an application made by the appellant and therefore did not fall within S-LTR.4.2. It was argued in the alternative that if it was found that S-LTR.4.2 did apply, then discretion should have been exercised in the appellant's favour.

8. Judge Grey found that the scope of S-LTR.4.2 did not extend to include an application for asylum. She also found that S-LTR.4.2 did not include travel document applications. However, she concluded that the representations made by the appellant in relation to the legacy scheme did fall within the scope of S-LTR.4.2 and that the term 'application' was capable of being more widely construed so as to include such submissions. The judge considered that the wording of the letters dated 12 April 2010 and 24 May 2010 from the appellant's representatives were framed in terms suggesting that the appellant had brought an application for consideration. The judge found that the letters contained false representations which were not peripheral to the application and that the appellant had maintained his deception for many years, such that it was entirely reasonable for the respondent not to exercise discretion in his favour. She found that the appellant was therefore unable to meet the requirements of paragraph 276ADE(1). The judge found further that the respondent's decision was proportionate and was not in breach of the appellant's Article 8 rights. She accordingly dismissed the appeal.

9. The appellant sought permission to appeal to the Upper Tribunal, relying in the grounds on two principles in considering S-LTR.4.2, namely certainty and *expressio unius est exclusion alterius*. With regard to the first it was asserted

that it was desirable that applicants, the respondent and the tribunals knew when an application was made, that rule 34 of the immigration rules created mandatory requirements for making an 'application' in a prescribed form and that the judge had erred in concluding that the appellant's written representations were an 'application'. The judge's approach of adopting a broad definition was an error of law. With regard to the second, the appellant did not make an application which fell within S-LTR.4.2 and the representations he made were therefore impliedly excluded.

10. Permission was granted to the appellant and, following a hearing on 5 January 2022, I set aside Judge Grey's decision as follows:

“12. The matter then came before me. Unfortunately, Ms Cunha had been unaware of the hearing until shortly before it was due to commence. Whilst she did not seek an adjournment and was content to proceed, after being given a period of time to familiarise herself with the issues, she was limited in her ability to make full submissions beyond the error of law point.

13. Ms Popal submitted that the judge had erred by going off “on a frolic of her own” when she considered that the appellant's submissions made in 2010 constituted an 'application', given that the respondent's position at the hearing was that the only relevant document for the purposes of the refusal under paragraph S-LTR.4.2 was the appellant's travel document. In any event, the judge was wrong to find that the appellant's submissions constituted an 'application'. It was accepted that an asylum claim did not engage paragraph S-LTR.4.2, yet the legacy submissions were triggered by the appellant's asylum claim. The judge's references within Mahmood, and her reliance on that case, were selective. Ms Popal relied upon the narrow interpretation of 'application' applied in the case of MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1615 and submitted that there was a requirement for certainty in the making of an application. The judge erred by adopting too wide an interpretation of 'application'.

14. Ms Cunha submitted that she had no notes of the hearing before her in order to clarify whether or not the judge had raised the question of the appellant's submissions constituting an 'application'. She accepted that, in the absence of anything to the contrary, it seemed that the judge had gone on a “frolic of her own” and that, accordingly, there had been procedural unfairness. However, Ms Cunha otherwise opposed the appellant's appeal. She relied upon the cases of Hakemi & Ors v Secretary of State for the Home Department [2012] EWHC 1967 and Geraldo & Ors, R (on the application of) v Secretary of State for the Home Department [2013] EWHC 2763, both of which concerned the legacy programme. She submitted that those cases made clear that the legacy programme did not just deal with asylum cases and that, as a result, Judge Grey was correct in saying that submissions such as those made by the appellant were capable of constituting an 'application' for the purposes of paragraph S-LTR.4.2.

15. Ms Popal, in response, submitted that the legacy submissions in the appellant's case were clearly related to the fact that he had previously claimed asylum and, since an asylum claim did not

constitute an 'application' for the purposes of paragraph S-LTR.4.2, neither could the submissions. The appellant had never made an application and his submissions had been triggered by the respondent's invitation for a response under the legacy programme which could only have been linked to the appellant's previous asylum claim, a matter which did not fall within the scope of paragraph S-LTR.4.2.

Discussion

16. In light of Ms Cunha's concession on the first part of Ms Popal's submissions, namely that the judge went off "on a frolic of her own", I agree that the judge's findings and conclusions on a matter not put to the parties, and not specifically ventilated before her, gave rise to procedural unfairness such as to amount to an error of law.

17. I have considered whether, in view of the fact that the appellant has now had an opportunity to respond to the issue, the procedural unfairness is immaterial on its own to justify the setting aside of the judge's decision. However, it seems to me that there is sufficient merit in the points raised by both Ms Popal and Ms Cunha to suggest that the judge's consideration did not take account of all relevant arguments and that there remains a case to be argued for both parties (see also [19] below). Both parties submitted that the decision should be re-made after hearing full legal arguments, although Ms Popal also suggested that the decision could simply be re-made by allowing the appeal if I was with her on the second part of her submissions, which I am not prepared to do. For the reasons already mentioned, Ms Cunha was not in a position to make full submissions on the legal arguments and, in the circumstances, the decision will be re-made on another day when both parties are properly prepared to present their arguments.

18. I therefore set aside Judge Grey's decision. The decision will be re-made at a resumed hearing on a date to be notified to the parties. It seems to me that it would be appropriate for this to take place in the Upper Tribunal since the re-making is on a narrow point, namely the interpretation of paragraph S-LTR.4.2, and thus involves only legal submissions.

19. I would point out at this stage that there are issues which have not been dealt with and which seem to me to be material matters requiring clarification by the parties. The respondent needs to put her case clearly as to which of the appellant's applications/claims/representations she considers to have given rise to the application of paragraph S-LTR.4.2. Although the Home Office presenting officer, at the hearing before Judge Grey, relied only upon the appellant's travel document application, I note that, at the end of [15] of the judge's decision, the respondent's case was said to rely on the appellant's false representations when applying for travel documentation *and naturalisation*. Yet no further mention was made of the naturalisation application, either by the judge or the presenting officer, despite that being referred to under the suitability heading in the refusal decision. The respondent therefore needs to make clear whether the appellant's application for naturalisation is relied upon as giving rise to the application of S-LTR.4.2. Further, I note that the legal arguments have thus far focussed on the term "application" in paragraph S-LTR.4.2, yet no reference has been made to "a previous

human rights claim” in relation to the appellant’s submissions to the legacy case resolution directorate. It seems to me that there may be an arguable case on that basis too. These are all matters which need to be addressed by the parties at the resumed hearing.

20. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party, with particular regard to the matters referred to at [19] above.

21. I therefore **DIRECT** that:

No later than **7 days before the hearing**, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation to paragraph S-LTR.4.2.”

11. Following a request made by the appellant’s solicitors on 13 January 2022, the directions were varied as follows:

“The respondent shall file and serve their skeleton argument 14 days before the hearing.

The appellant shall file and serve their skeleton argument 7 days before the hearing.”

12. The case was then listed for a resumed hearing on 7 March 2022, but that had to be adjourned owing to the fact that counsel for the appellant was on leave and that it would be difficult to instruct alternative counsel, given Ms Popal’s familiarity with the issues.

13. The case was then listed again for a resumed hearing on 13 June 2022. Neither party responded to the Tribunal’s directions and no skeleton arguments were produced in accordance with the directions, leading to efforts having to be made by the Tribunal to chase the parties prior to the hearing, with the appellant’s solicitors advising the Tribunal that they would serve their skeleton upon receipt of the respondent’s skeleton.

14. The matter came before me again, with brief skeleton arguments having been served the day before the hearing, and with Mr Trussler appearing as counsel for the appellant despite the matter having previously been adjourned to accommodate the previous counsel, Ms Popal’s, availability.

Hearing and Submissions

15. Mr Trussler submitted that paragraph S-LTR.4.2 of Appendix FM, as drafted, did not allow for the wider interpretation assumed by Judge Grey in the First-tier Tribunal and, in that respect, he relied upon [10] in the case of Mahad v Entry Clearance Officer [2009] UKSC 16, quoting Lord Hoffman in Odelola v Secretary of State for the Home Department [2009] 1 WLR. He submitted that the appellant’s representations produced within the legacy consideration did not fall within the provision. Neither did they amount to a human rights claim. Accordingly no false representations were made for the purposes of paragraph S-LTR.4.2. Mr Tufan submitted, however, that paragraph S-LTR.4.2 must be construed more widely than that and that the representations made by the appellant were made in terms which were tantamount to a human rights

application. He submitted that, in any event and even on the narrow construction, the appellant's application for naturalisation as a British citizen had to be construed as an application for a variation of leave for the purposes of paragraph S-LTR.4.2. Mr Trussler, in response, submitted that naturalisation was not leave to remain, but was a status and therefore did not fall within paragraph S-LTR.4.2.

Relevant Immigration Rules

16. The relevant suitability provisions for the purposes of paragraph R-LTRP.1.1(d)(i), namely S-LTR.4.2 of Appendix FM states as follows:

“Section S-LTR: Suitability-leave to remain

S-LTR.4.2. The applicant has made false representations or failed to disclose any material fact in a previous application for entry clearance, leave to enter, leave to remain or a variation of leave, or in a previous human rights claim; or did so in order to obtain from the Secretary of State or a third party a document required to support such an application or claim (whether or not the application or claim was successful).”

Discussion and Findings

17. Although I set aside Judge Grey's decision on the basis of Ms Cunha's acceptance of there having been procedural unfairness in her raising matters of her own which the parties had no opportunity to address, I have to say that, having now heard from the parties, I reach the same decision as she did for the same, or very similar, reasons to those which she gave in her decision.

18. It is the case, as Mr Trussler submitted, that the respondent conceded before Judge Grey that it was only the first part, and not the second part, of paragraph S-LTR.4.2 which was relied upon. In such circumstances, and considering the wording of the first part of the provision, I agree that the respondent cannot rely upon the appellant's application for a travel document or certificate of travel as amounting to a relevant application for the purposes of engaging paragraph S-LTR.4.2. I disagree, however, with Mr Trussler's submission that the appellant's application for naturalisation could not be considered as an application falling within that provision and I accept Mr Tufan's submission that the false representations made by the appellant within his application for naturalisation did meet the requirements of paragraph S-LTR.4.2.

19. However even if I am wrong in that regard, I reject the suggestion that the representations made by the appellant on 12 April 2010 and 24 May 2010 as part of the legacy consideration were not relevant for the purposes of paragraph S-LTR.4.2. I reach the same conclusion as Judge Grey at [47] to [49] to her decision and note, as she did, the repeated references within those representations to an application for leave to remain made by the appellant. Indeed Mr Trussler had to admit that he was somewhat disadvantaged by the use of the word “application” by the appellant's representatives in the written representations and I consider that that was properly so. Whether or not the legacy programme consideration was triggered by, or instigated by the

respondent, the fact remains that the representations were expressed in terms of there having been an application made by the appellant on human rights grounds.

20. As I mentioned at [19] of my decision 12 January 2022, paragraph S-LTR.4.2 referred not only to an application for leave to remain but also to a previous human rights claim and it seems to me that there can be no doubt that the representations amounted to a human rights claim, irrespective of there having been no specific application form submitted. The representations specifically refer to the appellant's removal being in breach of his right to respect for his family and private life, which is entirely consistent with a conclusion that a human rights claim had been made. I refer, in that respect, to the case of R (on the application of Mujahid) v First-tier Tribunal (Immigration and Asylum Chamber) and the Secretary of State for the Home Department (refusal of human rights claim) [2020] UKUT 85, which was in turn referred to in the case of MY (Pakistan) v Secretary of State for the Home Department [2021] EWCA Civ 1500. At [31] of Mujahid the Upper Tribunal observed as follows:

"It is clear from the definition of "human rights claim" in section 113(1) of the 2002 Act that the presumed removal of an individual from, or the presumed requirement on that individual to leave, the United Kingdom is an essential element in order for there to be an appeal. A person who makes a human rights claim is asserting that they (or someone connected with them) have, for whatever reason, a right recognised by the ECHR, which is of such a kind that removing that person or requiring them to leave would be a violation of that right. In the case of a qualified right, such as Article 8, a violation may result from the fact that it would be disproportionate to remove or to require the person to leave."

21. Accordingly, it seems to me that the respondent was fully and properly entitled to conclude that the appellant had made false representations which fell within the ambit of paragraph S-LTR.4.2 as an application for leave to remain on human rights grounds or a human rights claim.

22. The interpretation of paragraph S-LTR.4.2, as addressed above, was the only basis upon which Judge Grey's decision was challenged and set aside, as is made clear at [18] of my decision of 12 January 2022. There was no specific challenge to her findings at [54] as to the exercise of discretion under paragraph S-LTR.4.2, nor to her findings on Article 8 outside the immigration rules, from [56] to [64]. No application was made to produce further evidence and neither were submissions made on any other basis. Accordingly I rely upon Judge Grey's findings on those matters and need say nothing further.

23. For all of these reasons, the appellant's appeal is dismissed on human rights grounds.

DECISION

24. The original Tribunal was found to have made an error of law and the decision was set aside to the extent stated. I re-make the decision by dismissing the appellant's appeal on Article 8 human rights grounds.

Signed S Kebede
Upper Tribunal Judge Kebede

Dated: 13 June 2022