



IAC-FH-CK-V1

**Upper Tribunal  
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-001292;  
HU/05122/2020**

**UI-2021-001309; HU/05132/2020  
UI-2021-001303; HU/05124/2020**

**THE IMMIGRATION ACTS**

**Heard at Field House  
On the 24 June 2022**

**Decision & Reasons Promulgated  
On the 18 July 2022**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**MR GAZMEN JELLA  
MS EDJONA KERKOTI  
MASTER AIDEN JELLA  
(ANONYMITY DIRECTION NOT MADE)**

Appellants

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellants: Mr G Hodgetts, Counsel instructed by OTB Legal

For the Respondent: Ms A Everett, Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of the First-tier Tribunal, in this case First-tier Tribunal Judge S J Clarke, heard at Taylor House on 12 October 2021, promulgated, it appears, on 29 October 2021, in which she dismissed the appellants' appeals against decisions of the

Secretary of State to refuse their human rights claims and to remove them from the United Kingdom.

2. The appellants are all citizens of Albania. They made a human rights applications on 18 September 2019, the principal appellant being the partner of the second appellant and they are in turn the parents of the third appellant.
3. Essentially, the first appellant's case is that he has in effect been resident in the United Kingdom since his arrival in 2001 with two absences which are set out in the skeleton argument chronology at paragraph 2, principally that he was removed from the United Kingdom on 23 September 2004 and re-entered on the 27<sup>th</sup> and that he was absent from 10 April 2006 as his father was unwell and returning on 27 July 2006.
4. The second appellant entered the United Kingdom in 2018 unlawfully and their child was born on 16 October 2018.
5. The judge heard evidence from the first and second appellant and from two supporting witnesses. There were also letters of support from family and a number of documents. The judge found that the appellant had a poor immigration history and did not accept the appellant's account of having left in 2004, returning a matter of days later, despite the bank statements indicating withdrawals in the United Kingdom in the relevant period, find at paragraph 8 that these show his absence from the United Kingdom rather than placing him here and concluded that he had not told the truth.
6. The judge did not accept that removing the appellants from the United Kingdom was in breach of their rights pursuant to Article 8 and did not accept the expert report of Dr Tahiraj indicating that the appellants would have nothing to rely upon on return, finding on the contrary that they would have a support network and funds to rely upon. She then went on to dismiss the appeal.
7. The appellants sought permission to appeal on three grounds: first, that the judge had failed properly to address the best interests of a the minor third child; second, failed to put to the appellant doubts regarding the re-entry to the United Kingdom on 27 September 2004 and continuity of residence despite that not being in issue; and, third, that the judge's findings with respect to re-entry were irrational. The grounds also aver that grounds 2 and 3 are material.
8. I heard submissions from Mr Hodgetts as well as briefer submissions from Ms Everett. Mr Hodgetts also handed up a number of authorities on which he sought to rely. With the exception of a decision of UTJ Grubb, these are well-known authorities.
9. For reasons which I will come to it is better to address these grounds in reverse order. Ms Everett was understandably in some difficulty in seeking

to uphold the judge's findings with respect to re-entry in ground 3. I consider that this ground is well made out. The history in this case is that the Secretary of State did not directly dispute the appellant's account of when he had re-entered the United Kingdom in 2004 in the refusal letter. As is now the case in the First-tier Tribunal, skeleton arguments are required, that was served in this case and a chronology was put forward in which it was explained that the appellant had returned and directing the reader to the evidence in support of that set out in the bank statements.

10. Despite directions the Secretary of State did not respond to that but what happened next illustrates the difficulty of not appreciating that what a Tribunal is concerned with is the matters which are put in issue by the parties. It is not said that there was cross-examination on the point or that the Secretary of State took a point on the chronology nor do there appear to have been submissions on this point. In fact, what the judge appears to have done is to have reached her own conclusions without any reference to the appellant or for that matter to the respondent and asking for submissions on the issue.
11. Adverse inferences were taken and, I conclude, perverse inferences taken on the evidence presented to the judge. The appellant was not offered the opportunity to rebut what was said that in fact perhaps he had got somebody to make the withdrawals and the judge's conclusions which she then comes to about the appellant having a support network and having lived there and had a job are, with respect, a judge going into unwarranted and wholly unevicenced speculation.
12. It is one thing to say that evidence does not support a particular point of view. It is another, perversely, to say that it supports the opposite and accordingly, I find that there are irrationalities with respect to the judge's findings on the appellant's date of re-entry and that thus grounds 2 and 3 are made out.
13. A question then turns to ground 1. I find less merit in this observation, given the age of the child, but I am satisfied that the judge ought to have made a best interest assessment of the child even though he is 3 and whilst it is difficult to see that the fact of him being separated from an extended family in the United Kingdom are difficult, there is no assessment of the circumstances he would find on return to Albania. That in part is due to the judge's dismissal of the expert's report.
14. That issue then takes me to the issue of materiality. Where, as here, there has been procedural unfairness it is difficult to say that the outcome would have been the same but what the judge did in this case was to attach no weight to the expert report on the basis of findings of fact which are unsustainable, that is the findings of an extensive support network, ability to work and the conclusion derived from it is unclear where that the first appellant had been working in Albania.

15. Taking those together and despite the appellant's poor immigration history, I conclude that the errors are material in that it is possible that another judge properly directing himself or herself to the law could have reached another decision and for that reason I conclude that the decision of the First-tier Tribunal involved the making of an error of law capable of affecting the outcome and I set it aside.
16. As I have found that the issue in appeal is a procedural error, the result of that is that the appellant had an unfair hearing I consider that the only option open to me is to remit the appeal to the First-tier Tribunal for a fresh decision on all issues, that is de novo, before a judge other than S J Clarke and that concludes my decision.

### **Notice of Decision**

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. I remit the appeal to the First-tier Tribunal for it to make a fresh decision on all matters; none of the findings of fact are preserved.

No anonymity direction is made.

Signed

Date 29 June 2022

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul