



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/02684/2019 (V)

THE IMMIGRATION ACTS

Heard remotely at Field House
On 7 August 2020

Decision & Reasons Promulgated
On 18 August 2020

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

S B
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms J Norman, instructed by OTS Solicitors

For the Respondent: Mr S Walker, Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. The documents that I was referred to are in the bundle of 264 pages, the contents of which I have recorded. The order made is described at the end of these reasons.

DECISION AND REASONS

1. The Appellant is a citizen of Albania born on 2 July 1985. He appeals against the decision of First-tier Tribunal Judge B A Morris, dated 22 January 2020, dismissing his appeal against the refusal of leave to remain on human rights grounds.
2. The Appellant came to the UK as an unaccompanied minor in 2001 when he was 16 years old. He claimed to be a citizen of Kosovo and was granted refugee status. When the Appellant applied for naturalisation in 2014, the Respondent discovered that he was a citizen of Albania. The Appellant's refugee status was revoked in July 2017 and his indefinite leave to remain was revoked in June 2018. He did not appeal these decisions. The Appellant married his British citizen partner on 10 November 2018. He applied for leave to remain on Article 8 grounds on 29 November 2018.
3. The Appellant accepts that he was aware he lied about his nationality and he did not seek to correct it after 2004 when he received advice that an application to change his nationality would have a less than 50% chance of success. The Appellant's family live in Albania and he has visited them several times since he came to the UK. The last time was in 2011.
4. The Respondent refused the application for leave to remain on 24 January 2019 on the basis that the Appellant could not meet the suitability requirements (paragraph S-LTR 2.2) and there were no insurmountable obstacles to family life continuing outside the UK and therefore paragraph E.X. 1 did not apply. Further, there were no very significant obstacles to re-integration and the Appellant could not satisfy the requirements of paragraph 276ADE. The Respondent considered the Appellant's deception in finding there were no exceptional circumstances and concluded the refusal of leave did not breach Article 8. The application was refused under D-LTRP 1.3 with reference to R-LTRP 1.1(d)(iii) of Appendix FM and paragraph 276CE with reference to 276ADE(1).
5. At the appeal before Judge Morris, the Appellant's representative argued that paragraph S-LTR 2.2 did not apply because the Appellant had not provided false information in this application. The discretionary nature of paragraph S-LTR 4.2 was not raised at the hearing, although the judge recorded the Appellant's evidence that he was told to by his solicitor to lie about his nationality at [7]. The Appellant's representative submitted there were insurmountable obstacles to family life continuing outside the UK because the Appellant's wife was about to give birth to their British citizen child and she required the Appellant to administer injections during her pregnancy.
6. The Respondent's representative relied on the refusal letter and submitted the Appellant had given false information on arrival in the UK and had failed to correct it. The false information had been discovered by the Respondent in 2014. The Appellant had family in Albania and support was available there.
7. Judge Morris made the following findings:
 - (i) The Appellant accepted he made false representations when stating he was a citizen of Kosovo and therefore he failed to show he met the suitability requirements [17];

- (ii) There were no insurmountable obstacles to family life continuing outside the UK. Paragraph E.X. 1(b) did not apply [19] and [20];
- (iii) There were no very significant obstacles to re-integration under paragraph 276ADE(1)(vi) [21].
- (iv) The Appellant did not meet the suitability requirements under S-LTR 4.2 [17] and [21];
- (v) The Appellant could not satisfy paragraph 276ADE(1)(i) [21].
- (vi) The Appellant had established family and private life in the UK and the decision interfered with his Article 8 rights. The decision was in accordance with the law and the issue was whether the refusal of leave was proportionate [22];

8. At [24] the judge made the following findings:

“... Nevertheless, the Appellant has always been aware that he obtained asylum and indefinite leave to remain in 2001 on a false basis. The Appellant does not meet the requirements of the Immigration Rules and I repeat and adopt here all the matters I have set out above in this decision. Further, by claiming asylum falsely stating that he was born in Kosovo, the Appellant has had the advantage of all matters associated with asylum as an unaccompanied minor, including housing, maintenance, education and healthcare. [The Appellant’s representative] accepted in submissions that such matters are relevant considerations when considering the public interest, but argued that such matters should be balanced against the positive use the Appellant has made of his time here by obtaining qualifications and paying taxes. Paying taxes is expected of all people working in the United Kingdom.”

- 9. The judge concluded that the decision was proportionate. The factors in the Appellant’s favour did not outweigh the public interest in the maintenance of effective immigration control. The judge dismissed the appeal on human rights grounds.
- 10. The Appellant applied for permission to appeal on the grounds that the judge failed to appreciate the discretionary nature of paragraph S-LTR 4.2 and failed to consider the Appellant was a minor when he made false representations. Permission was granted by First-tier Tribunal Judge Ford on both grounds on 12 May 2020.

Submissions

- 11. Ms Norman relied on her grounds and submitted the judge failed to consider the discretionary nature of paragraph S-LTR 4.2 and to take into account the Appellant’s explanation for making false representations which was accepted by the Respondent. The Appellant would have been granted a period of discretionary leave as a minor and he should be treated differently in applying the suitability requirements. The Respondent wrongly relied on paragraph S-LTR 2.2. and the judge wrongly treated paragraph S-LTR 4.2 as a mandatory ground of refusal. Ms Norman accepted paragraph S-LTR 4.2 applied but submitted the judge did not appreciate its discretionary nature. Although the judge recorded the Appellant’s explanation given

in cross-examination, she failed to take it into account in applying paragraph S-LTR 4.2.

12. In relation to ground 2, the Appellant was in a worse position than someone who had committed a criminal offence because the discretionary suitability requirements applied to someone who was 16 years old. I indicated that I failed to see the relevance of comparing this case with the exceptions to deportation as submitted in the grounds and Ms Norman did not pursue the point save to say there was an imbalance with 16 year olds who commit an offence. Ms Norman stated that the Appellant's daughter was born in February 2020 and she was a British citizen.
13. Mr Walker submitted that the Appellant was still claiming he was from Kosovo when he applied for British nationality. It was only after the Respondent's investigations with Tirana that it was discovered he was Albanian. The Appellant continued to lie in his application for naturalisation and his indefinite leave to remain was revoked on this basis. Although the judge did not refer to the discretion under paragraph S-LTR 4.2 there was no material error of law in her decision to dismiss the appeal.
14. Ms Norman submitted that the falsehood flowed from an earlier lie. If the judge had taken into account the discretionary framework she would have said so. The judge had failed to consider the Appellant's evidence on this issue. The Respondent did not rely on paragraph S-LTR 4.2, but the judge considered it anyway.
15. I asked Ms Norman why an error of law in relation to the suitability requirements was material given that the judge concluded the Appellant could not satisfy paragraph E.X.1. Ms Norman submitted that if the Appellant succeeded in satisfying the suitability requirements, he did not have to satisfy paragraph E.X.1 because the Respondent accepted he satisfied the eligibility requirements in relation to his partner. She submitted that if the decision was set aside, the Appellant would succeed on any re-hearing of the appeal because it would not be reasonable to expect his British citizen child to leave the UK following SF Albania.
16. Mr Walker agreed that if the appeal was re-heard the Appellant would succeed because he had a British citizen child. Ms Norman submitted that if the Appellant succeeded in this appeal on suitability grounds, then the Appellant would succeed under Appendix FM on the basis of his relationship with his partner. If the appeal was re-heard the Appellant would succeed under section 117B, even if he could not satisfy the suitability requirements.

Conclusions and reasons

17. It is worth noting at the outset that this is a human rights appeal. It is not appropriate to convert a human rights appeal into a precise calculation under the Immigration Rules, although the Appellant's ability to satisfy the Immigration Rules will be relevant to the assessment of proportionality.
18. I find that the judge erred in law in failing to appreciate the discretionary nature of paragraph S-LTR 4.2. However, this conclusion was not material to the decision to dismiss the appeal on human rights grounds for the following reasons.

19. The Respondent failed to apply the correct paragraph of the Immigration Rules and therefore she has failed to consider her discretion under paragraph S-LTR 4.2. The judge also failed to consider that discretion. The Appellant had been deprived of the opportunity of having his case considered under the correct Immigration Rule and no more.
20. In any event, on the facts, the Appellant could not satisfy paragraph S-LTR 4.2. Even if his explanation for his failure to disclose his true nationality when he arrived in the UK is accepted, he continued to claim a false nationality for many years and in his application for naturalisation in 2014. I am not persuaded by Ms Norman's submission that this matter was not raised on appeal before the First-tier Tribunal and therefore it cannot be relied upon. The Appellant was aware he had falsely represented his nationality and he was granted indefinite leave to remain on the basis of his nationality. The factual matrix relevant to the proportionality assessment is not changed by any misapplication of the Rules by the Secretary of State or error of law on the part of the judge.
21. Further, the error was not material because the Appellant could not satisfy paragraph R-LTRP 1.1 (d) (iii) or the eligibility requirements at E-LTRP 2.2(b). The Appellant has remained in the UK without leave since June 2018. The Appellant had to satisfy paragraph E.X.1 for the following reasons.
22. Paragraph R-LTRP 1.1 states: "The requirements to be met for limited leave to remain as a partner are –
 - (a) the applicant and their partner must be in the UK;
 - (b) the applicant must have made a valid application for limited leave to remain as a partner; **and either**
 - (c) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; **and**
(ii) the applicant meets all the requirements of Section E-LTRP: Eligibility for leave to remain as a partner; **or**
 - (d) (i) the applicant must not fall for refusal under Section S-LTR: Suitability leave to remain; **and**
(ii) the applicant meets the requirements of Section E-LTRP 1.2 – 1.12 and E-LTRP 2.1-2.2; **and**
(iii) paragraph E.X.1 applies.
23. It is not the Appellant's case that he can satisfy all of the eligibility requirements. There was nothing in the application or on the court file to show that the financial requirements were met. Paragraph R-LTRP 1.1(d) is therefore applicable. Even if the Applicant can satisfy the suitability requirements, he still has to satisfy paragraph E.X.1
24. I am not persuaded by Ms Norman's submission (summarised at paragraph 15 above), but I can understand why she put her case as she did. The Respondent's decision stated that under paragraph R-LTRP 1.1 (d)(ii) the Appellant satisfies the

eligibility immigration status requirements at E-LTRP 2.1 to 2.2. However, the Appellant still has to satisfy paragraph R-LTRP 1.1 (d) (iii). The Respondent did go on to consider paragraph E.X. 1. The grounds of appeal address this point and the issue was properly argued on appeal.

25. In any event, the Appellant remains in the UK in breach of the immigration laws. He cannot satisfy E-LTRP 2.2(b) which states:

“The applicant must not be in the UK in breach of immigration laws (except that, where paragraph 39E of these Rules applies, any current period of overstaying will be disregarded), unless paragraph E.X.1 applies.”
26. There was no challenge to the judge’s finding that there were no insurmountable obstacles to family life continuing outside the UK. The Appellant could not satisfy Appendix FM or paragraph 276ADE of the Immigration Rules, even if he succeeded in showing he met the suitability requirements.
27. The judge took into account all relevant factors in assessing proportionality at [24] and the refusal of leave to remain was proportionate. Even if discretion was applied in the Appellant’s favour and the judge concluded the suitability requirements were met, it does not alter the factual situation that the Appellant lied about his nationality. On the facts, the public interest outweighs the Appellant’s Article 8 rights.
28. Accordingly, I find there was no material error of law in the decision dated 12 February 2020 and the Appellant’s appeal is dismissed.

Notice of decision

Appeal dismissed

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 11 August 2020

TO THE RESPONDENT
FEE AWARD

I have dismissed the appeal and therefore there can be no fee award.

J Frances

Signed
Upper Tribunal Judge Frances

Date: 11 August 2020