



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-
2022-006194
First-tier Tribunal No:
HU/52893/2022
575/2022
IA/04

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 22 June 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE L MURRAY

Between

V R
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Bustani, Counsel instructed by Lawlex Solicitors
For the Respondent: Ms Rushforth, Senior Home Office Presenting Officer

Heard at Cardiff Civil Justice Centre on 18 May 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Appellant is a national of Georgia born in 1974. He appeals with permission against the decision of First-tier Tribunal C Lester (the Judge) who on 23 November 2022 dismissed his appeal against the Secretary of State's refusal of his human rights claim dated 28 February 2022.
2. The Appellant entered the UK illegally on 17 July 2009 and submitted a claim for asylum on 22 July 2009 which was withdrawn on the same day. He applied for residence as an EEA national on 22 July 2009 but this application was refused on the same day. He submitted an asylum claim on 23 July 2009 which was refused on 25 November 2009. His application for leave as a spouse was made on 28 February 2022.
3. The Respondent refused his claim under the partner route under paragraph R-LTRP of Appendix FM of the Immigration Rules on grounds of suitability under section S-LTR because his presence in the UK was considered to be not conducive to the public good because he had been convicted in 2009 for possession of a false identity document and sentenced to 6 months imprisonment. He had sought admission as an EU/EEA national on 22 July 2009 attempting to use a Lithuanian passport. It was further concluded that he did not meet the immigration status requirements of paragraphs E-LTRP 2.1 to 2.2 because he entered illegally. The Respondent concluded that he did not meet the requirements of paragraph EX.1 because there were no insurmountable obstacles to family life continuing in Georgia for either him or his partner. His children were adults and he had failed to provide any evidence indicating that his children's lives would be significantly disrupted if he was to leave the UK.
4. The grounds seeking permission to appeal argue that the Judge failed to consider Article 8 outside of the Immigration Rules; failed to consider whether an application for entry clearance would succeed in line with Chikwamba v Secretary of State for the Home Department [2008] UKHL 40; failed to make any findings as to whether the Appellant enjoyed family life with his young adult sons; failed to make any findings on whether the Appellant met the suitability requirements of Appendix FM; failed to give reasons why there were no insurmountable obstacles to family life continuing in Georgia; failed to give reasons for rejecting the evidence of the Appellant's wife and sons in relation to the issue of his employment at a US military base and erroneously cited the wrong Immigration Rule in three paragraphs of the decision.
5. First-tier Tribunal Judge Barker granted permission on all grounds on 22 December 2022.
6. The Rule 24 response states that the Judge was plainly aware of all the issues in the appeal having agreed these with the advocates at the start of the hearing. The Judge directed himself correctly to the relevant jurisprudence and there was nothing in the grounds which established that the Judge did not apply these appropriately to the evidence and arguments which were extensively recorded. The Judge made a litany of findings on the evidence and concluded that the Appellant had adduced no evidence beyond hearsay about the purported risk to him from Russian aggression; that he had been deceptive and evasive and that there was no real evidence of the family being unable to return to Georgia where his wife's family was from. The Respondent argues that the grounds fail to identify how the Appellant could succeed and any background material which supported any claimed risk on return. With regard to the case of Younas (section 117B (6) (b); Chikwamba; Zambrano) [2020] UKUT 129 it was not clear how the appeal would succeed on this basis. Temporary separation was permissible.

Whilst it was unclear from the decision which elements of Appendix FM had not been met, it is submitted that it is clear that the Judge had regard to the reasons for refusal and agreed with the Respondent's position on all aspects under Appendix FM. There was an absence of evidence as to why the family would be unable to work and set up ties in Georgia and the paucity of evidence was insufficient to establish a breach of Article 8.

7. At the hearing Miss Bustani expanded on the grounds and submitted that the Article 8 findings were materially flawed as, although the evidence and arguments were set out, there were simply no findings on Article 8 and no findings on whether there was family life with the Appellant's two sons. Further, no reasons were given as to why there were no insurmountable obstacles to family life continuing in Georgia and the credibility assessment was carried out in the context of the asylum appeal in 2009 but not in relation to his family circumstances in the UK. The Judge had concluded that the Appellant was not credible in relation to his evidence in 2009 and then concluded that none of his evidence could be credible. He had not considered the evidence of the Appellant's wife and children and that was a material error. In relation to the suitability requirements of the Immigration Rules, there was a failure to make material findings. His conviction was 13 years ago and the conviction in itself was not proof that his presence was not conducive to the public good. It was incumbent on the Judge that he make his own findings. He had further failed to make any findings on whether the Appellant would make the requirements for entry if he applied from abroad and there were references to the wrong Immigration Rules.
8. Miss Rushforth accepted that the Judge could have made more detailed findings but submitted that the findings were adequate to demonstrate that he was not satisfied that there would be a breach of Article 8. He made findings on the suitability requirements and the factors under section 117 of the 2002 Act would have been against him. The principle in Chikwamba was not applicable.

Analysis

9. The decision of the First-tier Tribunal is 19 pages long and sets out the contents of the Appellant's skeleton arguments ("ASA"), the Respondent's review, the issues agreed at the hearing, the law in relation to Article 8 ECHR, the evidence and the findings of fact. The issues identified at paragraph 8 of the decision as agreed between the parties are recorded as being the Article 8 claim; the suitability requirements of Appendix FM; insurmountable obstacles to family life continuing outside the UK for the Appellant his partner; very significant obstacles to the reintegration of the Appellant into Georgia and exceptional circumstances which would render refusal a breach of Article 8.
10. We have firstly considered the grounds in relation to the Judge's findings on the matters in issue under the Immigration Rules, which it is asserted are not adequately reasoned. The Respondent concluded that paragraph S-LTR.1.6, a mandatory ground for refusal, applied to the Appellant and his presence in the UK was not conducive to public good due to his conviction in September 2009 and that paragraph S-LTR.4.2 applied because he attempted to gain entry on a false Lithuanian passport. The Appellant's skeleton argument, cited in the decision, argues that he poses no risk to the public and it is difficult to see how the Appellant's presence is "not conducive to the public good" simply on account of his conviction. An additional ASA, also cited in the grounds, makes further arguments about the application of the suitability requirements in relation to the

circumstances surrounding his conviction and lack of legal advice. It is also argued that the conviction is spent and he should be regarded as rehabilitated.

11. Paragraph S-LTR.1.6 requires that the applicant will be refused limited leave to remain on grounds of suitability in the following circumstances:

“S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.”

12. Paragraph S-LTR.4.2 allows for a refusal on discretionary grounds in the following circumstances:

“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).”

13. The Judge was referred in the skeleton argument to the case of Balajigari and Others v SSHD [2019] EWCA Civ 673 in which the Court of Appeal considered the ‘undesirability’ provisions of the Immigration Rules and concluded at paragraph 34 that a correct and helpful analysis was that there must be: (i) reliable evidence of (ii) sufficiently reprehensible conduct; and (iii) an assessment, taking proper account of all relevant circumstances known about the applicant at the date of decision, of whether his or her presence in the UK is undesirable (this should include evidence of positive features of their character).

14. The Judge’s findings are at paragraph 39 to 44. In these paragraphs he concluded that the Appellant was “not credible”. He rejected the Appellant’s account of the circumstances of his arrest, conviction and sentence. He concluded that the Appellant absconded from his probation accommodation. At paragraph 47 he concluded that that “Appendix FM was not satisfied”.

15. In KM v SSHD [2021] EWCA Civ 693 at [77] the Court of Appeal set out the well-established principles as to the approach of the higher courts when considering a decision of a specialist tribunal and we have taken heed of the need for judicial restraint when the reasons that a tribunal gives for its decision are being examined and that the appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it (per Lord Hope in R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19 [2013] 2 All ER 625).

16. We accept that it follows from the fact that the Judge concluded that the requirements of Appendix FM were not satisfied that he must have concluded that the Appellant did not meet the suitability requirements of the Rules although he does not say so in terms. However, we find that the reasoning for his conclusion does not address the relevant tests in paragraphs S-LTR.1.6 and S-LTR 4.2 of the Immigration Rules. The Judge’s findings address the Appellant’s credibility and not whether the Respondent has demonstrated that his conduct made it undesirable to allow him to remain in the UK, taking account of the age of the conviction, all the relevant circumstances at the date of the hearing and the

Respondent's policy in relation to the suitability requirements and criminality referred to in the Appellant's ASA and set out at page 7 of the decision. The Judge's finding that he did not find his account of the circumstances surrounding his conviction in 2009 credible and concluded that he had absconded from probation accommodation are not an answer to whether the Respondent has demonstrated that the mandatory or discretionary suitability grounds are made out.

17. At paragraph 46 the Judge found that there were no insurmountable obstacles to family life continuing in Georgia. It is trite law that the reasons given by the tribunal must show what the issues between the parties are; what its conclusions on those issues are and what evidence was relied on to reach those conclusions. Although the Judge clearly sets out the issues between the parties and concludes that there were no insurmountable obstacles we find that the reasoning by which that conclusion was reached was not adequate. The "insurmountable obstacles" advanced by the Appellant consisted of a fear of Russian aggression; a claim that he and his partner would face substantial challenges in supporting themselves financially; the fact that both children, although adults, lived in the family home and relied on them financially and emotionally and the loss to the Appellant's wife of employment and friends.

18. The Judge rejected the Appellant's account that he could not return to Georgia because he worked at a US military base and found that he had been working in the UK. These matters led him to conclude that the Appellant was "not credible". However, the reasoning does not address the obstacles advanced by the Appellant which were argued, cumulatively, to be insurmountable and does not explain the conclusion that they were not.

19. The grounds also assert that the Judge failed to consider Article 8 'outside the rules' and that this is a material error because the appeal could have arguably succeeded on this basis. The Judge sets out the requirement for a two stage assessment at paragraph 49 of the decision. However, he then assesses proportionality in the following way:

"Proportionality Assessment

50. I place significant weight upon the principle of legitimate immigration control. Section

117B(1) provides that the maintenance of effective immigration control is in the public interest.

51. The Appellant does not meet the requirements of the immigration rules.

52. It follows that I find the decision of the Respondent is not a disproportionate and unlawful interference with the rights of the appellant under Article 8."

20. In some cases, of course, a consideration of proportionality within the Immigration Rules may be a complete answer to an appellant's Article 8 claim because there are no factors that need consideration outside the Rules. However, in this case, the Appellant argued that he enjoyed family life with his adult sons. There are no findings on whether there was family life within the meaning of Article 8 with his sons and no assessment of whether his relationship with his adult sons amounted to exceptional circumstances outweighing the public interest in removal.

21. We consider that the references to paragraph 297 of the Immigration Rules are a mistake and do not amount to an error of law as the Judge did not consider the paragraph as part of his substantive deliberations. It followed from his findings in relation to the Rules that the principle in Chikwamba, clarified by the Court of Appeal in Alam v SSHD [2023] EWCA Civ 30 did not apply.
22. We find that the decision was infected by material errors of law in relation to the findings on the suitability requirements of the Rules, paragraph EX.1 and the failure to consider Article 8 outside the Rules. For these reasons the decision cannot stand.
23. We have considered whether to remit or retain the case within the Upper Tribunal with regard to the recent decisions of Begum (Remaking or remittal) Bangladesh [2023] UKUT 00046 (IAC) and AEB v Secretary of State for the Home Department [2022] EWCA Civ 1512. We have concluded in view of the extent of fact finding in relation to Article 8 both within and outside the Immigration Rules that the case should be remitted to the First-tier Tribunal for a de novo hearing with no findings of fact preserved.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of a material error of law.

The decision of the First-tier Tribunal is set aside.

The appeal is remitted, de novo, to the First-tier Tribunal to be reheard by any judge except Judge Lester.



L Murray

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 June 2023

