



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2023-001900

First-tier Tribunal No:  
PA/50205/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

10<sup>th</sup> October 2023

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

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

Appellant

**And**

**A G**

**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer  
For the Respondent: Mr Andrew Gilbert of Counsel, instructed by Milestone Solicitors

**Heard at Field House on 9 August 2023**

**Order Regarding Anonymity**

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant has been granted anonymity, and is to be referred to in these proceedings by the initials A G. 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**

### **Introduction**

1. The Secretary of State challenges the decision of the First-tier Tribunal dismissing the claimant's appeal against her decision on 24 November 2021 to refuse him international protection, or leave to remain in the UK on human rights grounds.
2. The claimant is a citizen of Albania. The claimant was a minor when he came to the UK. He is 20 years old now.
3. For the reasons set out in this decision, we have come to the conclusion that the decision of the First-tier Tribunal must be set aside and remade by dismissing the appeal.
4. **Mode of hearing.** The hearing today took place face to face.

### **Background**

5. The main basis of the appellant's case is that he is at risk from a blood feud in Albania following a single killing, the murder of his cousin. He was 15 years old in October 2018, when he came to the UK, travelling on his own passport, accompanied by his father, but arriving clandestinely in a lorry.
6. The claimant benefits from a Conclusive Grounds decision on 7 November 2022 that he was a victim of modern slavery, following his arrest for being involved in cannabis growing in the UK. He was 19 years old then.

### **First-tier Tribunal decision**

7. The First-tier Judge considered the guidance in the Secretary of State's February 2023 CPIN and in *EH (blood feuds) Albania CG* [2012] UKUT 348 (IAC). She found as a fact that there was no active blood feud relating to the claimant's family which put him at risk on return. The claimant's family have not carried out any reprisal killing.
8. The First-tier Judge dismissed both the asylum and humanitarian protection elements of the international protection claim. There was no past persecution which required paragraph 339K to be considered, and no risk of a breach of Articles 2 or 3 ECHR. The First-tier Judge found that the claimant was still in contact with his mother, who could support him in reintegrating in Albania on return.
9. Little weight could be given to any private life the claimant had developed in his 5 years spent in the UK: see section 117B of the Nationality, Immigration and Asylum Act 2002 (as amended). The claimant could not

bring himself within the Article 8 provisions of the Immigration Rules as the Secretary of State's decision was proportionate.

10. The First-tier Judge allowed the appeal in the following terms:

"49. I have had regard to *SS* ([2017] UKSC 10), *Agyarko* ([2017] UKSC11) and *Lal* ([2019] EWCA Civ 1925). It is at this point, where I consider if there are exceptional circumstances meriting a grant of leave to remain outside the rules under article 8 because the decision will have unjustifiably harsh consequences for the appellant. I have had regard to the fact that since the refusal letter the appellant has been the subject of a positive Conclusive Grounds decision on the basis that he has been found to be a victim of Modern Slavery. ...

52. The respondent may not have been made aware that the appellant was made the subject of a NRM referral, but she would have been made aware of the Reasonable and Conclusive Grounds decisions and yet has not granted the appellant leave to remain to pursue his asylum claim as she should have done under *EOG and KTT* ([2022] EWCA Civ 307) at paragraphs 73-4 and 78-82. The respondent has now incorporated ECAT into UK law at section 65 of NABA and that section of NABA came into force on January 30th, 2023. The immigration rules which deal with Temporary Permission to Stay for Victims of Trafficking and Modern Slavery were brought into force on January 30th, 2023. The appellant does not have to make the application to stay. According to the rules, it is considered automatically, but to date, there is nothing to say that the respondent has considered the fact that the appellant has been the beneficiary of a Conclusive Grounds decision since November 2022.

53. In the circumstances, I am satisfied that the fact that the appellant has not been granted temporary stay to pursue his asylum claim as per *VCL and AN* and there is no evidence that the respondent has considered a claim to stay under the new Temporary Protection Rules is enough of an exceptional circumstance to allow his appeal under article 8 outside the rules on the ground the decision will have unjustifiably harsh consequences for the appellant.

54. Given all the above, I therefore find that the appellant has not discharged the burden of having a well-founded fear of persecution for any convention reason nor has he established that he qualifies for Humanitarian Protection. His claims under articles 2 and 3 fail for the reasons given above, but, given that I find exceptional circumstances, I am satisfied that his removal will place the UK in breach of its obligations under the 1950 Human Rights Convention."

11. The Secretary of State appealed to the Upper Tribunal.

### **Permission to appeal**

12. Permission to appeal to the Upper Tribunal was granted by First-tier Judge Fisher as follows:

"2. ...Paragraphs 2 to 5 of the grounds disclose no arguable error of law. However, the grounds then go to claim that the Judge misdirected herself

in concluding that the [claimant] had an automatic entitlement to leave following the positive conclusive grounds finding that he had been a victim of modern slavery. It is further said that she misapplied case law and the [Secretary of State's] policy.

3. In paragraph 53 of her decision, the Judge found that the [Secretary of State's] failure to grant the [claimant] a temporary stay in order to pursue his asylum claim and the lack of evidence that the [Secretary of State] had considered a claim to remain under the new Temporary Protection Rules was sufficient to amount to exceptional circumstances to enable her to allow the appeal under Article 8 of the ECHR.

4. I consider it arguable that the Judge has erred in law for the reasons set out in the grounds, and in reaching the conclusion that there were exceptional circumstances. Accordingly, permission to appeal is granted."

13. There was no cross appeal on behalf of the claimant.

### **Rule 24 Reply**

14. On 7 August 2023, the claimant filed an out of time Rule 24 Reply settled by Counsel Mr Gilbert, who appears today. We have treated it as his skeleton argument.

15. We also received a skeleton argument from Mr Nolan on behalf of the Secretary of State.

16. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

17. The oral and written submissions at the hearing are a matter of record and need not be set out in full here, although we will summarise the relevant points. We had access to all of the documents before the First-tier Tribunal.

18. The Secretary of State's skeleton argument, adopted by Mr Tufan, observed that her policy guidance on *Discretionary Leave, version 1.0* [16 March 2023] provided that:

"Individuals who before 30 January 2023, had both a positive conclusive grounds decision and had made an asylum claim or further submissions, based in a material part on a claim to a well-founded fear of re-trafficking / real risk of serious harm due to re-trafficking, which had not been finally determined, were potentially entitled to DL had their applications for leave been determined under the Home Office policies prior to 30 January 2023."

19. This claimant's asylum application was not related to a fear of re-trafficking but was linked to a blood feud claim. The Secretary of State's policy of considering discretionary leave was not germane, on those facts. The First-tier Judge's finding that the Secretary of State had erred in not considering discretionary leave on that basis was legally erroneous and

unsound. The First-tier Judge had incorrectly applied the decision of the Court of Appeal in *EOG and KTT* [2022] EWCA Civ 307.

20. The Secretary of State asked the Tribunal to set aside the decision of the First-tier Tribunal and dismiss the appeal.
21. In his Rule 24 Reply, which we are treating as his skeleton argument, Mr Gilbert argued that the First-tier Judge's decision was sustainable. She had directed herself to relevant authority, statute and Rules in force at the date of the Conclusive Grounds decision in her favour. The Secretary of State had not considered a grant of leave to him as a victim of modern slavery, pursuant to the majority decision of the European Court of Human Rights in *VCL and AN v United Kingdom* (Applications 77587/12 and 74603/12) 5 July 2021.
22. Mr Gilbert relied in particular on paragraph [50] of *VCL and AN*, which is a quotation from the judgment of the national Court of Appeal. The relevance of that paragraph to the facts of this appeal is not apparent to us, since it concerns matters relating to a change of instructions in criminal proceedings to advance a trafficking or modern slavery claim. The First-tier Judge had considered that the claimant appeared not to have been advised of victim of modern slavery defences to the cannabis farming charge and had pleaded guilty.
23. The Secretary of State had not considered granting him victim of modern slavery leave, and the First-tier Judge considered that the claimant ought to be granted 'temporary stay to pursue an asylum claim'.

## **Discussion**

24. Before allowing the appeal on exceptional grounds outside the Rules, the First-tier Judge had rejected it on all international protection and human rights grounds. Her reasoning on exceptional circumstances appears to be on a stand alone basis, untethered either to Article 8 or even Article 4 ECHR.
25. In *EOG and KTT*, Lord Justice Underhill, with whom Lord Justice Dingemans and Sir Geoffrey Vos MR agreed, considered the implementation in UK law of Articles 10, 12, 13 and 14 of the Council of Europe Convention on Action against Trafficking in Human Beings ("ECAT"). Article 13 provides for a recovery and reflection period of at least 30 days, while Article 14 requires the Secretary of State to issue a renewable residence permit where the Competent Authority considered that stay by a victim of modern slavery was necessary owing to their personal situation, or for the purposes of their cooperation in investigation or criminal proceedings.
26. In this appeal, the claimant has had much more than 30, or 45 days recovery in the UK. He is not assisting with any criminal proceedings or investigation, nor did the First-tier Judge identify any personal circumstances for which leave might be necessary. Any speculation as to

the advice his representatives in the criminal proceedings gave him as to what defences were available to him is inappropriate in these proceedings: we have no witness statement about that and the claimant pleaded guilty to the cannabis farming offence.

27. The First-tier Tribunal's finding that the claimant should be granted temporary leave to pursue an asylum claim sits uncomfortably with the rest of the decision, in which the First-tier Judge rejected the international protection claim. By the point in her decision when she was considering leave to remain on exceptional circumstances outside the Rules, there was no asylum or humanitarian protection claim left to pursue.
28. Further, the asylum claim is not related to the cannabis farming. The claimant continues to base his fear of return on the alleged blood feud, which the First-tier Judge found did not exist.
29. The finding of fact that exceptional circumstances exist for a grant of leave to remain outside the Rules is rationally unsupportable: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [65]-[66] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.
30. We therefore set aside the decision and substitute a decision dismissing the appeal on all grounds.

### **Notice of Decision**

31. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

We set aside the previous decision. We remake the decision by dismissing the appeal.

**Judith A J C Gleeson**  
Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**Dated: 3 October 2023**