



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

Case No: UI-2023-003872

First-tier Tribunal No:
HU/54222/2021
(IA/10801/2021)

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 9 January 2024**

Before

DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ARMAND BEQIRI
(NO ANONYMITY ORDER MADE)**

Respondent

Representation:

For the Appellant: Mr T. Lindsey, Senior Home Office Presenting Officer

For the Respondent: Mr A. Chakmakjian, Counsel instructed by Kilby Solicitors

Heard at Field House on 18 December 2023

DECISION AND REASONS

Introduction

1. In this appeal the Secretary of State for the Home Department is the Appellant but in order to maintain consistency with the decision of First-tier Tribunal Judge Knight (hereafter “the Judge”) promulgated on 9 August 2023, I shall refer to the parties as they were in that hearing.
2. Permission to appeal was ultimately granted by Upper Tribunal Judge Macleman on 10 November 2023 after application to the Upper Tribunal.

The Judge's decision

3. In the decision the Judge laid out the background to the appeal:

- a. When the Appellant first entered the United Kingdom on 1 November 1999 he used a false name, date of birth and nationality, those being: Armando Beqiri, born on 29 June 1982, Kosovan national, §1.
- b. The Appellant's claim for asylum was refused. On 19 March 2003 he was granted Leave to Remain under the EEA rules at that time, which was subsequently renewed on 14 April 2005 extant until 14 April 2008, §§15 & 22.
- c. On 14 April 2008 the Appellant made an in-time application for an EEA Permanent Right of Residence card which was refused by the Respondent on 27 July 2010 - the Appellant's appeal rights were exhausted on 14 October 2010, §22.
- d. However, on 23 September 2010 the Appellant was granted Indefinite Leave to Remain ("ILR") it appears on the basis of the Respondent's legacy scheme operating at that time, §§15 & 22.
- e. On 18 June 2019, the Appellant's ILR was revoked by the Respondent on the basis that he had not provided his true details in his applications for Leave to Remain, §2.
- f. On 27 November 2019, the Appellant applied for Leave to Remain on the basis of 20 years continuous residence in the United Kingdom which was refused by the Respondent on 29 July 2021, §3.
- g. On 29 July 2021 the Respondent made the decision currently under appeal. In respect of the substantive reasoning in that decision, the Judge records that the Respondent concluded that the Appellant fell for refusal on Suitability grounds: S-LTR.2.2.(b) & S-LTR.4.3. of Appendix FM, §23.
- h. Two reasons were given: the first that the Appellant did not disclose material facts in the making of this application because he declared that he was given a penalty for drink-driving on 15 January 2015 but did not also declare that he was convicted at the same time for failing to stop after an accident and that he also received a conviction on 29 August 2008 for driving whilst disqualified and uninsured, §23.
- i. The second issue raised by the Respondent was that the Appellant made false representations and failed to disclose material facts for the purpose of obtaining a document from the Respondent which later led to the revocation of the Appellant's ILR, §23.

- j. The Respondent also concluded that the Appellant had not established 20 years residence at the date of the application; nor had he shown that there would be very significant obstacles to his reintegration into Albania, §24.

4. In respect of his own findings, the Judge found the following:

- a. The Appellant previously lied about his identity throughout multiple immigration applications covering the vast majority of his time in the United Kingdom, §41.
- b. The Judge however noted that in the present appeal there had been no serious challenge to the Appellant's credibility. The Judge accepted the Appellant's explanation for why he did not mention his partner and child in his current application and found his evidence about his current situation in the United Kingdom to be credible, §41.
- c. At §42, the Judge specifically found that the Appellant lied when he claimed to be a child refugee in 2000 and that the reality was that he was an adult citizen from Albania who was fleeing economic deprivation. The Judge also found that the Appellant provided a false date of birth, name and nationality and only confessed his true details once he had been found out by the Respondent.
- d. The Judge also concluded that the Respondent's case that the Appellant had not been in the United Kingdom for 20 years prior to the date of application was contrived and obviously wrong; such an assertion was not pursued by the Presenting Officer at the hearing, §43.
- e. In respect of the Appellant's child and partner, the Judge accepted that they are Albania citizens without immigration status in the United Kingdom but have outstanding applications for Leave to Remain in their own right, §45.
- f. In respect of the Appellant's private life, the Judge found that he has built up close relationships in the United Kingdom and had set up a business here which employs other people. The Judge also concluded that the Appellant owns his own home and has close relationships with British citizen friends, and that the interference with his private life would be a serious wrench for him; he only has his mother in his home village in Albania, §46.
- g. In respect of the Appellant's previous driving offences, the Judge concluded that the Appellant had disclosed two previous driving offences in his application but also recorded that the Appellant gave evidence that he did not know the specific details of the offences for which he was convicted because it was so long ago. The Judge also noted that the technical legal labels applied to such criminal offences were not something that he could be expected to know, §47.

- h. The Judge also found that the Respondent had not evidenced the assertion that there were other specific offences which the Appellant had been convicted for nor the underlying circumstances. The Judge therefore found that he was not in a position to conclude that any offences which the Appellant was convicted were of a significantly different character or greater seriousness, to that which he disclosed in his application, §47.
- i. Importantly, the Judge also found that the Respondent had previously considered a Police National Computer printout when he considered the Appellant's application under the legacy scheme in 2010 and nonetheless granted ILR.
- j. Bringing these factual findings together, the Judge specifically accepted that the Appellant met the 20 years residence requirement in paragraph 276ADE(1) but recognised that the Respondent had raised Suitability issues which could exclude the Appellant from the direct benefit of that rule: S-LTR.2.2.(b) & S-LTR.4.3., §50.
- k. At §52 the Judge concluded that the Appellant had genuinely disclosed to the Respondent the criminal offences which he knew about at that time. The Judge also found that the Appellant's offending behaviour did not reach the level of seriousness that would be required for deportation.
- l. In assessing Suitability, the Judge also took into account the Appellant's past use of deception in respect of his identity and observed that the deception could have led the Appellant to be granted refugee status which was a particularly serious form of deception because it was capable of contributing to a culture of disbelief which could lead to the claims of genuine refugees being disbelieved and ultimately took advantage of the United Kingdom's obligations under the Refugee Convention, §53.
- m. At §54, the Judge however noted that the Appellant had never derived a specific benefit from that particular deception and observed that the immigration history showed that the Appellant's application for asylum was refused by the Respondent. The Judge also concluded that the Appellant's initial grant of Leave to Remain in 2003 was predicated upon his status as a family member of an EEA national which was itself not dependent upon his own claimed nationality.
- n. In the same paragraph, the Judge noted that the Appellant was granted ILR on the basis of his length of residence in the United Kingdom and the absence of any attempt by the Respondent to remove him. The Judge noted the reference in the GCID note to the Appellant's Kosovan nationality, but also found that this reference was only related to whether the Appellant was removable; if the Appellant could be removed on an EU letter that meant he was more removable

than someone who could not be so removed. The Judge therefore found that the Appellant's false claim to Kosovan nationality did not have any bearing on his previous grant of ILR, §54.

- o. At §55, the Judge recognised that the impact of the use of past deception would normally lead to refusal. In respect of the Respondent's reliance upon the Appellant's continued use of the false identity, the Judge noted that the Appellant had effectively trapped himself in the lie he told about his identity on entering the UK. The Judge also noted that the Appellant's ILR had in fact been revoked in 2019 on the basis of the Respondent's awareness of this prior deception, §56.
- p. At §57, the Judge went on to conclude that it was disproportionate for the Respondent to refuse Leave to Remain on Suitability grounds in the context of this application because of: the strength of the Appellant's private life ties in the United Kingdom; the fact that he had derived no material benefit from his original lie about his identity; that the Appellant's use of false details and his criminality was not so serious as to require the integrity of the immigration system to be protected by the act of refusal. The Judge found that the Suitability provisions deployed in this case had led to a disproportionate decision and therefore found that they should not be invoked in the Appellant's case.
- q. This also led to the Judge concluding that the Appellant met the requirements of 276ADE(1)(iii) and that he was not excluded from this provision by the Suitability provisions. On that basis the Judge concluded that compliance with the Immigration Rules was positively determinative of the Appellant's Article 8 ECHR appeal, §59.
- r. The Judge also nonetheless considered Article 8 ECHR outside of the Rules, and centring upon the Appellant's private life in the UK concluded that there would be sufficient interference in the case to move to the assessment of proportionality under Article 8(2), §63.
- s. The Judge went on to find that the Appellant speaks English and is financially self-sufficient which are both neutral factors (applying s. 117B of the NIAA 2002), §§65 & 66.
- t. Additionally, the Judge took into account the matters in favour of the public interest, that being the Appellant's previous low-level criminality and deception, §64.
- u. The Judge furthermore noted the statutory requirement for little weight to be given to the Appellant's private life on the basis that it was developed whilst he had been residing unlawfully or precariously, §68.

- v. The Judge ultimately included that the Appellant's private life had developed over more than 20 years residence in the United Kingdom; that this was an important factor and that being removed to Albania at this stage would be devastating to him, §69.

The error of law hearing

5. In his submissions, Mr Lindsey submitted that he would not rely on the Respondent's first ground as formulated in writing because the drafter had erroneously argued that the Judge had sought to apply the Respondent's residual discretion outside of the Rules.
6. In my view this was a sensible position to take as Ground 1 is plainly misconceived. Mr Lindsey did however seek to elaborate upon the point without seeking permission to amend the grounds, with reference to Ukus (discretion: when reviewable) Nigeria [2012] UKUT 307 (IAC), ("Ukus"). He argued that the Judge had materially erred by applying the Respondent's discretion as expressed in the Suitability provisions of the Rules. Mr Lindsey also relied upon the Respondent's guidance document entitled 'Rights of Appeal' (dated 11 December 2023) at page 20 which itself refers to the Upper Tribunal's decision in Charles (human rights appeal: scope) Grenada [2018] UKUT 89 (IAC), ("Charles"). Mr Lindsey argued that the Judge should have focused his findings through the prism of Article 8 ECHR and that it was impermissible for the Judge to apply the Respondent's discretion in the Suitability provisions.
7. Ultimately, Mr Lindsey did appear to argue that the Judge should have found that the Respondent's decision in respect of the Suitability provisions in Appendix FM was not perverse, in other words applying a public law test.
8. In respect of ground 2, Mr Lindsey referred to §57 of the Judge's decision and argued that there was no requirement in the Suitability provisions of Appendix FM for the deception to be material to a previous grant of Leave. Mr Lindsey also argued that if the Appellant had in fact disclosed his true identity then the Respondent would not have initially granted Leave to Remain and therefore would not have needed to revoke the extant Leave. Mr Lindsey also referred to the Upper Tribunal's decision in Matusha, R. (on the application of) v Secretary of State for the Home Department [2021] UKAITUR, ("Matusha"), with specific reference to §§22, 26 and 60.
9. In respect of ground 3, Mr Lindsey accepted that the Judge was right to say that the Respondent had not provided evidence of the other convictions referred to but submitted that the terms of S-LTR also incorporated the situation where the deception was not within the Appellant's knowledge.
10. In response, Mr Chakmakjian criticised Mr Lindsey for effectively running a completely new argument through the prism of ground 1. He nonetheless responded to the new point by relying upon the Court of Appeal's decision in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109, ("TZ"), and asserted that the Judge had

firstly considered the Appellant's appeal via the Article 8 rules in accordance with §§33 & 34 of TZ. Mr Chakmakjian also referred to the latter part of the Judge's decision in which he considered the appeal outside of the Rules under Article 8(2) and submitted that the Judge had made lawful findings in respect of the balancing exercise.

11. Mr Chakmakjian also argued, in respect of ground 2, that the Judge was entitled to conclude that the Appellant's use of deception in 2000 was of no relevance to the grant of Leave first given to him in 2003 as a partner of an EEA national and also emphasised that the Appellant had already been subject to revocation proceedings in respect of his ILR in 2019. He also referred to §53 of the Judge's decision and argued that the Judge was in fact taking into account the Upper Tribunal's decision in Matusha.
12. Mr Chakmakjian further referred to his argument at §18 of the Appellant's skeleton argument to the First-tier Tribunal by reference to the Court of Appeal's decision in Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673 at §37, which emphasised that deception in itself would not always automatically lead to a sufficient level of seriousness and that any assessment had to be fact sensitive in accordance with the duty under Article 8 ECHR.
13. Mr Chakmakjian also reminded the Upper Tribunal that the Appellant had put the Respondent to proof in respect of the allegation of the existence of other undeclared offences in the Case Management Review hearing on 26 October 2022 which led to a Tribunal direction for the Respondent to provide such evidence - the Respondent did not do that. Therefore, Mr Chakmakjian argued that the Judge was entitled to conclude that the Appellant had declared what he could remember and also reverted to the fact that the Presenting Officer at the First-tier hearing did not pursue the issues mentioned in the refusal letter, see §47.
14. Ultimately, he submitted, that the Respondent had had enough opportunities to evidence the allegation of the offence in 2015 but had failed to do so.
15. I also heard submissions in response from Mr Lindsey who reiterated that he had not made new points and that they in effect flowed from those grounds given permission by the Tribunal.

Findings and reasons

16. I agree with the Appellant that the Respondent's representative did argue new points by reference to the actual written grounds upon which permission was given. I have however decided to consider them on the basis that my conclusions do not cause unfairness to the Appellant's position in response.

Ground 1

17. In the amended form of the argument, Mr Lindsey asserted that the Judge materially erred by seeking to exercise the discretion in S-LTR.2.2.(b) and S-LTR.4.3. himself.
18. In my view, Mr Lindsey's reliance upon Ukus is misconceived. The Head-note states:

"1. If a decision maker in the purported exercise of a discretion vested in him noted his function and what was required to be done when fulfilling it and then proceeded to reach a decision on that basis, the decision is a lawful one and the Tribunal cannot intervene in the absence of a statutory power to decide that the discretion should have been exercised differently (see s 86(3)(b) of the Nationality, Immigration and Asylum Act 2002).

2. Where the decision maker has failed to exercise a discretion vested in him, the Tribunal's jurisdiction on appeal is limited to a decision that the failure renders the decision 'not in accordance with the law' (s 86(3)(a)). Because the discretion is vested in the Executive, the appropriate course will be for the Tribunal to require the decision maker to complete his task by reaching a lawful decision on the outstanding application, along the lines set out in SSHD v Abdi [1996] Imm AR 148. In such a case, it makes no difference whether there is such a statutory power as is mentioned in paragraph 1 above.

3. If the decision maker has lawfully exercised his discretion and the Tribunal has such a statutory power, the Tribunal must either (i) uphold the decision maker's decision (if the Tribunal is unpersuaded that the decision maker's discretion should have been exercised differently); or (ii) reach a different decision in the exercise of its own discretion."

19. It is important to firstly note that this case was seeking to analyse the effect of the previous version of s. 86 of the NIAA 2002 prior to the changes brought in by the 2014 Immigration Act. The former version of s. 86 read (in respect of the issues before this Tribunal):

"86 Determination of appeal

(1) This section applies on an appeal under section 82(1) 83 or 83A.

(2) ...

(3) The Tribunal must allow the appeal in so far as it thinks that—

(a) a decision against which the appeal is brought or is treated as being brought was not in accordance with the law (including immigration rules), or

(b) a discretion exercised in making a decision against which the appeal is brought or is treated as being brought should have been exercised differently.

(4)...

(5) *In so far as subsection (3) does not apply, the Tribunal shall dismiss the appeal.*

(6) *Refusal to depart from or to authorise departure from immigration rules is not the exercise of a discretion for the purposes of subsection (3)(b)."*

20. The case concerned when it was appropriate for a judicial decision-maker to deploy a finding of not in accordance with the law [s. 86(3)(a)] and/or when it was permissible for a Judge to consider and exercise a discretion contained within the Rules, [s. 86(3)(b)].
21. As I have said, the Tribunal's powers have changed since the introduction of the 2014 Immigration Act. The current provision requires the Tribunal to determine any matter raised as a ground of appeal: s. 86(2)(a) read with s. 84(2). The sole ground of appeal arising from s. 84(2) is that the decision in question *is unlawful under section 6 of the Human Rights Act 1998*.
22. The Tribunal's task is therefore to assess the Respondent's decision through the prism of the Article 8 ECHR appeal: firstly, by reference to the Respondent's Rules, as emphasised by the Court of Appeal in TZ (Pakistan) and PG (India) v The Secretary of State for the Home Department [2018] EWCA Civ 1109 at §34:

"That leaves the question of whether the tribunal is required to make a decision on Article 8 requirements within the Rules i.e. whether there are insurmountable obstacles, before or in order to make a decision about Article 8 outside the Rules. The policy of the Secretary of State as expressed in the Rules is not to be ignored when a decision about Article 8 is to be made outside the Rules. An evaluation of the question whether there are insurmountable obstacles is a relevant factor because considerable weight is to be placed on the Secretary of State's policy as reflected in the Rules of the circumstances in which a foreign national partner should be granted Leave to Remain. Accordingly, the tribunal should undertake an evaluation of the insurmountable obstacles test within the Rules in order to inform an evaluation outside the Rules because that formulates the strength of the public policy in immigration control 'in the case before it', which is what the Supreme Court in Hesham Ali (at [50]) held was to be taken into account. That has the benefit that where a person satisfies the Rules, whether or not by reference to an Article 8 informed requirement, then this will be positively determinative of that person's Article 8 appeal, provided their case engages Article 8(1), for the very reason that it would then be disproportionate for that person to be removed.

23. Such an assessment requires the Tribunal to assess the merits: it is an argument based on illegality not irrationality, as per Balajigari v The Secretary of State for the Home Department [2019] EWCA Civ 673 at §104.
24. This is in accordance with the Court of Appeal's guidance on the powers of the Tribunal in Article 8 ECHR appeals as laid out by the Court of Appeal in R (Caroopen) v Secretary of State for the Home Department [2016] EWCA Civ 1307 at §81:

"It is no doubt true that in Lord Carlile's case, and indeed in Bank Mellat, the Court emphasised the respect that it was necessary to pay to the original assessment of the Secretary of State. That is unsurprising having regard to the nature of the considerations in play in those cases, involving as they did matters of foreign affairs and national security. Mr Staker submitted that the same emphasis on respect for the assessment of the decision-maker could be straightforwardly read across to cases of the present kind because of the important public interest in controlling immigration. I do not agree. I quite accept that great weight must be accorded to the policy assessments of the Secretary of State in the immigration field, as reflected in the Rules, but in taking decisions in the circumstances of an individual case a caseworker in the Home Office is not inherently better placed to make the necessary proportionality assessment than a specialist Judge of the First-tier Tribunal."

25. It is therefore clear that the Tribunal is not limited to considering decisions taken under certain parts of the Respondent's Article 8 specific rules through the prism of public law principles - it can make its own decision.
26. This is also entirely consistent with the arguments (and the approach of the Upper Tribunal) in Mahmood (paras. S-LTR.1.6. & S-LTR.4.2.; Scope) Bangladesh [2020] UKUT 376 (IAC) and most recently in DK and RK (ETS: SSHD evidence, proof) India [2022] UKUT 112 (IAC) which specifically looked at the Suitability provision in Appendix FM: S-LTR.1.6. at §44.
27. I therefore find no error in the Judge's approach in respect of the discretionary provisions in S-LTR.2.2.(b) (read with S-LTR.2.1.: "*will normally be refused*") or in respect of S-LTR.4.3. (read with S-LTR.4.1.: "*may be refused*").

Ground 2

28. In essence the Respondent criticises the Judge's conclusions on the basis of the guidance given by the Upper Tribunal in Matusha, R (on the application of) v Secretary of State for the Home Department (revocation of ILR policy) [2021] UKUT 175 (IAC).
29. It is clear that the Judge properly understood that the Appellant's ILR was revoked by the Respondent on 18 June 2019.

30. Whilst there is some force in the Respondent's criticism that the Judge should not have sidelined the Appellant's use of a false nationality and age when considering the Respondent's GCID note and the detailed explanation for granting the Appellant ILR under the Legacy scheme, as per the guidance in Matusha at §§56-60: see the Judge's reasoning at §54, I however find that such an error is not material.
31. The reason why it is not material is that the Judge also considered and accepted the Respondent's assertion that the Appellant had repeatedly used the false identity details over very many years, see §§56 & 57.
32. The Judge expressly concluded that the Appellant's deception and previous criminality "heightened" the weight to be given to the public interest but that it was outweighed by factors on the Appellant's side of the Article 8(2) balancing exercise, see §§57, 64-70.
33. I therefore find that the Judge did not fail to fully assess the nature of the Appellant's past deception and reached conclusions which were open to him in respect of Article 8(2) ECHR.

Ground 3

34. In respect of the claim that the Judge materially erred in fact when assessing the Appellant's past convictions in the UK, I find that there is no such error.
35. Mr Lindsey did not challenge the Judge's finding at §47 that the Respondent had failed to provide supporting evidence in respect of the claim that the Appellant had deliberately deceived the Respondent when declaring his past criminal convictions in the making of his current application.
36. There is therefore no basis to go behind the Judge's conclusion that the Appellant disclosed what he could remember and that there was no deception involved.
37. I also take into account that the two convictions for driving offences in 2008 were not significant enough to lead to a refusal of ILR in 2010, see §15.
38. Ultimately, the Judge properly factored in the Appellant's criminality and his use of deception when assessing the competing sides of the balance in Article 8(2) ECHR; there was no error of fact.

Notice of Decision

39. The Respondent's appeal is dismissed; the decision of the Judge is upheld.

I P Jarvis

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 January 2024