



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000685
LH/06018/2023
HU/51172/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 10th June 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Peka Izmir
(No anonymity order made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: -

For the Respondent: Ms Newton, Senior Home Office Presenting Officer

Heard at Manchester Civil Justice Centre on 21 May 2024

DECISION AND REASONS

1. The Appellant is a national of Albania born on the 10th May 1994. He appeals with permission against the decision of the First-tier Tribunal (Judge Dieu) to dismiss his appeal on human rights grounds.
2. The Appellant has lived in the United Kingdom since 2012 when he entered the country illegally. He had no right to remain here until he successfully applied, in 2019, for limited leave to remain as the partner of a person present and settled in the UK. That period of leave came to an end on the 31st October 2021. The Appellant applied for a further period of leave on the 13th December 2021, this time on the basis of his private life in the UK, his relationship having come to an end. That application was refused on the 23rd January 2023 on the grounds that the Appellant had not demonstrated that he met any of the alternative requirements to be granted leave on private life grounds. The Appellant appealed to the First-tier Tribunal. Prior to the hearing the Respondent undertook a review of the case, and found another reason to refuse the Appellant leave.

That was that on the 24th December 2021 he had been convicted of conspiracy to supply Class B drugs (cannabis) for which he had been sentenced to 16 months imprisonment, with, he tells me, the entire sentence suspended. He was also fined and required to undertake 180 hours of unpaid work.

3. As matters stand it is the Respondent's position that although the Appellant's conviction does not meet the threshold for deportation¹, it is right that he be refused leave on suitability grounds. The Appellant submits that this was his only conviction and that it does not mean that he should not be granted leave to remain. That dispute between the parties is not however what concerns me in this appeal. At this stage I am asked only to determine whether Judge Dieu erred in law in respect of his approach to the appeal. In making that assessment I note that I have been greatly assisted by written grounds drafted by Mr Raza Halim of Counsel, upon which the (now unrepresented) Appellant relied before me. Ms Newton made oral submissions in defence of Judge Dieu's submissions and I reserved my decision.

Legal Framework

4. At the date of the application and appeal the relevant provision of the Immigration Rules relating to 'private life' claims was paragraph 276ADE(1). The sections relevant to the Appellant are highlighted here:

276ADE (1). The requirements to be met by an applicant for leave to remain on the grounds of private life in the UK are that at the date of application, the applicant:

(i) **does not fall for refusal under any of the grounds in Section S-LTR 1.1 to S-LTR 2.2. and S-LTR.3.1. to S-LTR.4.5. in Appendix FM;** and

(ii) has made a valid application for leave to remain on the grounds of private life in the UK; and

(iii) has lived continuously in the UK for at least 20 years (discounting any period of imprisonment); or

(iv) is under the age of 18 years and has lived continuously in the UK for at least 7 years (discounting any period of imprisonment) and it would not be reasonable to expect the applicant to leave the UK; or

(v) is aged 18 years or above and under 25 years and has spent at least half of his life living continuously in the UK (discounting any period of imprisonment); or

(vi) subject to sub-paragraph (2), **is aged 18 years or above, has lived continuously in the UK for less than 20 years (discounting any period of imprisonment) but there would be very significant obstacles to the applicant's integration into the country to which he would have to go if required to leave the UK.**

¹ By virtue of s117D(4)(a) Nationality Immigration and Asylum Act 2002

5. The Appellant therefore had to show three things in order to qualify under this rule. That he was 'suitable' to be given leave to remain, that he had lived here for a period, and that there are "very significant obstacles" to him integrating in Albania.
6. The 'suitability' requirements for leave to remain under the rules are set out, slightly confusingly, in Appendix FM. The specific paragraphs cited by the Respondent are S-LTR 1.5 and S-LTR 1.6:
 - S-LTR.1.5. The presence of the applicant in the UK is not conducive to the public good because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law.
 - 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.
7. If the Appellant cannot meet the requirements of paragraph 276ADE(1) he could still succeed in his appeal if he could show that it would, in all the circumstances, be a disproportionate interference with his Article 8 rights if he were to be refused leave to remain. In undertaking that balancing exercise any decision maker would be bound to have regard to the public interest considerations set out at s117B Nationality Immigration and Asylum Act 2002:

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

- (a) are less of a burden on taxpayers, and
- (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

- (a) are not a burden on taxpayers, and
- (b) are better able to integrate into society.

(4) Little weight should be given to—

- (a) a private life, or
- (b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

- (a) the person has a genuine and subsisting parental relationship with a qualifying child, and
- (b) it would not be reasonable to expect the child to leave the United Kingdom.

The Decision of the First-tier Tribunal

8. Judge Dieu's reasoning is brief. Of the 'suitability' grounds for refusal he says this:

"17.I am not satisfied that the Appellant is able to meet the Immigration Rules. Firstly, his offending history is accepted. It was a serious offence he had committed, reflected by a correspondingly serious sentence. The Respondent argues that his presence in the UK is not therefore conducive to the public good, nor desirable. I agree. Drug offences cause significant public harm and the imposition of a 12 month custodial term of imprisonment, albeit suspended, reinforces that."

9. He continues:

"...Further, or in the alternative, I am not satisfied that there would be very significant obstacles to his return. The threshold is an elevated one. The Appellant is in touch with his family in Albania. In particular his parents and a younger sister. I entirely concur with the Respondent's assessment of this in the RFL and Review and I adopt it. The Appellant is of an employable age and even on his evidence is able and willing to work, but is not permitted to in the UK. He also speaks Albanian and there is no reason to suggest that he has lost the cultural understanding of Albania. The Appellant spoke of suffering from depression previously but was feeling better now.

18. He says he has taken out loans in the UK from some Albanian's. He says that he does not want to bring his debts to his

family. The Respondent has pointed out that the Appellant can take advantage of the Assisted Voluntary Return Scheme however and in any event there is no satisfactory evidence before me as to any harm that might befall the Appellant because of the loan(s). If anything, his return would enable him to be able to work and to make repayments. I am not satisfied that the Appellant's circumstances could be said to amount to very significant obstacles therefore".

10. The decision then notes that there is no evidence capable of establishing that there are exceptional circumstances such that the appeal should be allowed on wider Article 8 grounds, and the appeal is dismissed.

Ground 1: Suitability

11. In his written grounds Mr Halim submits on the Appellant's behalf that the reasons given for upholding the suitability elements of the refusal are not adequate. If the Judge thought that S-LTR 1.5 was engaged, it was incumbent upon him to identify why his offending has caused serious harm, or in the alternative whether the Appellant was a persistent offender. This being his only offence it could not sensibly be the latter. Mr Halim takes issue with the Tribunal's characterisation of this offence as "serious" and points out that the Judge has not explained why he finds it to have "caused" serious harm. Since the decision is silent on S-LTR 1.6 it must be assumed that the Tribunal did not consider this paragraph to be engaged.
12. For the Respondent Ms Newton submitted that the Judge was plainly entitled to conclude that drug offences caused serious harm, and to infer from the sentence that this was a "serious" offence. She submitted that the Tribunal needed to do no more to justify and explain its decision.
13. I begin with paragraph S-LTR 1.6. I agree with Mr Halim that the First-tier Tribunal appears to ignore this provision altogether and I am prepared to read into that omission a finding that it did not apply. In order to make out a refusal on that ground the Respondent would have needed to produce some evidence about the Appellant's character and associations and as far as I am aware, he did not do so.
14. Turning to S-LTR 1.5 I also accept Mr Halim's submission that the Appellant cannot be said to be a persistent offender. This is his only conviction.
15. That leaves whether, "in the view of the Secretary of State, their offending has caused serious harm". It will be recalled that the original decision maker did not take a view on this one way or the other. It was not until the Review in September 2023 that this general ground for refusal was invoked. This is what the Respondent said about his view at that time:

8. The R notes the A was convicted on 24/10/2022, at Norwich Crown Court, of conspiracy to control and supply class B drugs and was sentenced to 16 months suspended imprisonment, Wholly suspended for 12 months (AB page 2, para 5). The R has uploaded a Court PNC print as further evidence. The R also notes the adverse behaviour of the A, with regards the illegal entrance

to the UK by the A and having no valid leave since the expiry of the leave to Remain on the 31/10/2021.

9. The R maintains it is proportionate to refuse the A under paragraph S-LTR.1.6 due to the behaviour of the A making it undesirable to allow the A to remain in the UK.

16. Setting aside the confusing reference to S-LTR 1.6, these were the Secretary of State' reasons, and as can be seen from the passage I cite above, the Tribunal did no more than adopt them. Were they sufficient?

17. The written grounds rely on the judgment in R (Mahmood) v Upper Tribunal [2020] EWCA Civ 717:

"39. So far as the word 'caused' is concerned, the harm must plainly be causatively linked to the offence. In the case of an offence of violence, injury will be caused to the immediate victim and possibly others. However, what matters is the harm caused by the particular offence. The prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so. Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be said that such a thief caused serious harm himself, either to the owner or to society in general. Beyond this, we are doubtful that a more general analysis of how the law approaches causation in other fields is helpful.

40. As to 'harm', often it will be clear from the nature of the offence that harm has been caused. Assault Occasioning Actual Bodily Harm under s.47 of the Offences Against the Person Act 1861 is an obvious example.

41. Mr Biggs argued on behalf of Mahmood that the harm must be physical or psychological harm to an identifiable individual that is identifiable and quantifiable. We see no good reason for interpreting the provision in this way. The criminal law is designed to prevent harm that may include psychological, emotional or economic harm. Nor is there good reason to suppose a statutory intent to limit the harm to an individual. Some crimes, for example, supplying class A drugs, money laundering, possession of firearms, cybercrimes, perjury and perverting the course of public justice may cause societal harm. In most cases the nature of the harm will be apparent from the nature of the offence itself, the sentencing remarks or from victim statements. However, we agree with Mr Biggs, at least to this extent: harm in this context does not include the potential for harm or an intention to do harm. Where there is a conviction for a serious attempt offence, it is likely that the sentence will be more than 12 months.

42. The adjective 'serious' qualifies the extent of the harm; but provides no precise criteria. It is implicit that an evaluative judgment has to be made in the light of the facts and circumstances of the offending. There can be no general and all-embracing test of seriousness. In some cases, it will be a

straightforward evaluation and will not need specific evidence of the extent of the harm; but in every case, it will be for the tribunal to evaluate the extent of the harm on the basis of the evidence that is available and drawing common sense conclusions.”

18. Mr Halim relies on this passage to submit on the Appellant’s behalf that the wording of the rule requires an evaluative judgment as to whether the offending has *in fact* caused serious harm, to either an individual or society at large.
19. I note that Mahmood is not actually concerned with S-LTR 1.5. It is concerned with the wording which appears at s117D (2)(c)(ii) Nationality Immigration and Asylum Act 2002, which asks whether the proposed deportee has committed an “offence that has caused serious harm”. I do not think that anything turns on that since S-LTR 1.5 asks the very same question put in a slightly different way: has it been shown that “their offending has caused serious harm”. In Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350 (IAC) a Presidential panel of the Tribunal considered the guidance in Mahmood and a number of other Court of Appeal decisions and synthesised it as follows:

The current case law on "caused serious harm" for the purposes of the expression "foreign criminal" in Part 5A of the 2002 Act can be summarised as follows:

- (1) *Whether P's offence is "an offence that has caused serious harm" within section 117D(2)(c)(ii) is a matter for the judge to decide, in all the circumstances, whenever Part 5A falls to be applied.*
- (2) *Provided that the judge has considered all relevant factors bearing on that question; has not had regard to irrelevant factors; and has not reached a perverse decision, there will be no error of law in the judge's conclusion, which, accordingly, cannot be disturbed on appeal.*
- (3) *In determining what factors are relevant or irrelevant, the following should be borne in mind:*
 - (a) *The Secretary of State's view of whether the offence has caused serious harm is a starting point;*
 - (b) *The sentencing remarks should be carefully considered, as they will often contain valuable information; not least what may be said about the offence having caused "serious harm", as categorised in the Sentencing Council Guidelines;*
 - (c) *A victim statement adduced in the criminal proceedings will be relevant;*
 - (d) *Whilst the Secretary of State bears the burden of showing that the offence has caused serious harm, she does not need to adduce evidence from the victim at a hearing before the First-tier Tribunal;*
 - (e) *The appellant's own evidence to the First-tier Tribunal on the issue of seriousness will usually need to be treated with caution;*
 - (f) *Serious harm can involve physical, emotional or economic harm and does not need to be limited to an individual;*
 - (g) *The mere potential for harm is irrelevant;*

(h) The fact that a particular type of offence contributes to a serious/widespread problem is not sufficient; there must be some evidence that the actual offence has caused serious harm.

20. The only evidence produced about the offence itself was the PNC print out. That is to say nothing but the bald fact of the conviction. There were no sentencing remarks, no victim impact statements, no probation reports, nor in fact any detail about the matter at all. The Appellant did not serve a single day in jail. There was certainly no evidence about whether the offence caused harm to any individual. That being the case, Mr Halim's grounds are correct when they state that the First-tier Tribunal "failed to make an evaluative judgment having regard to all the circumstances". What the Tribunal did instead was simply to find, as a matter of fact, that "drug offences cause significant public harm". I am satisfied that this was inadequate reasoning. There are of course numerous authorities to the effect that drugs have a serious adverse impact on society, but as far as I am aware, these are all concerned with Class A drugs such as a heroin. Furthermore as President Lane concludes at headnote 3(h) above, a general statement to that effect is not sufficient here: there must be some evidence that the *actual* offence has caused serious harm. I am therefore satisfied that ground 1 is made out. I set aside the Tribunal's findings on suitability, and given the complete lack of evidence, replace them with a finding that the Respondent has failed to discharge the burden of proof on this matter.

Ground 2: Obstacles

21. The second ground takes aim at the substantive findings about whether the Appellant has shown that he meets the requirements of 276ADE(1)(vi). It is submitted that the reasoning is flawed for a failure to engage with a material matter, namely whether the Appellant's parents would be financially able to assist him in rebuilding his life in Albania, given the poor economic conditions in that country. It is submitted that the bare fact that he had contact with his parents was not determinative of the question; it required further analysis. Similarly the finding that the Appellant could work was to support himself did not involve any consideration of how possible that might be given the economic situation there and the length of his absence.
22. There is no merit at all in this second ground. The Appellant is a healthy young man who has made a life for himself in a country in which he has – apart from two short years – never had any leave to remain. He has survived the 'hostile environment', and in doing so has demonstrated the kind of resilience required in a difficult job market. The Tribunal was entitled to assume that young men do work in Albania. The situation of the Appellant's parents was therefore of limited relevance.

Other Matters

23. No issue is taken with the wider Article 8 analysis, and indeed it cannot be, since the Appellant derives no benefit from s117B Nationality Immigration and Asylum Act 2002: the public interest factors therein weigh significantly against him. There are no circumstances weighing in his favour save the fact that he has been here a long time and would like to stay.

24. I would add that at paragraph 18 of the decision the First-tier Tribunal records the HOPO's submission on the day that the Appellant would be able to take advantage of the Assisted Voluntary Return Scheme. This is, I think, incorrect. The Scheme is not available to people with convictions such as this. I do not however think anything turns on this error. It is not clear whether the First-tier Tribunal in fact placed any weight on this factor, and it is clear that its decision would have been the same even if it had.

Decisions

25. The appeal is allowed only to the extent identified at my §20 above. I set aside the findings on 'suitability' but preserve the central finding that the Appellant does not meet the requirements of the rules.
26. The appeal is therefore dismissed.
27. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
30th May 2024