



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-001281

First-tier Tribunal No:
PA/52338/2023
LP/02685/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

6th September 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE LOUGHRAN

Between

XT
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Marziano, Westkin Law

For the Respondent: Ms E Blackford, Senior Home Office Presenting Officer

Heard at Field House on 2 August 2024

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 appeals under Section 82 of the Nationality, Immigration and Asylum Act 2002 (“the 2002 Act”) against the decision of the respondent made on 4 April 2023 to refuse his protection claim and, both on asylum and human rights grounds. He appealed against that decision to the First-tier Tribunal, which in a decision promulgated on 18 February 2024, dismissed his appeal.
2. That decision was set aside insofar as it related to a refusal of the appellant’s Article 8 rights by the Upper Tribunal sitting as a panel of Upper Tribunal Judge Rintoul and Deputy Upper Tribunal Judge Chana, for the reasons set out in a decision promulgated on 15 May 2024. A copy of that decision is attached.
3. Subsequent to a transfer order, this appeal was then listed before us to remake on Article 8 grounds.

The Appellant’s Case

4. The appellant’s case, as now formulated, is that he is in a relationship with Ms Madiha Hussain. They met in April 2022 and have been living together since June 2022. Ms Hussain has a son, YH, who is now 17 years old and who lives with them.
5. We observe at this point that the fact that Ms Hussain has a son, YH, born in 2006, was not previously disclosed to the First-tier Tribunal, or, for that matter the respondent. This is explained by Ms Hussain as due to a breakdown between her and the previous representatives in whom she had little trust, and partly because her experiences during previous divorce proceedings. The existence of a son is clearly a new matter as defined.
6. The appellant’s case is that requiring him to leave the United Kingdom would be a disproportionate interference with his rights pursuant to Article 8 of the Human Rights Convention as it would be unduly harsh and unreasonable to expect either Ms Hussain and her son to join him in Albania or for Ms Hussain to join him in Albania, leaving her son in the United Kingdom. It is also submitted that it would be unduly harsh under breach of Article 8 to require him to return to Albania to make an application for entry clearance to return.

The Secretary of State’s Case

7. The Secretary of State’s case is that it would be reasonable to expect Ms Hussain to relocate to Albania where the appellant could assist her, along with his family, to integrate into life there and it would not be unreasonable to expect her to be separated from her son to do so, given his age and extent to which other members of the family could support him, including his father. It is further submitted that it would not be unduly harsh to expect the appellant to return to Albania and that he and

Ms Hussain could marry there; or, he could apply for entry clearance as a fiancé to join her in the United Kingdom or subsequent to a marriage.

Preliminary Matters

8. On 18 July 2024, the appellant served a consolidated bundle, including additional material, skeleton argument and an application pursuant to Rule 15(2A) requesting permission to admit new witness statements, letters of support, material relating to the background of support of application. On 1 August a further short bundle was produced again accompanied by an application pursuant to Rule 15(2A) seeking permission to adduce correspondence between Ms Hussain and the previous representatives, seeking to explain why the Article 8 case had been previously fully set out before the First-tier Tribunal.
9. The Secretary of State did not object to the production of either bundle and in the circumstances, we were satisfied that it would be appropriate and in the interests of justice to admit the material. In doing so, we note that in effect, part of the reason given as to why this issue was not raised before the previous First-tier Tribunal, is due to poor advice from a previous representative. Whilst there does not appear to have been any formal complaint made to them, it is sufficiently clear from the material produced including WhatsApp chats, which we find sufficiently explain that Ms Hussain had wanted to raise it but appears to have been dissuaded by the previous representative.
10. Insofar as this is a new matter, and the existence of the son was certainly not disclosed, Ms Blackford said that she was content for consent to be given to this being treated as a new matter and considered by the Tribunal.

The Hearing

11. We heard evidence from the appellant and Ms Hussain. We also have before us the following documents:
 - (1) Consolidated bundle.
 - (2) Additional bundle served on 18 July 2022.
 - (3) Additional bundle served on 1 August 2024.
12. The appellant gave evidence in English with the assistance of an Albanian interpreter. Ms Hussain gave evidence but did not require the assistance of any interpreter.
13. We then heard submissions from both representatives.

The Law

14. It is for the appellant to demonstrate that his removal would be in breach of his rights under article 8 of the Human Rights Convention. The proper approach in such cases is to determine if the appellant qualifies under the Immigration Rules and then to consider whether, outside the Rules to refusal of entry clearance would amount to a breach of article 8, that is whether the refusal would result in unjustifiably harsh consequences for the appellant, applying in particular the principles set out in Agyarko [2017] UKSC 11 at [47]. We note also what was held in note what was held in TZ (Pakistan) and PG (India) [2018] EWCA Civ 1109] at [28];

28. The consideration of article 8 outside the Rules is a proportionality evaluation i.e. a balance of public interest factors. Some factors are heavily weighted. The most obvious example is the public policy in immigration control. The weight depends on the legislative and factual context. Whether someone is in the UK unlawfully or temporarily and the reason for that circumstance will affect the weight to be given to the public interest in his or her removal and the weight to be given to family and/or private life (see the examples given in Agyarko at [51] and [52] which include the distinction between being in the UK unlawfully and temporarily). Decisions such as those in Chikwamba and EB (Kosovo) v Secretary of State for the Home Department [2008] UKHL 41, [2009] AC 1159 describe examples of how the weight or cogency of the public interest is affected. It is accordingly appropriate for the court to give weight when considering the proportionality of interference with article 8 outside of the Rules to factors that have been identified by the Strasbourg court, for example, the effect of protracted delay, the rights of a British partner who has always lived here and whether it can reasonably be expected that s/he will follow the removed person to keep their relationship intact: that is, by way of example, the circumstances identified in EB (Kosovo) or the circumstance described in Chikwamba where the removal of an appellant who is the spouse of a British citizen could be followed by a right of re-entry.

15. With respect also to the position that the appellant may qualify for entry clearance, have applied SSHD v Hayat [2012] EWCA Civ 1054, in particular the principles set out at [30], and also on Younas (section 117B(6)(b)); Chikwamba; Zambrano [2020] UKUT 129 at [83] to [90] and Alam v SSHD [2023] EWCA Civ 30 (in particular at [106] ff).

16. The appellant and his partner gave, in their evidence, a detailed explanation of their relationship and also the closeness of the relationship between Ms Hussain and her son; and, between the appellant and YH. We accept her evidence that the breakdown in the marriage between her and her former husband was difficult and that this impacted on her son. We accept that as a result, he is perhaps closer to her than might be necessary or expected. We accept also that he is close to his paternal grandparents but equally that he is close to Ms Hussain's sister and her family.

17. We note Ms Hussain's evidence that her husband's family would not be prepared to look after her son for any extended period and that in the past, when she had to go away for a work trip, there was difficulty over that, it being suggested that she was not a proper parent, this leading to abusive messages. Similarly, we accept that the former husband has been

reluctant to help out to any significant degree in the past but we do accept the evidence that YH now spends weekends with his father, goes on holiday with him and they see each other on a regular basis.

18. We accept the evidence of the appellant and Ms Hussain that it would be difficult for them to live in Albania. We accept that she does not speak the language and that she has not tried to learn, given the other things going on in her life. We accept also that the appellant comes from a relatively poor background and we also accept Ms Hussain's evidence supported by the background evidence that the position of women is significantly different from that in the United Kingdom. We accept that it would be difficult for her to adapt to life in Albania given she does not speak the language, even with the active assistance of her partner.
19. We also accept also that it would be very difficult for YH to adapt to life in Albania given he has lived his entire life in the United Kingdom. It would be difficult, if not impossible, for him to maintain that the family life he has with his father and it would be significantly disruptive to his education given that he is about to enter the final stages of his secondary education with a view to going to university. We do not accept either that it would be anything other than unjustifiably harsh for him, given his close relationship with his mother, on whom he has depended for a significant period, including through a difficult and traumatic divorce, to be separated from her.
20. We conclude, therefore, on the evidence before us that it would be wholly unreasonable to expect the son to go to live in Albania. To do so would effectively sever the relationship he has with his father. Equally, to expect to remain here in circumstances where, as we accept on the basis of Ms Hussain, there would be difficulties in his father looking after him full-time let alone the separation from his mother and the disruption that it would be unreasonable to expect his mother to go to live in Albania and to leave him in the United Kingdom.
21. Accordingly, it flows from this that we are satisfied on the basis of the evidence before us that it would be unduly harsh to expect Ms Hussain to go to live in Albania given the cumulative effects both of the difficulties she would face in adapting to life there and the separation from her son. We reach that conclusion on the basis that although he is very nearly 18, the family life does not simply cease to exist when someone turns 18, not least where, as here, they continue to live in the family home and where he is continuing secondary education and is to all intents and purposes, still significantly both financially and emotionally dependent on her.
22. We have then moved on to consider whether it would be unreasonable to expect the appellant to return to Albania. We accept that this would amount to an interference with the family life he has with Ms Hussain. We do not, however, accept in the circumstances in which the father plays an active role in the life of Ms Hussain's son, that there exists a parental relationship between them. It is unusual that there would be three people

in such a relationship and we have accepted, given the evidence we have heard, that the parental relationship between YH and his father still exists. They go on holiday together, they spend time together and he stays overnight with his father.

23. Mr Marziano sought to persuade us that it would be unjust and unfair to expect the appellant to return to Albania given that there was a possibility he would not be able to obtain entry clearance to come home, given the fact that he had entered the United Kingdom illegally and had not claimed asylum until after his arrest. That is an unattractive argument; it is in effect submitting that somebody should not have to take the consequences of their actions in entering the United Kingdom unlawfully. We bear in mind that less weight must be attached to the relationship given the effect of Section 117B(4) of the 2002 Act. We accept that the appellant would be supported by his spouse, by his partner and thus there would be no dependency on the state. But that is a neutral matter, as is the fact that, as was evident from his evidence that he speaks English to a reasonable degree and it is unlikely that he would have difficulty passing the low level of English requirement to enter as a fiancé or spouse.
24. We accept that there may be difficulties in the appellant having return to Albania and make an application but we have not been provided with any evidence to suggest that any delay that there would be is excessive, nor could we speculate as to the possibility of the application being refused on the basis of suitability requirements given the appellant's immigration history. As Mr Marziano accepted, this is a discretionary matter and in considering the exercise of discretion, the Secretary of State would need to bear in mind the facts that we have found in the cases set out above, which is that it would be unreasonable to expect Ms Hussain to go to live in Albania and thus, effectively, the only basis on which family life could exist would be in the United Kingdom after the appellant was granted entry clearance to come here.
25. We accept, however, that there are some difficulties involved but we consider also that significant weight must be accorded to the fact that the appellant does not meet the requirements of the Immigration Rules.
26. Taking all of these factors into account and viewing the evidence cumulatively, we are satisfied that it would not be disproportionate interference with the appellant's right to respect for his family life to refuse to grant him leave to enter the United Kingdom.
27. Accordingly, for these reasons, we dismiss the appeal.

Notice of Decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
- (2) We remake the appeal by dismissing the appeal on human rights grounds.

Signed

Date: 27 August 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal

ANNEX – ERROR OF LAW DECISION

IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER
Extempore

Case No: UI-2024-001281

First-tier Tribunal No:
PA/52338/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

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Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

XT
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Marziano, Legal Representative instructed by Westkin Law

For the Respondent: Mr M Parvar, Senior Home Office Presenting Officer

Heard at Field House on 10 May 2024

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 appeals with permission against a decision of First-tier Tribunal Coll dismissing his appeal on protection and on human rights grounds in respect of Article 8 of the Human Rights Convention. Permission in this case was granted on a limited basis by Judge Moon confining the grounds of appeal to the issue of Article 8.
2. The appellant's case is that he is in a relationship with a person with leave to remain in the United Kingdom and that it would be a breach of his and indeed their rights pursuant to Article 8 to remove him from the United Kingdom.
3. In this case it was put to the First-tier Tribunal that the appellant came within paragraph EX.1. of Appendix FM but equally it was put that a proper consideration pursuant to paragraph GEN.3.2. needed to be undertaken and that there were in this case as set out in the skeleton argument at paragraph 11 to 13, (in particular at 13(v) and (vi)) that the consequences of removal were unjustifiably harsh. The judge did in this case consider EX.1. and at paragraph 28 held that this did not apply. It is accepted that finding is correct given that the relationship between the appellant and his partner was on their own evidence of less than two years' duration as at the date of decision. On that basis they could not fulfil the requirement that relationship to have been of two years' duration and thus EX.1. could not apply. That paragraph of the decision could have been more carefully worded; it would have been better if the judge had said they do not meet the definition because the relationship had not lasted for two years, and this the definition of "partner" could not have been met. The judge appears also to have thought that two years' cohabitation is still required by the rules, given her reference to them not having lived together for two years.
4. Despite Mr Parvar's submissions expanding upon the Rule 24 letter we do not consider that consideration under GEN 3.2 was a matter that the judge was not under a duty to deal with. We consider that on the facts of this case where there were issues regarding the nature of the relationship and the difficulties there would be in the family life continuing outside the United Kingdom; the decision of the Upper Tribunal in Lata [2023] UKUT 163 can be distinguished given what was said in the skeleton argument here. There was information here regarding the relationship, there is evidence from the appellant's partner as to the difficulties there would be and these were not addressed. In the circumstances we consider that the judge did make an error in that it was up to the judge to address GEN.3.2. which as Mr Marziano correctly pointed out is within the Immigration Rules and it may be that the judge confused herself in this case by referring at [11] to not being asked to consider Article 8 outside the Rules.
5. For all of these reasons we are satisfied that the error is material in that there was a failure to consider properly the correct legal test which

requires an assessment of the nature of the family life that exists, what obstacles there are to that continuing outside the United Kingdom and balancing that with the need to maintain immigration control.

6. On that basis we set aside the decision of the First-tier Tribunal and we direct that the matter be re-made in the Upper Tribunal on a date to be fixed.

Notice of decision

- (1) The decision of the First-tier Tribunal involved the making of an error of law and we set it aside.
- (2) We direct that the appeal be re-made in the Upper Tribunal on a date to be fixed with a time estimate of 2 hours. An Albanian interpreter will be booked.
- (3) If either party wishes to adduce any further evidence, this must be served in electronic format on the other party and the Upper Tribunal at least 10 working days before the next hearing, accompanied by an application made pursuant to rule 15 (2A) of the Tribunals Procedure (Upper Tribunal) Rules 2008.
- (4) If the appellant wishes to give further oral evidence, or to call other oral evidence, he must provide a witness statement or statements capable of standing as evidence in chief, to be served in accordance with direction [3] above.

Signed

Date: 13 May 2024

Jeremy K H Rintoul
Judge of the Upper Tribunal