IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001387

First-tier Tribunal No: HU/58296/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

28th November 2024

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

GAZMIR MULAJ
(ANONYMITY ORDER LIFTED)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T. Bobb, Solicitor, Aylish Alexander Solciitors.
For the Respondent: Mr. S. Walker, Senior Home Office Presenting Officer

Heard at Field House on 22 November 2024

Order Lifting Anonymity

The appellant was granted anonymity in the proceedings before the First-tier Tribunal. That anonymity order is lifted.

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge L. Murray dismissing his appeal against the respondent's decision to refuse his protection and human rights claim and refuse to revoke a deportation order that had been made against him in 2018.

Anonymity

2. The appellant made a claim for international protection, and an anonymity order was made by the First-tier Tribunal for this reason. However, the appellant has not sought to challenge the Judge's dismissal of that aspect of his appeal. Mr Bobb agreed at the hearing before the Upper Tribunal that it was therefore appropriate to lift the anonymity order.

Background

3. The appellant is a citizen of Albania, born in 1994. He says he first came to the UK clandestinely in 2013. In 2017, he was convicted of possession of cocaine with intent to supply and sentenced to two years' imprisonment, and on 29 May 2018, the respondent signed a deportation order against him. A human rights appeal was dismissed by the First-tier Tribunal on 20 July 2018 and his applications for permission to appeal were unsuccessful.

4. On 13 August 2018, the appellant made the asylum claim and human rights claim that led to this appeal. The respondent refused that claim on 10 March 2023 and certified it as clearly unfounded. The appellant challenged that decision by way of judicial review, and the respondent issued a new refusal decision on 28 August 2023.

5. The appellant's protection claim is based on fear of harm from a creditor, from whom he borrowed money to leave Albania in 2012, and from people from his local area with whom he had a fight before he left.

6. His human rights claim is based on his relationship with his partner, a British citizen with whom he says he has been living since October 2018. His partner suffers from a number of medical conditions, including polycystic ovary syndrome (PCOS) and Chiari I malformation. The couple say that she suffers from a number of debilitating symptoms as a result of these conditions, including severe headaches and numbness in her arms and legs, and that she needs some assistance from the appellant with daily life tasks. She will be unable to conceive a child without medical assistance. Weight loss was recommended as part of the management of her PCOS and because her current BMI made her ineligible for assisted conception. The appellant and his partner both said in their witness statements that she had recently undergone bariatric surgery.

The challenged decision of the First-tier Tribunal

7. The challenged decision begins with a section entitled "Appellant's immigration and criminal history", taken from the respondent's refusal decision. This was followed by a section entitled "The Law", which refers to the UK Borders Act 2007 and Sections117A-D of the Nationality, Immigration and Asylum Act 2002. The Judge's "Findings and Reasons" then take these laws as a starting point.

8. At [15], the Judge states, "In the Appellant's case, as he has been sentenced to a period of imprisonment of four years or more. He must

therefore demonstrate that [sic] very compelling circumstances over and above the exceptions that outweigh the public interest." This is undoubtedly a serious mistake of fact, and one that led the Judge to identify the wrong legal test at the beginning of her findings.

9. The Judge then [17] set out the issues before her as:

> "a. Whether the previous determination of IJ Woolf is the starting point when considering the Appeal?
>
> "b. Whether the Appellant qualifies for humanitarian protection?
>
> "c. Whether there are very compelling circumstances such that the Appellant should not be deported?"

10. The Judge found that the appellant had been convicted of a particularly serious crime but, having regard to OASys report and the lack of subsequent offending, that he had rebutted the presumption that he was a danger to the community [21-22] that arises pursuant to section 72 of the Nationality, Immigration and Asylum Act 2002. With regard to his protection claim, however, the Judge found that his behaviour was not consistent with someone who had been in genuine fear and that he was "an entirely unreliable witness of fact" [25]. He had not given a truthful account, but even if he had, sufficiency of protection would be available [27]. The appellant does not challenge this aspect of the Judge's findings.

11. The Judge then turned to the appellant's Article 8 claim. She began by considering whether either of the exceptions set out at Section 117C(4) or (5) was met. The appellant had never been in the UK lawfully, which precluded reliance on the first exception [28]. With regard to the second exception, the Judge began by referring to the definition of "unduly harsh" endorsed in HA (Iraq) and others v SSHD [2022] UKSC 22 and KO (Nigeria) v SSHD [2018] UKSC 53. She found that the appellant and his partner were in a genuine and subsisting relationship [30]. She then set out the appellant's arguments about why it would be unduly harsh for the partner to relocate to Albania [31], before considering the medical evidence. She noted that the medical letters showed that she had PCOS, but that she had never had a smear test and had not taken the progesterone that she had been prescribed. She had declined surgery to treat her Chiari I malformation. She suffered from abdominal pain [32].

12. The Judge noted that there was no evidence before her about the unavailability of treatment in Albania. Moreover, there was "little medical evidence" to show that the partner required treatment "regularly". It was noted that "some people experience painful headaches, movement problems and other unpleasant symptoms" as a result of Chiari I malformation, but that the partner had declined surgery. At his previous appeal, the Judge had found that the appellant would be able to live and work in Albania. The partner had never been to Albania, did not speak the

language and was unfamiliar with the culture. Relocating to Albania would be harsh, but not unduly harsh [33].

13. It would not be unduly harsh for the partner to remain in the UK without the appellant. She could visit the appellant in Albania; there was no medical evidence to corroborate her claim that she was unable to fly. She has friends and family in the UK and "has been employed here". She would be "adequately supported" without the appellant [34].

14. There were no very compelling circumstances over and above the two exceptions to deportation. It had been found at the appellant's previous appeal that he would be able to find employment in Albania and that his family would support him. The Judge did not believe the appellant's claim to have lost touch with his family. He would be able to find employment on return [35].

15. At [36], the Judge applied the balance sheet approach recommended in Hesham Ali v SSHD [206] UKSC 60 [36]. In so doing, she referred to Gosturani v SSHD [2022] EWCA Civ 799 for the principle that "the length of sentence is a reliable indicator of the seriousness of the offence." [38] She concluded that the public interest in deportation outweighed the appellant's "private life ties" to the UK [39].

Grounds of appeal

16. The appellant has been granted permission to appeal on three grounds:

(i) The Judge erred by finding that the appellant had been sentenced to at least four years' imprisonment, and this error was material because it may have tainted her consideration of the various factors weighing for and against him in the Article 8 assessment.
(ii) In her assessment of whether it would be unduly harsh for the partner to relocate to Albania, the Judge failed to take into consideration several material factors. These were said to include:
    a. the debilitating symptoms that the partner suffers as a result of her accepted medical conditions, which affect her ability to work; the appellant pointed to a medical letter saying she was off work because of headaches;
    b. although there was no evidence of the cost of health care in Albania, it was not free, and the treatments needed were "extensive", such that a finding could have been made that it was unaffordable; and
    c. the difficulty of finding employment and the low average wages in Albania.
(iii) In her assessment of whether it would be unduly harsh on the partner to remain in the UK without the appellant, the Judge failed to take into account her evidence that her long-term goal is to have a child with the appellant, and that this would require IVF treatment.

17. There was no Rule 24 response.

The hearing

18. The hearing was held via Cloud Video Platform. I was present at Field House, while both representatives appeared via videolink.

19. It was accepted at the outset of the hearing that the Judge had made an obvious error of fact with regard to the length of the appellant's sentence, and that this had led her into the legal error of considering that Section 117C(5) could not apply. It nonetheless fell to be determined whether this error was material.

20. I then heard helpful submissions from both representatives. Mr Walker initially submitted that the mistake at [15] was an isolated one, and therefore might not be material. He pointed to [21], in which the Judge described the appellant as having been "convicted of an offence of two years or more." As Mr Bobb properly pointed out in response, however, the appellant was not sentenced to "two years or more". He was sentenced to two years. The reason that the Judge referred to "two years or more" at [21] was that she was considering exclusion from protection under section 72 of the NIAA 2002, which at the relevant time set a sentence of "two years or more" as the threshold for a presumption of exclusion to arise. I agree. This is not evidence that the Judge had corrected the clear error at [15].

21. I then heard submissions from Mr Bobb with regard to the materiality of the error as to the length of sentence, and regarding the other two grounds of appeal. Mr Walker responded.

Discussion

22. In deciding whether the Judge's decision involved the making of a material error of law, I have reminded myself of the principles set out in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 [26] and Volpi & Anor v Volpi [2022] EWCA Civ 464 [2-4] and of the danger of "island-hopping", rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].

23. Mr Bobb suggested that the error as to the length of sentence must be material, because it would necessarily have affected the Judge's assessment of whether the appellant's removal would have unduly harsh consequences for his partner. He accepted, however, that as a matter of law, the test of what is "unduly harsh" for a partner or child should not be affected by the seriousness of the foreign criminal's offending. See, e.g. HA (Iraq) [19, 45] (reaffirming that there is no link between the seriousness of the offending and the assessment of whether consequences would be "unduly harsh"). In line with Ullah, I presume that the Judge was aware of the law in this regard, and Mr Bobb was unable to take me to any evidence that she was not.

24. The Judge's error in thinking that Section 117C(5) could not apply would obviously be material if she had erred in finding that it was not met. I therefore consider Grounds Two and Three first.

25. I am not persuaded that the appellant's second and third grounds are made out. Mr Bobb's main submission with regard to these grounds was that the Judge had either made irrational findings about the medical evidence, or had failed to place sufficient weight on that evidence in her Article 8 assessment. Having read the medical evidence with care, I find that it was open to the Judge to find that the appellant's partner did not require regular treatment for her various conditions. This finding was based on medical letters before her that stated that the partner had declined most of the monitoring and treatment that had been recommended. It is true that the partner's statement suggests that she has been receiving monitoring and treatment, but some of what she says is directly contrary to the medical evidence. It was reasonably open to the Judge to prefer the medical evidence, and Mr Bobb did not suggest that it was an error of law for her not to state expressly that she was rejecting the partner's statement.

26. Having found that the partner did not require regular treatment, the Judge did not err by not taking into account the theoretical possibility that treatment in Albania might not be affordable.

27. Mr Bobb did not pursue before me the claim that he Judge should have taken into account the medical evidence that showed that the partner was unable to work for due to headaches. That medical evidence dates from 2017, and the payslips before the Judge showed that the partner was working full time.

28. Mr Bobb also accepted that there was no medical evidence before the Judge that confirmed that the partner would require IVF. There is evidence that PCOS can lead to reduced infertility, but there is no indication that IVF is necessarily the only remedy. It therefore was no error for the Judge not to put weight on the couple's eventual need for IVF.

29. If there was no error of law in the Judge's finding that the consequences of deportation would not be unduly harsh for his partner, it cannot have been material that the Judge decided that Section 117C(5) could not apply. If she had correctly understood that it applied, she would have found that it was not met.

30. The final question is whether the Judge would inevitably have come to the same conclusion about whether there were "very compelling circumstances" over and above those set out at Exceptions 1 and 2. It appears inevitable that she would have found that there was less weighing against the appellant than she did, because she explicitly refers to the principle that "the length of sentence is a reliable indicator of the seriousness of the offence", and she was operating under the mistaken belief that the sentence was twice as long as it actually was. Although her

findings as to why Exception 2 was not met might suggest that it is very likely that the final outcome would have been the same, it cannot be said that it this would have been inevitable.

Notice of Decision

31. The decision of the First-tier Tribunal regarding the Article 8 aspects of the appellant's claim involved the making of a material error of law and is set aside.

32. Although the Judge's findings on the "unduly harsh" question did not involve the making of an error of law, a new decision will need to be made on the basis of up-to-date medical evidence. Therefore all of the Article 8 findings will need to be made afresh.

33. The Judge's dismissal of the appellant's protection claim is not challenged, and the Judge's findings in that regard are preserved.

34. The appeal is remitted to the First-tier Tribunal to be dealt with afresh on Article 8 grounds only, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(b), before any judge aside from Judge L. Murray.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 November 2024