IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004380

First-tier Tribunal No:
HU/60588/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 10th of January 2025

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BLENDI AXHAMI

Respondent

Representation:
For the Appellant: Ms J. Norman, instructed by Solicitor's Inn
For the Respondent: Ms S. Cunha, Senior Home Office Presenting Officer

Heard at Field House on 20 December 2024

DECISION AND REASONS

1. The Secretary of State for the Home Department appeals with permission against the decision of First-tier Tribunal Lloyd-Lawrie ('the Judge') allowing Mr Axhami's appeal against the Secretary of State's decision of 17 August 2023 to refuse his human rights claim made on 30 August 2022.

2. For the purposes of this decision, I shall refer to the Secretary of State as the respondent and to Mr Axhami as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. The appellant is a citizen of Albania, born in 1981. He claims to have entered the UK clandestinely in 2015. On 30 August 2017, he applied for leave to remain in the UK on the basis of his family and private life, and on 13 August 2018, he was granted leave to remain on this basis, valid through 13 February 2021.

4. On 30 August 2022, the appellant applied for a further period of leave to remain, on the basis of his family life with his British son, born on 5 August 2017. The respondent found that he met all of the requirements for a grant of leave to remain as a parent, with the exception of the suitability requirement. He did not meet the suitability requirement because he had been convicted of a criminal offence in Albania in 2002 and sentenced to eight years' imprisonment, and he had failed to declare this conviction in his application. Moreover, he had been arrested in the UK twice in 2021.

5. At the outset of the First-tier Tribunal hearing, the respondent's Presenting Officer confirmed that there had been no respondent's review, and that there was no update concerning the outcome of the appellant's 2021 arrests and no PNC check had been done since the one in the appellant's bundle (dated 29 November 2022). He further confirmed that he was content to proceed on the basis of the available evidence [5].

6. The appellant's representative then requested that the Presenting Officer confirm whether a background check had been carried out prior to the grant of leave to remain in 2018. The Presenting Officer advised that he did not know, and that the relevant papers would have been archived in a paper file. The appellant's representative then advised the Tribunal that he intended to submit that it was likely that the respondent had run such a check prior to the 2018 grant of leave, and that it was therefore "perverse" for her to take the point against him now [6].

7. The Judge recorded [at 7-8] that the parties agreed that the only issues in dispute were:

   (i) Did the appellant meet the suitability requirements of Appendix FM? and

   (ii) If not, would the refusal be a disproportionate interference with the appellant's son's Article 8 rights, given the son's special educational needs and his relationship with his father?

8. The Judge heard evidence from the appellant and from the mother of his son, as well as submissions from the appellant's representative and the respondent. The Judge then made two uncontentious findings:

   (i) The appellant did not meet the suitability requirements of the Rules, both because of his 2002 conviction and because he had failed to declare it on the application form [12-13].

(ii) It was in the best interests of the appellant's son to continue to have an "in-person relationship with both his parents each week as he has throughout his life", but this was not determinative [14].

9. The Judge then turned to considering the child's needs in more detail. She set out that she had taken into account the various reports about the child. These included his EHCP [Education, Health and Care Plan] and the report of an Independent Social Worker, whom she accepted was a relevant expert. She did not consider Mr Kristo Papa PhD an expert with regard to the opinions he expressed about the relationship between the appellant and his son [15].

10. On the basis of the ECHP, the ISW report and the report of an NHS Speech and Language Therapist (SALT), she made a series of findings at [16]-[17]. I set them out in full, as they are the focus of the respondent's appeal before me:

"16. […] I have no hesitation in finding that the appellant's son is primarily supported by his mother. Indeed, the witnesses did not seek to dispute this. I do find that the appellant has attended some medical appointments and that his son has told those who were tasked with seeking his views for his EHCP, that his father was important to him. I find that the child does have special educational needs and is on the ASD pathway. This is the start of a rather long process, due to system delays, in having a child assessed for autistic spectrum disorder. The EHCP demonstrates that the school are using strategies with the appellant's son as if he is autistic and the fact that the appellant's son has high levels of anxiety and is resistant to change is demonstrated also in the papers.

"17. I find that the appellant's son has needs that are far in excess of a neurotypical child of his age and that the child benefits from seeing his father and feels safe having his father assist him for certain activities that are sensory challenging, such as having his hair cut. The appellant's son also benefits from the routine of knowing that his father will come on a set day. I also find that the appellant's ex-partner who is described as "wonderful" by the NHS SALT, finds the presence of the appellant, who assists by caring for their son on Saturdays, essential in managing her caring responsibilities.

"18. […] the child will of course stay in the UK regardless of the outcome of this appeal as he is a British Citizen child who lives with his British Citizen mother and his older sister. […] the child will struggle to understand and adjust to the change of his father no longer following the routine of looking after him once a week and […], due to his needs, this will amount to unjustifiably harsh consequences on the child."

11. The Judge then conducted her Article 8 assessment, adopting the familiar balance sheet approach. Weighing against the appellant was his inability to meet the rules, his 2002 conviction, and a conditional caution for the possession of class A drugs in 2020, as well as his failure to disclose these convictions [19(a)]. Weighing his favour was that:

"the appellant has a child with fairly significant levels of special educational needs who is thought likely to be neurodiverse and struggles with change who he provides care for on a weekly basis which the child enjoys and benefits from. I

find that the child would face considerable distress should the appellant have to leave the UK and that as he would not be able to understand this, would cause him unjustifiably harsh consequences."[19(b)]

12. At [20], the Judge also took into account that the respondent had previously granted the appellant leave in spite of his 2002 conviction, and accepted the appellant's counsel's submission that the respondent was "likely to have undertaken a PNC check before granting leave". The 2020 criminal caution had not been relied on by the respondent, and she accepted the appellant's evidence that there had been no further action from the police with regard to the two 2021 arrests. Nonetheless, she confirmed that she had taken "particular note of the weighty consideration I mist give to immigration control, particularly in the case of an appellant with the criminal history of the appellant." Ultimately,

> "the specific special educational needs of the appellant's son means that he struggles significantly with change and has anxiety issues such as to remove his secondary care giver would cause him serious levels of harm so as to render the refusal a breach of Article 8."

She allowed the appeal.

The respondent's appeal

13. The respondent was granted permission to appeal on a single ground, entitled "Failing to give reasons or any adequate reasons on material matters". This was subdivided into four points:

(i) "The Judge had failed to adequately reason how exactly the appellant's removal would be 'unjustifiably harsh' on S [for Son] when all material evidence is considered and the relevant case law is applied." This appears to be by way of introduction, as no particular evidence or caselaw was identified at this point.

(ii) The Judge had failed to apply "any scrutiny" to the ISW report or to "rely on any of its findings". The ISW report was based only on a single observation of the child and interviews with the child's parents, and failed to set out what other documents about the family had been considered. "Although it is stated [presumably by the ISW] that the appellant plays a material role in S's life, this is in stark contrast to the objective evidence from professionals involved in S's educational and mental health assessments." There was "zero reference to the appellant being involved or even mentioned by [the child] and presumably by his ex-partner" in the "letters/reports/records from CAHMS, the NHS and EHC". "It is therefore unclear how the FTTJ has found S benefits from seeing the appellant to any degree that would materially impact S if he is removed to Albania [17]."

(iii) It is "hard to decipher" how the consequences for the child would meet the standard for "unduly harsh" set out in MK (section 55 – Tribunal options) [2015] UKUT 223 (IAC), given that the appellant sees the child only once a week and "what benefit this actually has on S's educational or

development needs is unclear." The Judge's finding that the removal would have severe or bleak consequences was therefore not "made out".

(iv) At [16], the Judge had made findings "concerning the ASD pathway" that appeared to be based on "assumptions outside their own remit as an adjudicator". "If this has been based on knowledge outside of the evidence in this appeal, or even that provided for it, then the SSHD is entitled to know exactly what this is so he can understand why he has lost, as per Budhathoki (reasons for decisions) [2014] UKUT 341 (IAC).

14. In the "Background" section of the respondent's grounds, the respondent also stated that "it appears" that she had not been aware of the appellant's 2002 conviction when she granted him leave to remain in 2018. However, as noted above, this was not the position taken by the respondent at the hearing before the First-tier Tribunal; her position at that time was that she did not know whether she had been aware of the conviction or not and that the relevant records were difficult to access. It is not clear whether she is now positively asserting that she did not know about the conviction; if so, she has not sought to provide any evidence in support of this change of position. Moreover, the statement that it "appears" that this was the case may simply be a disagreement with the Judge's finding that, in the absence of any evidence, he accepted that it was likely that background checks had been done. The respondent, however, does not raise any formal challenge to the Judge's finding on this issue in her grounds of appeal, and I therefore do not consider her apparent disagreement with that finding has any relevance to the appeal before me.

15. Ms Norman filed a Rule 24 response on behalf of the appellant, which I have taken into account. As she points out, the Judge's finding that the 2002 was likely known to the respondent – although not formally challenged – was supported by the fact that it now appears the appellant's UK PNC check.

The hearing

16. The error of law hearing in this matter was heard in a hybrid format. I was present at Field House and Ms Cunha and Ms Norman both appeared by CVP videolink. There were no difficulties in communication during the hearing.

17. I heard detailed submissions from both representatives, which I have taken into account and which I will refer to where relevant in my findings below. I would like to express my gratitude to Ms Cunha for her thoughtful and diligent efforts to present the respondent's appeal, as I understand that she was asked to step in at very short notice to cover for a colleague who was unwell, and on a day of the year when many other colleagues were likely to have already been on leave or winding down their work in anticipation of the holiday period.

18. At the end of the hearing, I reserved my decision, which I now give, with my reasons.

Discussion

Principles governing appeals to the Upper Tribunal

19. Section 11(2) of Tribunals, Courts and Enforcement Act 2007 ("the TCEA") gives any party to an appeal a right to appeal a decision to the Upper Tribunal. Section 11(1), however, specifies that the right of appeal is only on a "point of law". As set out in Joseph (permission to appeal requirements) [2022] UKUT 00218 (IAC) at [13];

> "Maintaining the distinction between errors of law and disagreements of fact is essential; it reflects the jurisdictional delimitation between the first-instance role of the FTT and the appellate role of the UT, and reflects the institutional competence of the FTT as the primary fact-finding tribunal. […] 'The temptation to dress up or re-package disagreement as a finding that there has been an error of law must be resisted.'" [citing AE (Iraq) v Secretary of State for the Home Department [2021] EWCA Civ 948].

20. The error of law that the respondent says that the Judge made was a failure to give reasons. The scope of the duty to give reasons was set out MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC) and reiterated in Budhathoki, on which the respondent relies, and more recently in Joseph. Citing English v Emery Reimbold & Strick Ltd. (Practice Note) [2002] EWCA Civ 605, the Upper Tribunal reiterated in Joseph at [43] that:

> "[The duty to give reasons] does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. […] It need not involve a lengthy judgment. It does require the Judge to identify and record those matters which were critical to his decision."

21. Nothing in the respondent's grounds even attempts to argue that the Judge's reasons were inadequate as defined in MK, Budhathoki and Joseph, and if such an argument had been made, it would have failed. At [7-8], the Judge clearly identified the issues in dispute, as agreed by the parties. At [15], she specified that she was taking into account the professional reports before her, and she gave reasons for accepting the expertise of the ISW but not of Dr Papa. At [16], she highlighted the aspects of the evidence that appeared particularly relevant to her: the child was primarily supported by his mother, but his father was important to him; the child had special educational needs, was being treated by the school "as if he is autistic", had high levels of anxiety and was resistant to change. At [17], the Judge specifically found that the child had "needs that are far in excess of a neurotypical child of age", and identified specific ways in which he benefitted from contact with his father. Moreover, the child's mother found the appellant's support "essential" in managing her own caring responsibilities. At [18], she found that the child would "struggle to understand and adjust" to his father's removal and that, because of his

care needs, the consequences of this would be “unjustifiably harsh”. Some of these reasons were imported in similar terms in the balancing sheet at [19](b).

22. At [20], the Judge set out what factors she was taking into account in her assessment of the appellant’s criminality, with reference to her finding that the 2002 conviction was likely to have been known to the respondent in 2018, and specific findings about other aspects of his criminal record.

23. The Judge has clearly done everything she was required to do in terms of giving reasons: she has identified the issues, the evidence on which she relied in resolving those issues, why she put weight on some items of evidence but not others, key aspects of the evidence that were particularly relevant to her decision, and why she gave the weight she did to the factors weighing for and against the appellant.

24. This is simply not a case in which the Judge has failed to give adequate reasons, as that error of law is properly understood.

25. At the hearing, Ms Cunha recast the respondent’s four points as four separate grounds of appeal. The first and third points, she argued, were perversity challenges, the second was that the Judge put undue weight on the ISW report, which was unreliable both because it was inconsistent with the other “medical evidence” and because it failed to identify what medical evidence it relied on. The fourth, which she presented as her strongest point, was that the Judge’s assessment of the child’s special needs was both inconsistent with the evidence before her and procedurally unfair.

26. I agree with Ms Norman that it is not open to the respondent to entirely recast her grounds on the morning of the hearing, without having made any application to do so. The respondent was not granted permission to appeal on the ground that the Judge’s conclusion was not open to her on the evidence before her, nor on the ground that the Judge proceeded on the basis that the child had an ASD, when that was not consistent with the evidence, nor on the ground that the decision was infected by procedural unfairness. She did argue in her application for permission that the Judge should not have put the weight that she did on the ISW report, but she made that point in support of an overarching argument that the Judge had failed to give reasons, which is a fundamentally different type of error. As noted above, the jurisdiction of the Upper Tribunal is a limited one, and appellants are required to apply for and be granted permission to appeal on specific grounds, which it is their responsibility to identify and particularise.

27. I repeat that I intend no personal criticism of Ms Cunha, who stepped in at short notice to perform the unenviable task of pursuing grounds that were, self-evidently, not what they said they were. In fact, it was helpful to the Tribunal that she recognised that the substance of the grounds differed from how they were described.

28. However, because the respondent has failed to put forward any arguments in support of the ground of appeal on which she was granted permission, her appeal falls to be dismissed for that reason alone.

29. For the sake of completeness and in the alternative, I nonetheless deal with the grounds as reformulated by Ms Cunha.

30. Ms Cunha addressed the respondent's fourth point first, on the grounds that it was the strongest. She explained that the respondent took issue with the Judge's sentence describing the ASD Pathway: "This is the start of a rather long process, due to system delays, in having a child assessed for autistic spectrum disorder." She pointed out that there was nothing in the evidence before her on which the Judge could have based her finding that the ASD Pathway was a "long process, due to system delays". This appears to me to be correct.

31. She then argued that this was material because this assumption/external knowledge allowed the Judge to proceed on the basis that the child was on the autism spectrum, in spite of a lack of a daignosis. This was plainly inconsistent with the evidence before the Judge, which was that the child had been diagnosed as <u>not</u> being autistic. She took me to the mother's statement of 28 August 2023, in which she said that her child had been referred to a paediatrician named Dr Barnes, who "has assessed [him] and decided he is not on the autism spectrum but recognises he has a learning disability which she does not know if this is temporary or permanent." She then took me to Dr Barnes' assessment, made in May 2021, that "[m]any of his baseline social and communication skills are appropriate and I do not feel that his presentation overall would be consistent with a diagnosis of autism". There was, therefore, simply no basis for the Judge to treat the child as autistic. The only explanation for the Judge treating the child as autistic in the decision despite the diagnosis that he was not, Ms Cunha submitted, was that the Judge believed that he would have been diagnosed as autistic, but for the systemic delay.

32. There are several significant flaws in this argument. *First*, the Judge's description of the child as being on the ASD pathway is correct. This is what is stated in his ECHP dated 15 May 2024, which was before the Judge. Ms Cunha conceded that she had not seen this document when formulating her submissions. *Secondly*, the ECHP does in fact say, twice, that he is awaiting further assessment at this time. The Judge's statement that he was awaiting a further assessment that had not yet been made reflects what the school itself says, albeit that the school does not express any opinion about how long it will take for the assessment to be completed. *Third*, there is nothing to suggest that the Judge considers the absence of a completed assessment to be relevant, because she proceeds to note in the next sentence that the school is already "using strategies with him as if he were autistic". Although the ECHP does not describe what the school is doing in this language, this is a reasonable summary of a complex document. It records, inter alia, that the child has many strengths but also that he faces a range of challenges related to attention, learning,

communication, sensory overload, and motor skills, and that he suffers from anxiety, low self-esteem, social withdrawal, and difficulty coping with change. It states that the school supports him by providing access to "daily small group teaching sessions within the school's Nurture resource base" and that "Adults supporting [him] try to provide warnings or countdowns to support transitions, as well as visual timelines." In other words, the Judge's description of the evidence concerning the child's current needs is reasonably accurate. *Fourth*, and finally, nowhere in her own reasoning does the Judge rely on the child meeting a specific ASD diagnosis. She refers to the child as "having special education needs" and being "on the ASD Pathway" [16], having "needs far in excess of a neurotypical child" [17], and as having "fairly significant levels of special educational needs" and being "thought likely to be neurodiverse." [19](b). The respondent has challenged none of these findings. The Judge's comment that there may be delays in obtaining an updated diagnosis is entirely by-the-by and plays no part in her reasoning.

33. For this reason, what Ms Cunha identified as the respondent's strongest "ground" is not made out.

34. Ms Cunha helpfully accepted that the first paragraph of the respondent's grounds was in fact a general perversity challenge, and she did not pursue it with any vigour. She was right not to do so. It is entirely unparticularised.

35. The respondent's second point consists of a detailed attack on the ISW's report. As was confirmed at the hearing before me, that report was served on the respondent as part of the appellant's bundle, which was uploaded on 8 January 2024. The hearing was more than six months later, but the determination records at [5] that there was no respondent's review and at [10] that the respondent's submissions at the hearing were based on the reasons for refusal letter (which does not mention the ISW report). Having raised no criticisms of the ISW report prior to or at the First-tier Tribunal hearing, it is plainly too late for the respondent to raise them now, let alone for her to say that the Judge erred by not coming to this criticisms herself. Lata (FtT: principal controversial issues) [2023] UKUT 00163 (IAC).

36. Moreover, the thrust of this new criticism is that the rest of the professional evidence shows that the ISW was plainly wrong to conclude that appellant played "a material role" in his son's life. She is departing significantly here from the position she took in the refusal decision (which, as noted above, she repeated at the hearing). This was that the appellant met Para. R-LTRPT.1.1.(d)(ii), which includes that he was "taking, and intend[ed] to continue to take, an active role in the child's upbringing" and that he took "an active role in [the child's] life and support[ed] him and your previous partner financially."

37. The respondent's third point, finally, simply consists of two facts that the respondent contends point towards the appellant playing only a "minimal" role in the appellant's life (contrary, as noted above, to the position taken

in the RFRL that he played an active role in his upbringing) and an assertion that as it was "unclear" how the child benefited from his presence, the consequences of his removal could not be bleak or severe. However, there was considerable evidence before the Judge from the parents and the ISW about how the child benefitted from the appellant's involvement in his life, and the Judge relied on specific details of that evidence in her decision. Unless the respondent can point to some reason that the Judge should not have accepted that evidence (which she only does, far too late, with regard to the ISW report), there is no substance to this challenge. It is simply an expression of disagreement, based on a very selective reading of the evidence.

38. For these reasons, the decision of the First-tier Tribunal did not involve the making of any material error of law. The decision to allow the appellant's appeal stands.

Notice of Decision

The Decision of First-tier Tribunal Judge Lloyd-Lawrie promulgated on 25 June 2024 did not involve the making of an error of law. I therefore uphold that decision. The Secretary of State's appeal against that decision is dismissed, with the consequence that Mr Axhami's appeal against the Secretary of State's decision to refuse his human rights claim is allowed.

E. Ruddick
Judge of the Upper Tribunal
Immigration and Asylum Chamber
03 January 2025