Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00768/2013

THE IMMIGRATION ACTS

Heard at Field House
on 11 September 2013

Determination promulgated
on 19 September 2013

Before

LORD BANNATYNE
UPPER TRIBUNAL JUDGE MACLEMAN

Between

ANDY GANIA

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

For the Appellant: Mr J Rene, Barrister
For the Respondent: Mr N Bramble, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1) The appellant is Armando (or Andy) Gania, born on 22 November 1989. In late 1998 he entered the UK with his parents, his brother and his sister. An asylum claim was made on the basis that they are all from Kosovo. While the full immigration history of the family members is not before us, a letter dated 27 February 2006 from the respondent to solicitors acting for the appellant's father indicates that by April 2004 the respondent had information that the family members are Albanian citizens. At least from that date, it appears that the respondent declined to accept that the appellant and his relatives are Kosovan. Notwithstanding, following a series of applications and appeals, the appellant was granted indefinite leave to remain on 13 November 2008, in line with his parents.

© CROWN COPYRIGHT 2013

2) The appellant has the following criminal convictions:

   14 July 2005, robbery, 2 counts, 6 months' detention in a Young Offender's Institution;
   7 February 2006, possession of a knife, 6 months' supervision order;
   7 July 2006, possession of an offensive weapon in a public place, 100 hours community service;
   19 March 2007, shoplifting, fined £50;
   4 January 2008, shoplifting, fined £50;
   12 February 2010, robbery, 2 counts, 7 years' imprisonment.

3) In consequence of the last conviction, the respondent served a deportation order on the appellant as a foreign criminal under section 2 of the UK Borders Act 2007. The order proposed the removal of the appellant to Kosovo (which, he continued to maintain, was his place of origin).

4) The Immigration Rules HC395 provide at paragraphs 398 and 399A:

> **Deportation and Article 8**
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> (a) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> (b) the deportation of the person from the UK is conducive to the public good because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
> (c) the deportation of the person from the UK is 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,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors.
>
> 399. [not relevant] …
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or
>
> (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.

5) By determination of 14 January 2013 (case reference DA/00923/2012) a panel of the First-tier Tribunal allowed the appellant's appeal against deportation, on the finding that the appellant had no ties <u>with Kosovo</u> (our emphasis).

6) Neither party sought to appeal against that outcome.

7) The respondent made a further deportation order, dated 16 April 2013, accompanied by a notice explaining that the decision was made on the basis that the appellant is Albanian. The notice narrates (paragraph 20) that enquiries made with the Kosovan and Albanian authorities had established that the family is of Albanian nationality, and that the appellant's brother and sister hold Albanian passports.

8) The appellant appealed to the First-tier Tribunal. His grounds assert that although he is now adult, there would be disproportionate interference with the family life he has with his parents, and with his private life; that separation from his parents would "create an unbearable and exceptional circumstance for the family"; that deportation would be disproportionate, because most of his criminality was as a juvenile; and that it was not established "that the appellant is not a Kosovan national".

9) First-tier Tribunal Judge Plumptre dismissed the appellant's appeal by determination promulgated on 18 June 2013, against which this appeal is taken.

10) Mr Rene said at the outset of his submissions that the ultimate crux of this case is whether in terms of paragraph 399(A)(a) the appellant has no ties with Albania.

11) The first ground of appeal to the Upper Tribunal, at paragraph 2 of the grounds, claims that there is material error in the judge's statement at paragraph 21 of her determination:

> There is now evidence before me that the entirety of the appellant's family was born in Puke, Albania and that his brother and arguably his sister are living in the country.

12) Sub-paragraph 2 (i) complains that a family registration document which the respondent produced at the FtT hearing to show the birth place of the appellant and his relatives was not translated, and the judge stated in open court that she could not take it into account for that very reason. Sub-paragraph 2 (ii) is that the judge was wrong to say that the appellant's sister is living in Albania, because the evidence showed that she has returned to the UK, and resides here as the wife of a British citizen.

13) Mr Bramble had no record from which he could help us as to whether the judge made the statement suggested. We were able to find the judge's handwritten record on the file. It does not mention the matter. We drew Mr Rene's attention to paragraph 13 of the determination, where the judge records submissions from Mr Rene on the weight to be given to the document, and to paragraph 16, where she records submissions on behalf of the respondent on the same issue. We observed that such submissions do not sit well with the judge having committed herself to the view that the document was not to be taken into account. The submissions appear to have assumed the contrary.

14) Mr Rene accepted that paragraph 2(i) of his grounds might not take the appellant very far. He submitted that there was clear evidence of the return of the appellant's sister as an Albanian citizen to the UK, and that the judge had therefore gone wrong in considering that the appellant had ties to Albania through his sister.

15) We observed that by using the word "arguably" at paragraph 21 the judge did not conclude the sister was necessarily still in Albania. In response, Mr Rene referred us to paragraph 3 of his grounds and to paragraph 34 of the determination, where Judge Plumptre finds that she is entitled to give weight to findings in a previous determination that it was undisputed the appellant's sister now lived in Albania with her husband. Mr Rene said that was incorrect, and the clear evidence before Judge Plumptre was that the appellant's sister is married to a UK citizen.

16) Paragraph 4 of the grounds complains that the judge makes confusing and contradictory findings over whether the appellant speaks fluent English, and whether or not he is able to speak Albanian. The grounds say that the judge communicated with the appellant and he responded in English, without the use of an interpreter. Mr Rene accepted that the appellant had not given any oral evidence, but he said that the judge addressed the appellant in English and he had clearly been able to follow her. He submitted that at paragraph 36 the judge "tried to dilute" the significance of the fact that although the appellant's parents both communicated in Albanian, he was educated in the UK in English.

17) Paragraph 5 of the grounds complains that the judge's conclusion at paragraph 38 that the appellant had not discharged the burden of showing what is required by Rule 399(A)(a) is unreasoned. The judge refers to "evidence belatedly put forward by the SSHD", but did not say what that was. Mr Rene submitted that it must refer to the untranslated document submitted on the day; that the judge had said she would give it no weight; and that therefore the paragraph contained no sustainable reasoning.

18) Paragraph 6 of the grounds criticises paragraph 39 of the determination. Sub-paragraph (i) complains that the judge's finding on the appellant and his family's true nationality is a "subjective opinion" reached despite the fact that the appellant was a minor, aged 8, on entry to the UK. Sub-paragraph (ii) complains that in giving weight to the fact that the appellant's grounds of appeal [to the First-tier Tribunal] failed to specify to which country he has no ties, the judge was "grabbing at straws".

19) Paragraph 7 of the grounds relates to <u>Ogundimu</u> [2013] UKUT 00060, quoted by the judge at paragraph 40, and to the appellant's links through his family to Albania. The ground complains that links through the appellant's brother, sister and mother are not his direct links; complains yet again that the judge went wrong on whether his sister is living in Albania; and points out that the appellant's brother was allowed entry clearance on 29 March 2013 to join his UK citizen wife in the UK. The ground argues that the finding that the family members could not have returned to Albania if there were no other family members there is "pure speculation … not supported by any

evidence". Finally, at (v) the ground observes that Kosovans need to make their entry clearance applications at the British Embassy in Tirana.

20) Further to paragraph 7, Mr Rene submitted that the appellant did not necessarily have close links with his brother, because his brother is 9 years older, and if he had any real influence would have kept the appellant free of offending while he was a juvenile. He said that there was nothing to demonstrate that the appellant's ties with his brother are other than biological, and that it was relevant that the appellant's brother has married a UK citizen and was on the verge of re-entering the UK at the time of the determination.

21) Returning, he said, to the crux of the case Mr Rene finally submitted that the judge failed to give weight to the fact that the appellant's offences were committed mainly as a juvenile, in terms of Maslov; that the respondent failed to bring evidence which excluded the appellant from the application of paragraph 339A(b); and that the determination could not stand.

22) Mr Bramble drew our attention firstly to the family registration document, the subject of paragraph 2 and of other parts of the grounds. He said that both representatives in the First-tier Tribunal made detailed submissions on the weight to be given to this evidence, and so even if the judge made any prior comment about whether untranslated documents should be admitted, the hearing clearly proceeded on the basis that the document should be evaluated for what it was worth. Although the document is untranslated it is plain from the names, dates and places of birth shown on it, which are clear without translation into English, that it is an official record of the family's Albanian origins and prior residence. Even without that document, there was ample evidence that the family is from Albania. As to the whereabouts of the appellant's sister, the determination at paragraph 17 showed that the judge was aware that she is now in the UK as the spouse of a UK citizen. At paragraph 34, the judge was only rehearsing a prior finding on the sister's previous movements. That disposed of paragraphs 2(ii) and paragraph 3 of the grounds, which essentially raise the same point. At paragraph 4, the grounds reflect only the judge's correct narration of the facts before her, and go nowhere as to disclosing error of law. Paragraph 5 says that the judge failed to supply reasoning at paragraph 38, but the determination was to be read as a whole. Paragraphs 17, 39 and 40 of the determination made it clear that the judge had good reason for finding that the evidence did not disclose absence of ties of the appellant to Albania. His mother, sister and brother had all returned there for varying periods. His brother and sister obtained Albanian passports. His brother was there at the date of the First-tier Tribunal hearing. The appellant's grounds of appeal did not disclose any issue related to Maslov, and in any event the appellant's significant offending was as an adult, not as a juvenile.

23) Mr Rene in reply said that paragraph 17 of the determination was a record of the submissions for the respondent, not a conclusion on fact and credibility. Although the submissions acknowledged that the appellant's sister was back in the UK, the judge went wrong at paragraph 34. While the determination by the previous First-tier Tribunal panel had made adverse findings on evidence from the appellant and from

his mother, that panel had not focused on the question of ties with Albania. Even if other family members had ties in Albania, the appellant has lived here since the age of 8, and during the period when he was free to travel in and out of the UK did not appear ever to have returned to Albania. The ties of other family members did not necessarily mean that he has ties there, and the focus should be on him.

24) After briefly adjourning to consider the submissions, we advised representatives that we had reached the view that there is no error of law in the determination, such as to require it to be set aside. Our reasons are as follows.

25) As to paragraph 2 of the grounds, we accept on the basis of what Mr Rene has told us that when the family registration document was tendered the judge at least made some comment to the effect that a translation ought to have been provided. The grounds before us are not properly framed so as to establish any procedural impropriety thereafter which might amount to error of law. Any such allegation ought to have been clearly made, and accompanied by the evidence by which the impropriety was to be established. Following upon that, the respondent would have been expected to provide relevant evidence, and the judge would have been asked for her comments. In this case no such procedure would have been necessary even if the point of alleged procedural impropriety had been properly formulated, because representatives proceeded with the rest of the hearing on the footing that there was no objection to admission of the family registration document into evidence without a translation. They made their submissions not on admissibility, but on the weight the document should be given. The Presenting Officer was correct to point out to us that the document is plainly, without translation, to the effect that the family, including the appellant, is of Albanian not Kosovan birth. That last point goes to a fundamental issue in the appeal, and it is one to which Mr Rene made no response.

26) As to ground 2(ii), the determination is not entirely free of contradiction on whether the appellant's sister was thought to be residing in Albania at the time of the hearing. However, we think the judge broadly understood that the appellant's sister had re-entered the UK. The more significant points were that she returned to Albania and that she obtained her permission to re-enter the UK as an Albanian. The judge was correct in noting that the appellant's brother was in Albania for similar reasons and was entitled to take that as further demonstrating links to Albania.

27) If any slight error is disclosed by paragraph 2 of the grounds, it is not one which might have made any difference. Ground 3 discloses nothing further to ground 2(ii).

28) On ground 4, Mr Rene's submissions did not enlighten us as to how there could be any legal error in the judge's inability at paragraph 36 to determine whether or not the appellant speaks fluent English, and whether or not he is able to speak Albanian. Nor did Mr Rene explain how any such error might aid the appellant's case.

29) We observe, for what it matters, that if anything the judge might readily have found that the appellant is bilingual in English and Albanian. We think that would be the only sensible conclusion from all that is known about him.

30) Ground 5 criticises paragraph 38 as if it stood alone, but it states a conclusion the reasoning for which is to be found in the rest of the determination, in particular at paragraphs 39 and 40.

31) From paragraph 6 of the grounds it is difficult to derive any clear proposition of error of law. The judge was entitled to take account of the obvious fact that the appellant's family members have lied through multiple proceedings and hearings about their origins. Far from "grabbing at straws", the appellant's failure to put anything intelligible forward regarding his origins was a point rationally to be taken against him. The fact that he was aged 8 on entry to the UK does not make it any more likely that he, uniquely in his family, is Kosovan rather than Albanian. The judge's conclusion on nationality is far from a subjective opinion. It is the conclusion also reached by the previous panel; it is the thrust of the evidence; and it is rather difficult to see how any judge might sensibly reason that the appellant is *not* Albanian.

32) As to Ground 7 we can see no error in a judge concluding that the fact that an appellant's close relatives have ties in another country yields an inference that he has similar ties, both directly and indirectly. Absent evidence that an individual was estranged from his relatives, we do not see what other inference would follow; and the appellant says in his grounds that he is unusually close to his parents. The relevance of Kosovans having to apply in Albania for entry clearance is nil. Any applicant has to do so by proof of nationality, and the appellant's relatives made their applications on the basis of Albanian nationality, not of Kosovan origin.

33) Mr Rene did not refer directly to <u>Maslov</u>. The reference which should have been given is app no 1638/03, ECtHR, [2009] INLR 47. As Mr Bramble pointed out, there is no related ground of appeal before us. <u>Maslov</u> establishes (paragraph 75) that for a settled migrant who has lawfully spent the major part of his childhood and youth in the host country, very serious reasons are required to justify expulsion, the more so where the offences underlying expulsion were committed as a juvenile. In this case, the significant offending was as a young adult. We are satisfied that the FtT proceeded on the correct principles. There is no legal error in the effective finding that the very serious reasons to justify expulsion were present.

34) Some confusion runs through the prior history of these proceedings, including the determination in case DA/00923/2012, the appellant's grounds of appeal both in the First-tier Tribunal and in the Upper Tribunal, and in the determination now under appeal. The judge's determination would have benefited from further proof-reading and revision. For example, this would have led to the deletion of paragraph 339A of the Rules, which is set out in full. Although neither representative mentioned the point, this paragraph of the Rules seems to have no relevance and to have been quoted in error rather than paragraph 399A. The judge should also have made it clear for

what purposes she was quoting the earlier determination, which would have left no doubt about her understanding of the sister's whereabouts.

35) It may be helpful to take a step back from points of confusion and to undertake a reality check. The underlying source of uncertainty is not so much the judge as the lies told by the appellant and his family since their entry to the UK. The appellant even now puts forward no plain statement of his understanding of his origins, but he has not disputed that his brother and sister are Albanian and has not explained how he might not be so. He has chosen to sit back and try to leave obscure matters which must be readily within his knowledge. He is not in a position to complain when obvious adverse inferences are drawn.

36) While preparing this determination we note a further point, not mentioned on either side. The respondent's decision at paragraphs 37 - 42 deals with the case under paragraph 399A of the Rules on the basis that the appellant has lived in the UK for half his life until the date of decision, but that it is not considered that there are no ties to the country to which he is to be deported. The appellant seems to have been sentenced to 42 months on each of two counts, the sentences to run consecutively. Both sides have referred to that as a sentence of 7 years imprisonment, and the appellant has not suggested that it might mean anything else for present purposes. If we read paragraphs 398 and 399A correctly, the effect of the appellant having been sentenced to a period of imprisonment of 7 years is that he falls within 398(a) not (b) or (c) and so should not have been given the benefit of the test of "ties" in 399A. That would have lowered the test within the Rules to "exceptional circumstances". But in any event, on the higher test of "ties", his case was correctly dismissed by the First-tier Tribunal.

37) Our conclusion is that any error by the judge was in not finding with greater clarity that (i) the appellant is not Kosovan but Albanian and (ii) it is (much) more likely than not that he retains social, cultural and family ties with Albania.

38) No anonymity order has been requested or made.

39) The appeal to the Upper Tribunal is dismissed. The determination of the First-tier Tribunal shall stand.

16 September 2013
Judge of the Upper Tribunal