



IAC-AH-DN-V1

**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: IA/34460/2014

THE IMMIGRATION ACTS

**Heard at Field House
On 13th October 2015**

**Decision & Reasons Promulgated
On 19th October 2015**

Before

DEPUTY UPPER TRIBUNAL JUDGE M A HALL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BM

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Miss A Fijiwala, Senior Home Office Presenting Officer

For the Respondent: Mr B Hawkin of Counsel instructed by Nova Legal Services

DECISION AND REASONS

Introduction and Background

1. The Secretary of State appeals against a decision of Judge Hodgkinson of the First-tier Tribunal (the FTT) promulgated on 8th May 2015.
2. The Respondent before the Upper Tribunal was the Appellant before the First-tier Tribunal and I will refer to him as the Claimant.
3. The Claimant is a male citizen of Albania born 3rd June 1982 who applied for leave to remain in the United Kingdom on the basis of his family and

private life, and in reliance upon Article 8 of the 1950 European Convention on Human Rights (the 1950 Convention).

4. The application was refused on 5th August 2014, the Secretary of State issuing a Notice of Immigration Decision of that date, to remove the Appellant from the United Kingdom. A reasons for refusal letter was also issued, though this is incorrectly dated 5th August 2013. It is common ground that the correct date should be 5th August 2014. The reasons for refusal are based on S-LTR.1.6 which is set out below;

‘The presence of the applicant in the United Kingdom 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 United Kingdom.’

5. In addition the Secretary of State considered the application under Article 8 and accepted the Appellant was in a relationship with his partner and that they have a son born in August 2013, and the Appellant’s partner has a daughter born in September 2011 from a previous relationship. It is accepted that the Claimant’s partner and both children have leave to remain in the United Kingdom until 10th November 2016. It is considered the Appellant’s partner and children could leave the United Kingdom and relocate with the Claimant in Albania, or alternatively the relationship could be continued through modern forms of communication such as telephone, email, social networking sites and Skype.
6. The Claimant appealed and the appeal was heard by the FTT on 28th April 2015. Evidence was given by the Claimant and his partner. The FTT allowed the appeal under the Immigration Rules finding that the Secretary of State had failed to establish that the Claimant should be refused limited leave to remain on grounds of suitability with reference to S-LTR.1.6. The FTT found that the Claimant satisfied the requirements of paragraph EX.1(b) of Appendix FM in that he has a genuine and subsisting relationship with his partner who is an Albanian refugee, and therefore there were insurmountable obstacles for family life continuing in Albania.
7. This decision prompted the Secretary of State to apply for permission to appeal which was granted by Judge of the First-tier Tribunal Cruthers in the following terms;
 - “2. In my assessment there is something arguable in all the strands of the grounds on which the Respondent seeks permission to appeal. I will summarise those strands:
 - (A) It is arguable that the judge erred in not accepting the Respondent’s case pursuant to the suitability criteria in paragraph S-LTR.1.6 of the rules – especially given that this is an Appellant who had illegally re-entered the United Kingdom within one or two months of having been removed at public expense on 8th August 2009 (paragraph 8 of the decision under consideration).

(B)&(C) It is arguable that the outcome of this appeal would have been different if the judge had applied the principles explained in Farquharson (removal - proof of conduct) [2013] UKUT 146 (IAC).

(D) It is arguable that the judge failed to properly consider the likelihood that the Appellant's partner could reasonably be expected to live with him in Albania - if the Appellant and his partner do wish to continue family life together after the Appellant is next removed to Albania."

8. Directions were issued making provision for there to be a hearing before the Upper Tribunal to decide whether the First-tier Tribunal decision should be set aside.

The Upper Tribunal Hearing

The Secretary of State's Submissions

9. Miss Fijiwala relied and expanded upon the grounds contained within the application for permission to appeal which are summarised below.

A - Suitability under Appendix FM of the Immigration Rules

The FTT erred by finding the Secretary of State relied entirely upon the Claimant's alleged criminal history in refusing the application. It is contended that the Secretary of State at all times relied upon the Claimant's immigration history as well as the alleged criminal offending and in failing to have regard to the Claimant's immigration history the FTT erred in assessing whether suitability requirements are met.

B - Proof of Conduct

The FTT correctly found that the Claimant failed to advance any credible innocent explanation for the alleged taking of a vehicle without consent at paragraphs 37-39. In those circumstances and with reference to Farquharson the FTT erred by failing to find on a balance of probabilities that the Claimant has been shown to have engaged in some or all of the disputed criminal offending alleged by the Secretary of State.

C - Failing to Correctly Follow or Apply a Binding Case Authority

The Secretary of State relied upon the case of Farquharson and submissions were made on this before the FTT. There is no reference to Farquharson in the FTT decision and it is not sufficiently clear that the FTT directed itself adequately or at all in respect of this case.

D - Consideration of the Claimant's Partner's Status

The FTT has given significant weight to the Claimant's partner's ostensible inability to travel to Albania on the basis that she is a recognised refugee and her current travel document does not permit travel to Albania. The

FTT arguably erred by failing to consider whether the Claimant's partner's circumstances have changed so that she can now safely travel to and reside in Albania, as she would now no longer be returning to Albania as a lone female without family support, but would be returning as part of a family unit, with the assistance and support of the Claimant. The FTT erred by failing to consider the same in finding that family life could not reasonably be continued in Albania.

The Claimant's Submissions

10. Mr Hawkin relied upon the combined rule 24 response and skeleton argument submitted on behalf of the Claimant.
11. In brief summary it was submitted that the Secretary of State's refusal letter confirms that the Secretary of State relied upon the Claimant's alleged criminality and not his immigration history.
12. In relation to proof of conduct, and the alleged taking of a motor vehicle, the FTT noted that the Claimant was not prosecuted or even charged in relation to that incident due to insufficient evidence.
13. In relation to Farquharson, the FTT directed himself to the correct burden and standard of proof and applied that standard in making detailed findings.
14. The FTT did not err in finding that there were insurmountable obstacles to family life continuing in Albania. The Secretary of State was seeking to introduce a new argument as to circumstances having changed, as this was not mentioned in the original decision, nor was it mentioned in submissions before the FTT. The conclusion reached by the FTT as to insurmountable obstacles was a conclusion that was entirely open to be made on the evidence presented.
15. At the conclusion of oral submissions I reserved my decision.

My Conclusions and Reasons

16. I address the Grounds of Appeal in the sequence in which they are set out in the application for permission.

A I find no error in the FTT recording at paragraph 32 that the Secretary of State relies entirely upon the Claimant's alleged criminal history. The reasons for refusal letter at paragraph 16 indicates that the reasons for refusal under the suitability grounds were outlined in the following paragraphs. There then follows the heading 'Criminality'. The reasons are thereafter set out in paragraphs 17-24.

Those reasons relate to the Claimant's alleged criminal offending. There is no reference to his immigration history in the paragraphs which give reasons for refusing the application. The FTT was therefore entitled to find that the Secretary of State relied entirely

upon the Claimant's alleged criminal history. The FTT comprehensively addressed all of the reasons set out by the Secretary of State in paragraphs 17-24 of the reasons for refusal letter. This ground discloses no error of law.

B There is specific reference in this ground to paragraphs 37-39 of the FTT decision in which consideration is given to the Claimant's alleged involvement in taking a motor vehicle without consent on 21st September 2008. The FTT at paragraph 39 expresses some concerns regarding the Claimant's credibility in relation to this incident, and notes the Claimant was not charged or prosecuted due to insufficient evidence. The FTT was aware of the relevant standard of proof as this was set out in paragraph 29. As there was insufficient evidence to even charge the Claimant with an offence, the FTT was entitled to attach no weight to these allegations.

C It is correct the FTT does not specifically cite Farquharson. That decision gives guidance where the Secretary of State relies on allegations of conduct in proceedings for removal, concluding that the same principles apply as to proof of conduct and the assessment of risk to the public as in deportation cases. It was also found that a criminal charge that has not resulted in a conviction is not a criminal record, but the acts that led to the charge may be established as conduct. In relation to the legal principles relevant to assess disputed allegations of conduct the Tribunal found, inter alia at paragraph 23;

“Nevertheless, where the Secretary of State makes an allegation of conduct in the course of an overall assessment of the merits of the claim to remain or the decision to remove in the light of Article 8 and the provisions of former Immigration Rule 395C, it is for the Secretary of State to substantiate the conduct relied on to the standard of the civil balance of probabilities.”

The FTT applied the principles set out above, stating in paragraph 29 that with reference to the suitability criteria the burden of proof is on the Secretary of State to establish that the Appellant falls for refusal thereunder, and the standard of proof is a balance of probabilities. There is further reference to the correct burden and standard of proof in paragraphs 43 and 45. I conclude that the judge considered and correctly applied the principles in Farquharson and this ground discloses no error of law.

D I observe that in the reasons for refusal letter there is no mention of the fact that the Claimant's partner is an Albanian refugee and that one of the children also has refugee status. The FTT, in my view, correctly considered the definition of 'insurmountable obstacles' set out in EX.2. I accept the point made on behalf of the Claimant, that prior to the application for permission to appeal to the Upper Tribunal, there was no reference to a change of circumstances in relation to the Claimant's partner's circumstances. I have not been made aware of any application to revoke her refugee status. As the Claimant's

partner has been granted refugee status on the basis of her fear of persecution in Albania, the FTT in my view was entitled to find that there are insurmountable obstacles to family life between the Claimant and his partner continuing in Albania. I accept Mr Hawkin's submission that it was not contended before the FTT that there had been a change of circumstances that would make it safe for the Claimant's partner to return, and `this submission was not challenged before me.

17. The decision of the FTT is careful and comprehensive and contains findings with adequate and sustainable reasons for those findings. The grounds submitted by the Secretary of State disclose a disagreement with those findings, but do not disclose an error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law such that the decision must be set aside.

I do not set aside the decision. The appeal of the Secretary of State is dismissed.

Anonymity

The First-tier Tribunal made an anonymity direction and I continue that order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed

Date 15th October 2015

Deputy Upper Tribunal Judge M A Hall

TO THE RESPONDENT FEE AWARD

There are no fees paid or payable and therefore there is no fee award

Signed

Date 15th October 2015

Deputy Upper Tribunal Judge M A Hall