



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/05904/2017

THE IMMIGRATION ACTS

Heard at Field House
On 25 May 2018

Determination Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

v

MR A Q
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E. Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr S. Harding, counsel instructed by Marsh & Partners, solicitors

DECISION AND REASONS

1. The Respondent, to whom I shall refer as the Claimant, is a national of Albania, born on 26.10.78. He claims to have entered the United Kingdom illegally on 8 January 2008 and was encountered by Immigration Officers at Stansted airport on 22 January 2013. He claimed asylum on 21 November 2016. The basis of his claim is

that he feared persecution on return to Albania due to membership of a particular social group *viz* as a disabled person with hearing loss. This application was refused in a decision dated 7 June 2017.

2. The Claimant appealed and his appeal came before First tier Tribunal Judge Coutts for hearing on 30 January 2018. In a decision and reasons promulgated on 1 March 2018, he allowed the appeal on human rights grounds in that, whilst he did not accept that the Claimant would face persecution on account of his disability, he found that there would be very significant obstacles to his integration pursuant to paragraph 276ADE(vi) and that removal of the Claimant would constitute a disproportionate interference with his physical, moral and psychological integrity.

3. The Respondent sought permission to appeal, in time, on the basis that the Judge had erred in law, given that he found that the Claimant had fabricated his account of historic persecution on the basis of his disability, thus it was unclear on what basis he would face obstacles so significant as to amount to a barrier to reintegration or render his return disproportionate. It was further submitted that the very fact that the Claimant had been taught Albanian sign language was indicative of the fact that there is a recognized means of communication available to him in Albania. It was for the Claimant to prove that he could not return to his home area and he failed to do this. There was no evidence before the Tribunal that the Claimant suffered from mental health issues and it is unclear why the Tribunal concluded that removal would adversely affect his mental health.

4. Permission to appeal was granted by Judge of the First tier Tribunal Alis on the basis that it was arguable that the Judge reached his findings without any supporting evidence.

Hearing

5. At the hearing before me, Mr Tufan submitted that the Judge had dismissed the asylum appeal as not being credible but had allowed it under paragraph 276ADE and article 8. Whilst the Claimant has hearing and speech problems he comes from Albania and lived in Albania for 30 years. The Judge concluded there would be very significant consequences if he had to return to Albania and would have problems finding accommodation. However, he submitted that the test pursuant to paragraph 276ADE (vi) i.e. significant obstacles to return, is tantamount to the article 3 medical cases and that in order to show that he would not be able to reintegrate in Albania the circumstances would have to be very exceptional *cf.* GS India [2015] EWCA Civ 40.

6. Mr Tufan submitted that there were further errors i.e. at [102] where the Judge refers to "S" (previously Sanambar - see [14] but this is not what is actually found by the Court of Appeal at [58] onwards and is not contained therein. He submitted that, whilst this was not raised in the grounds of appeal it was a *Robinson* obvious point in that the Judge is relying on a case that is not properly cited or clear.

7. Mr Harding accepted that the Judge's manner of dealing with the caselaw was eccentric but does broadly speaking set out the principles. He submitted that the grounds of appeal are unfair in that the fact the Judge did not find the account credible does not mean it is a fabrication. He submitted that the first bullet point of Ground 1 is wrong and suggesting he was able to communicate at the hearing in English is misguided and even via that method it was problematic. Whilst the Claimant might have access at some stage to an Albanian sign language interpreter there is no evidence about this and the Judge had to make findings on that basis in the absence of evidence and the grounds of appeal misconstrue inadvertently what happened at the hearing. The Judge had to make a finding on that issue and did so.

8. In respect of the finding at [111] Mr Harding submitted that it was a comprehensive judgment and there was nothing to suggest the Claimant was in contact with his family and that all the points were fully articulated at the hearing. The Judge allowed the case under Article 8 and the finding in respect of paragraph 276ADE was the primary finding. He submitted that it was incumbent on the Judge to make findings of fact and has done so

9. In respect of the last bullet point regarding the Claimant's mental health, Mr Harding submitted that this was not what the judgment is saying at [109] where the Judge found that: "*the appellant's disability will therefore present a very significant obstacle to his ability to engage and communicate with others successfully in order to achieve these aims.*"

10. Mr Harding submitted that it is really a perversity challenge albeit it was not put on that basis. He submitted that the Judge made proper findings in what was a loss of private life case and that nothing the Secretary of State has said amounts to more than mere disagreement with those findings. It is a high test but there is nothing to say the Judge did not appreciate that and he made a sustainable decision under paragraph 276ADE(vi) and article 8. Mr Harding acknowledged that the case was unusual but that the Judge did all he could do.

11. In reply, Mr Tufan referred to [105] where the Judge refers to Claimant as severely disabled but he is not sure where that comes from. He submitted that the whole basis upon which the appeal has been allowed is due to his hearing and speech difficulties but he will be returning to his home country. Mr Tufan denied that it was a perversity challenge. In respect of the caselaw, this was distinguishable in that the applicants in those cases had lived in the United Kingdom since childhood.

Findings

12. I note that, in respect of the Claimant's account of past ill-treatment by his family and others that the Judge did not find it plausible and that he provided sustainable reasons for his findings. This was following a careful note of the difficulties in obtaining evidence from the Claimant, due to the lack of availability

of an Albanian sign language interpreter and thus the appeal proceeded on the basis of typing the questions and answers on an Albanian language keyboard.

13. In respect of the Claimant's private life, the Judge made the following findings:

"103. I saw for myself, at the hearing, the extent of the appellant's disability which is a total bilateral hearing loss together with speech impairment. There were very significant difficulties experienced in communicating with him notwithstanding the adjustments that were made to assist him. This also included issues of literacy. I have already stated above, the particular difficulties that we faced and I am satisfied that these were not exaggerated by him in any way ...

105. ... the appellant is severely disabled through his hearing loss and this is, without question, going to place an overlay upon his ability to reintegrate which I find will amount to a very significant obstacle for him."

14. The Judge went on to find that the Claimant's problems would start at the airport with difficulty communicating, on the basis that *"there has been no evidence put to me to establish such a conclusion."* [106] And at [107] that: *"I am unable to assume, without evidence, that there would be such support available to the appellant either at the airport, in Tirana or more widely in Albania itself."* And at [109]: *"there is no objective evidence before me that there are charitable groups or organizations available in Albania to assist a disabled person in the appellant's position with their reintegration."* I find that the Judge did err in reaching his finding at [112] that there would be very significant obstacles to the Claimant's reintegration in Albania in that there was no evidential basis of reception facilities or social support in the background evidence submitted by either party in support of his conclusion, which the Judge acknowledged at [95] and [96]. In light of the fact that it was for the Claimant to establish his case it cannot be said that the Claimant discharged that burden simply on the basis of his oral evidence.

15. However, the Judge went on to consider Article 8 outside the Rules, correctly directing himself at [120] that there were compelling circumstances in the case and I consider that his findings in this respect are sustainable. This is because, whilst there was an absence of background evidence in support of the contention that the Claimant would face very significant obstacles in Albania, the test in respect of Article 8 is different in that it encompasses a holistic approach, encompassing the public interest considerations, now set out at section 117B of the NIAA 2002. It is clear from the Home Office guidance *"Family Migration: Appendix FM Section 1.0b Family Life (as a Partner or Parent) and Private Life: 10-Year Routes"* 22.2.18 at page 60 that the decision maker is not permitted to consider private life established in the UK when considering whether there are very serious obstacles to integration pursuant to paragraph 276ADE (vi) of the Rules:

"The nature and extent of the private life that an individual has established in the UK is not relevant when the decision maker is considering whether there are very serious obstacles to integration into the country of return. However, where the applicant falls for refusal under the Rules, this will be relevant when considering whether there are exceptional circumstances which would make refusal unjustifiably harsh for the applicant."

In the judgment of the Supreme Court in MM & others [2017] UKSC 10 at [61] that, albeit that concerned linked Article 8 family life cases: *“the ultimate issue is whether a fair balance has been struck between individual and public interests, taking account of the various factors identified.”*

16. At [114] the Judge found that the Claimant had established a private life over the ten years he had been residing in the United Kingdom. In this respect he took account of the Claimant’s oral evidence that he had been able to attend a deaf outreach group, meet other disabled people in the same position and to make associations and friends [97] and that, if removed to Albania, he would not have the assistance of someone like Mr G with whom he resides and communicates with in the Albanian sign language on a day to day basis.

17. The Judge went on to consider the section 117B public interest considerations and concluded at [119] that his removal would be a disproportionate interference with the Claimant’s private life. This finding was subject to challenge in the grounds of appeal only to the extent that there was no evidence that the Claimant had mental health issues and no argument was put forward on this basis. I find that this ground of appeal is misconceived and is based on a very narrow interpretation of the private life aspect of Article 8. It is clear from the judgment of the Strasbourg Court in Bensaid [2001] 33 EHRR 10 that:

“47. “Private life” is a broad term not susceptible to exhaustive definition. The Court has already held that elements such as gender identification, name and sexual orientation and sexual life are important elements of the personal sphere protected by Article 8 (see, for example, Dudgeon v. the United Kingdom, judgment of 22 October 1981, Series A no. 45, pp. 18-19, § 41; B. v. France, judgment of 25 March 1992, Series A no. 232-C, pp. 53-54, § 63; Burghartz v. Switzerland, judgment of 22 February 1994, Series A no. 280-B, p. 28, § 24; and Laskey, Jaggard and Brown v. the United Kingdom, judgment of 19 February 1997, Reports 1997-I, p. 131, § 36). Mental health must also be regarded as a crucial part of private life associated with the aspect of moral integrity. Article 8 protects a right to identity and personal development, and the right to establish and develop relationships with other human beings and the outside world (see, for example, Burghartz, cited above, opinion of the Commission, p. 37, § 47, and Friedl v. Austria, judgment of 31 January 1995, Series A no. 305-B, p. 20, § 45). The preservation of mental stability is in that context an indispensable precondition to effective enjoyment of the right to respect for private life.”

18. It is clear from this paragraph that the Claimant’s disability is clearly capable of founding a basis for protection of his private life, given that his inability to hear and his accepted difficulties in communication has a serious impact on his ability to establish and develop relationships with others and the outside world. The Judge referred to this judgment as “B” at [119] and held as follows at [119]:

“His situation is not a typical one because he suffers from a severe disability. I am therefore satisfied that to disrupt his private life here and to expect him to return to his uncertain situation in Albania will have a negative impact upon his physical, moral and psychological integrity as held in B.”

19. In terms of the Judge’s use of jurisprudence, his practice appears to have been to set out the full name and citation of the cases he considered at [14] and then to

apply those cases by reference to their initial in the body of the determination. Whilst this may have lead to some confusion, it is not an erroneous approach. Moreover, none of the cases he sought to rely on are comparable given that the applicants in those cases, whilst they may have resided in the United Kingdom for longer, did not suffer from a serious disability as in the particular case of this Claimant.

Decision

20. For the reasons set out above, whilst the Judge's findings in respect of the Claimant's ability to meet the requirements of paragraph 276ADE(vi) of the Immigration Rules are flawed by error of law, his findings in respect of the proportionality of removal of the Claimant due to the impact on his established private life in the United Kingdom are sustainable.

21. Consequently, I dismiss the appeal by the Secretary of State and upheld the decision of First tier Tribunal Judge Coutts in that respect, with the result that his findings and conclusions in respect of the Claimant's private life pursuant to Article 8 of ECHR stand.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

17 June 2018