



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2022-006628

First-tier Tribunal No: HU/51737/2021

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

7<sup>th</sup> November 2023

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE MONSON**

**Between**

**ALBERT GJECAJ**  
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr E Fripp, Counsel instructed by Marsh & Partners Solicitors

For the Respondent: Mr E Terrell, Senior Home Office Presenting Officer

**Heard at Field House on 25 October 2023**

**DECISION AND REASONS**

1. The appellant appeals against the decision of First-tier Tribunal Judge Maurice Cohen promulgated on 13 October 2022 ("the Decision") dismissing the appellant's appeal against the decision of the respondent made on 26 April 2021 to refuse the appellant leave to remain in the UK on private life grounds under Rule 276ADE or on the grounds that requiring him to return to his home country, Albania, would constitute a disproportionate interference with his private life rights, thereby breaching Article 8 ECHR.

## **Relevant Background**

2. The appellant is a national of Albania, whose date of birth is 4 June 1981. On 9 October 2020 the appellant applied for leave to remain on the grounds of continuous, albeit mainly illegal, long residence in the UK of over 20 years' duration, apart from a few months absence when he had returned to Albania to apply successfully for an EEA family permit to enter and reside in the UK as the spouse of an EEA national from Lithuania who was exercising Treaty rights here. The appellant's case was that he qualified for leave to remain on private life grounds under the Rules, as there were very significant obstacles to his integration into the country of return, given that his life had been based in the UK for the past 21 years.
3. In the refusal decision dated 26 April 2021, the respondent rehearsed the appellant's immigration history, which included the fact that he had previously appealed against a decision to refuse him leave made in 2018, but his appeal had been dismissed by the First-tier Tribunal on 7 February 2019.

## **The Hearing before, and the Decision of, the First-tier Tribunal**

4. The appellant appealed, and his appeal came before Judge Cohen sitting at Taylor House on 23 May 2022. Miss Karen Reid of Counsel appeared on behalf of the appellant, and there was no appearance on behalf of the respondent.
5. In the skeleton argument she had prepared, she submitted that there were very significant obstacles to the appellant's integration into Albania, as he had left Albania at the age of 18 and, save for a 4-month period when he was applying for an EEA residence permit, he had been absent from the country for almost 22 years; he had no experience of Albania as an adult; and his relationship with his family in Albania had broken down due to his marriage. He could not rely on the support of his family to assist him in overcoming any obstacles to reintegration.
6. In support of his appeal outside the Rules, Miss Reid relied upon the appellant's 21 years of near-continuous residence in the UK; the fact that he had extended family members in the UK with whom he enjoyed a close relationship; the fact that he was financially independent and able to speak English; and that there were witnesses attesting to his good character.
7. Ms Reed's attendance note for the hearing records that she called the appellant and he adopted his witness statement. In answer to questions from the Judge, he confirmed that his children were in Lithuania, but he had not visited them there. He had returned to Albania only to apply for a visa and he had been resident in the UK for 15 years since then. She then made submissions in line with the skeleton argument. She said that the Judge reserved his position, and indicated that there would be a delay in receiving his decision as he had a backlog of decisions to write.

8. In the event, the Judge did not produce his Decision until 13 October 2022.

### **The Grounds of Appeal**

9. The grounds of appeal were settled by Miss Reid. Ground 1 was that the delay of 4 months and 3 weeks in reaching a decision had led to an unsafe decision. Ground 2 was that the Judge had applied the wrong test under Rule 276ADE(1)(vi).

### **The Reasons for the Grant of Permission to Appeal**

10. On 22 November 2022 Judge Barker granted the appellant permission to appeal on all grounds. It was arguable that the unexplained delay had led to factual errors, and that the errors implied a lack of care and a failure to carry out a proper assessment of the evidence. It was arguable that there was a lack of clarity and comprehension demonstrated on occasion throughout the decision and reasons - for example at para [13] - and the general errors (such as the repetition of paragraph numbers throughout the decision and reasons) further suggested a lack of careful assessment and consideration of the material issues in the appeal:

“Whilst one or other of these matters taken in isolation may not suggest material errors in the decision and reasons, it is arguable that taken together, these errors suggest that the significant delay between the hearing and making of the decision has infected the decision made by Judge Cohen.”

### **The Error of Law Hearing**

11. At the hearing before me to determine whether an error of law was made out, Mr Fripp developed the case advanced in the grounds of appeal. I was shown copies of two previous decisions relating to the appellant that had apparently been before Judge Cohen, comprising a decision of Judge Metzger giving reasons for dismissing an appeal by the appellant against a refusal to recognise that he had a retained right of residence under the EEA Regulations 2006 following his divorce from his Lithuanian spouse; and the decision of Judge Khawar promulgated on 7 February 2019 dismissing his appeal against the refusal of leave to remain under the Rules, or on Article 8 ECHR grounds outside the Rules.
12. Whereas there was a Rule 24 Response opposing the appeal on the ground that the Judge’s errors were not material, after Mr Fripp had completed his submissions, Mr Terrell conceded that the Decision of the First-tier Tribunal was unsafe. While the position taken by Mr Terrell was not determinative of the issue, I was satisfied that his concession was appropriate, and I held that the appellant had made out a case that he had been deprived of a fair hearing in the First-tier Tribunal, and that therefore the Decision should be set aside in its entirety, and the appeal remitted to the First-tier Tribunal for a *de novo* hearing.

13. I gave short oral reasons for so finding, and then moved on to agree directions for the remittal with the representatives. As well as directing that Judge Cohen should be treated as incompatible to sit on the rehearing of the appeal, Mr Fripp also asked me to include Judge Khawar in the same category. His reasoning was that Judge Khawar was the Judge who had dismissed the appellant's previous appeal in 2019, and therefore, although he acknowledged that this did not help his lay client, the *Devaseelan* guidance applied to the instant appeal. If the fresh hearing was allocated to Judge Khawar, he might feel that he ought to recuse himself in order to avoid a complaint of apparent bias. I agreed that I would "exclude" Judge Khawar solely on this basis.
14. I said that I would provide more extensive written reasons for my error of law decision, and these I give below.

### **Reasons for Finding an Error of Law**

15. As observed in the reasons for the grant of permission, there were a number of errors in the Decision. I only find it necessary to identify those errors which are the most significant.
16. Firstly, the Judge said that the appellant had been represented by Marsh & Partners, and the respondent had been represented by an unnamed Home Office Presenting Officer. In fact, the appellant had been represented by Miss Reid of Counsel (albeit instructed by Marsh & Partners), and no one had appeared at the hearing on behalf of the respondent. Accordingly, it is not true that, as stated by the Judge at para [5] of the Decision, he heard submissions from both parties.
17. Secondly, at para [9] the Judge said that the appellant's representatives had been disingenuous in their submissions to the Tribunal in the way that they presented this case in the appeal, as they had submitted that he had resided in the UK for 21 years. This was untrue and unfair, as Miss Reid had expressly accepted in her skeleton argument that the appellant had not resided continuously in the UK for 21/22 years, but there had been a period of absence abroad.
18. Thirdly, in considering whether the appellant qualified for leave to remain under paragraph 276ADE of the Immigration Rules, the Judge found that he did not, on the basis that he had not demonstrated that there were exceptional circumstances in his case. The Judge thus clearly applied the wrong test.
19. As a result of the errors which I have identified above, I consider that a fair-minded observer would not have confidence that the Judge had adequately assessed the case that Ms Reid had put to him on behalf of the appellant. Although there were, and remain, formidable obstacles to the appellant succeeding in his appeal, not least because of the application of the *Devaseelan* guidance to which the Judge made no reference, justice

must not only be done, but it must be seen to be done. I consider that the extensive delay in the production of the Decision has operated to render the Decision unsafe, and that the appellant has thereby been deprived of a fair hearing of his appeal in the First-tier Tribunal.

### **Anonymity**

The First-tier Tribunal did not make an anonymity direction, and nor do I.

### **Notice of Decision**

**The decision of the First-tier Tribunal involved the making of a material error of law, and so the decision is set aside in its entirety, with none of the findings of fact being preserved.**

### **Directions**

**The appellant's appeal shall be remitted to the First-tier Tribunal at Taylor House for a *de novo* hearing before any Judge apart from Judge Maurice Cohen and Judge Khawar.**

Andrew Monson  
Deputy Judge of the Upper Tribunal  
Immigration and Asylum Chamber  
29 October 2023