Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2023-000959
HU/00924/2022

THE IMMIGRATION ACTS

Decision & Reasons Promulgated
On 31 August 2023

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE WILDING

Between

MR GENTIAN HAROKU
(ANONYMITY DIRECTION NOT MADE)

Appellant

And

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr T Lay, Counsel, instructed by Abbott Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 27 July 2023

DECISION AND REASONS

1. The appellant brings this appeal against the decision of First-tier Tribunal Judge Dieu ('the Judge') who dismissed his appeal on an Article 8 basis on a decision promulgated on 13 February 2023.

Background

2. The appellant is a national of Albania born on 15 April 1988. He claims to have entered the UK in 2014 or 2015, and lived here illegally for a number of years. He first came to the Secretary of State's ('SSHD') attention on 19 December 2020 where he was encountered as a suspected illegal entrant. He was served with a notice of removal.

3. On 9 February 2021 he applied for permission to marry, and then on 24 February 2021 he made an application for leave to remain as a spouse. This application was refused, and he did not appeal

4. On 1 October 2021 he was convicted of driving a mechanically propelled vehicle while unfit through drink, failed to stop said vehicle when required by a constable/warden, failing to stop after an accident and driving without a licence.

5. On 13 January 2022 he was convicted of producing cannabis.

6. On 8 February 2022 he was sentenced to 6 months imprisonment.

7. On 2 March 2022 the SSHD made a decision to make a deportation order under s5(1) of the Immigration Act 1971.

8. On 21 March 2022 he made representations claiming to be a victim of modern slavery and raising an Article 8 claim in relation to the family life he enjoyed with his partner.

9. On 12 April 2022 an interview was conducted to seek the appellant's consent to be referred to the National Referral Mechanism ('NRM'). The appellant did not give consent.

10. These representations were considered and rejected in a decision dated 6 April 2022, and it is against this that the appellant appealed.

11. His appeal came before Judge Dieu in Birmingham on 13 January 2023. The Judge heard an application to adjourn from the appellant's representative on the basis that the appellant now consented to a referral to the NRM. It was submitted that he did not have the benefit of an interpreter previously when he was interviewed and the appellant did not understand what was being asked of him and he was confused. The Judge refused the application on the basis that he had been legally represented, by the same firm of solicitors, for the past 9 – 10 months. The delay was not reasonable, and the Judge was told a referral could take up to 12 months to resolve. The Judge did not consider that it was in the interests of justice or fairness for further significant delay and he refused the application.

12. The Judge went on to hear the appeal. He took as his starting point the exceptions to deportation through the criteria found in the Immigration Rules ('the Rules') at paragraph 399 and 399A. He found that 399 did not apply to the appellant as his partner is not settled in the UK. The Judge went on to consider that the provisions of 399A did not apply either to him as he had not been lawfully resident in the UK for most of his life.

13. As a consequence, the Judge considered the matter on the basis of whether there were very compelling circumstances over and above those described in paragraphs 399 and 399A of the Rules.

14. Turning to this test the Judge found as follows:

> *'37. Having assessed all of the evidence in the round, I am satisfied that the Appellant enjoys an Article 8 family life with his partner in the UK. Indeed, the Respondent did not dispute that at the hearing before me. This is a relatively short relationship which began around February 2020. The Appellant has been in the UK since 2014/2015 and whilst I accept that he would have integrated to some extent, I find not a significant level. Much of that time he was involved in a criminal operation. I find that he still retains his knowledge of life and culture of Albania. He speaks Albanian. Whilst his partner has not yet visited Albania, I find that she is a resourceful individual having come to the UK and managed to integrate here. I see no reason why they could not continue their relationship abroad. This is so even though they are trying for a baby. I do not find that that in itself amounts to very compelling circumstances.*
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> *38. The Appellant's case is that he would have significant difficulties in Albania. It was submitted that he was at risk from the people who had trafficked him to the UK. I do not accept, on the evidence before me and upon the standard of a balance of probabilities, that the Appellant had been a victim of trafficking however. I arrive at this finding with regard to the following:*
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> > *(a) There is no reference whatsoever within the sentencing remarks that the Appellant was the victim of trafficking. This would have been significant mitigation and so, if true, would have been reasonably likely to have been raised.*
> >
> > *(b) The Appellant said that the reason why he did not raise it was because he was afraid. But I find his evidence about why he was afraid to be vague and lacking in the detail expected if true. Nowhere does the Appellant speak of how they threatened him or what they said. He said that his family in Albania received silent phone calls from a UK number but I am not satisfied that those can be attributed to the Appellant's circumstances. It makes no sense, why, if these people are as ruthless and scary as the Appellant makes out, why they would not say something? The Appellant's evidence on his fear amounts no more than to a generic assertion that he is afraid and scared. In fact, during his interview as a potential victim of trafficking he said that they had not threatened him.*

(c) I find that the Appellant has also been inconsistent with his reasons as to why he did not give consent to an NRM referral. His position before me was that he thought he had to produce a lot of evidence which he would not have been able to. This he says was a misunderstanding. That is not what he had told the interviewing officer however. He told them that 'it is what it is, it's done. I don't want, I just want to be here and safe. To work and have a family'. If his concern was at being able to provide evidence, there is no reason why he could not, would not, have said so.

(d) When asked in evidence why he could not go back his first answer was 'because I don't have any income there. I have been here 8 years…' Only when his memory was jogged by reference to his witness statement that he added that it was because he was at risk of the people who brought him here.

(e) I find that the Appellant has exaggerated his narrative to bolster his claim. He said in his witness statement for instance that he had zero links to Albania. But he told me in evidence that his parents and brother were there. They spoke as recently as a month ago. Whilst he said that he has lost contact with them no reason was given why and how. I do not accept that he has.

39. I therefore find that the Appellant had not been trafficked into the UK and forced into working at the cannabis farm.

40. That being my finding, I can see nothing further by way of very compelling circumstances. The Appellant suffers from epilepsy but he had been suffering from it in Albania and receiving appropriate treatment there. It adds no more therefore to the circumstances.'

41. It was not advanced but for completeness, I am not satisfied that the threshold in AM (Zimbabwe) [2020] UKSC 17 can be made out on any basis of an Article 2 or 3 ECHR ground. There is simply insufficient evidence of this.

42. The Rules not being met, I can see no additional basis outside of it, and in particular under Article 8 ECHR, that would alter the outcome.

Grounds of appeal

15. The appellant appealed against this decision on three grounds:

(i) The Judge was wrong to refuse the adjournment application and the appellant was denied a fair hearing as a result. The appellant submitted that the unfairness was that he had been deprived of having his trafficking claim considered by the NRM.

(ii) The statement of 12 January 2023 raised an asylum and/or Article ECHR protection claim which should have been considered as a "new matter". The appellant was clearly raising a protection claim. The Judge materially erred by failing to consider whether he was consenting to the Article 3 protection matter. The only Article 3 claim

advanced before the SSHD was that in relation to his medical condition, and as such the Judge was wrong not to consider the question of the "new matter". As a consequence of this the Judge considered the trafficking ambit of the claim through Article 8 and applied the balance of probabilities, rather than the lower standard of proof found in a protection claim.

(iii) The Judge was irrational in his consideration of the public interest. The Judge treated the public interest as a fixity rather one which an assessment of weight was required.

16. Permission to appeal was granted by First-tier Tribunal Judge Lawrence on 15 March 2023 on all grounds.

The hearing

17. The appellant attended the hearing before us, and was represented by Mr Lay. We heard submissions from both representatives, a note of which is found in the record of proceedings.

Findings and reasons

18. We do not consider that the Judge fell into legal error in the way advanced by Mr Lay in his grounds of appeal and oral submissions before us. To take the grounds in the order in which they appear.

19. It was not unfair not to adjourn the case. The appellant's legal representatives had been instructed for a lengthy period of time before the hearing in the FTT, and no explanation had been provided for not raising this at an earlier stage with the respondent. It appears to us that if the submission made in the FTT as to the lateness of raising it, despite being represented throughout was surprising, then raising it on appeal when the same representatives are acting for him is extraordinary.

20. The grounds of appeal are, in essence, a complaint about his solicitors in the run up to the FTT hearing. Those same solicitors remain instructed by the appellant and indeed instructed Mr Lay in the appeal before us.

21. The Judge's reasoning for refusing the adjournment application was perfectly sound, and indeed when facing such an application are inherently unsurprising. We are concerned that this ground was advanced at all given the apparent conflict between the appellant and his solicitors, but ultimately take the view that the Judge gave clear and cogent reasons for rejecting the application. The issue of trafficking had been considered by the SSHD in the refusal as part of the Article 8 assessment and so was a matter in any event before the FTT.

22. Turning to ground two. We are struck by, even taking the submission at its highest, how the appellant establishes any material error of law in the Judge's approach. Mr Lay properly accepted before us that the issue of protection for the purposes of the refugee convention and/or Article 3

were, and are, new matters for the purposes of s85 of the Nationality, Immigration and Asylum Act 2002. The appellant was legally represented. The burden was on him to make an application to the SSHD for consent for any new matters to be considered. The Judge was not asked to consider an Article 3 case in this context, and indeed was prohibited from doing so absent the SSHD's consent. There is no evidence that the SSHD in fact did give that consent.

23. The Judge considered the trafficking element through the prism of Article 8, to which he correctly assessed as being the balance of probabilities and found that the appellant had not been trafficked. That approach was a correct one in so far as an Article 8 claim is concerned, but also alleviates the concern in ground one in relation to an NRM assessment. The Home Office NRM applies a balance of probabilities to any conclusive grounds consideration and consequently we do not consider that the Judge's approach was at all erroneous, let alone materially erroneous.

24. Finally in relation to ground three, there is no irrational consideration of the public interest. The Judge clearly identified that he was undertaking a proportionality balancing exercise, there is nothing within his decision that gives any indication that he was treating the public interest as a fixity. The only reference he does make to something approaching this is where he outlines, at paragraph 30, that the question as to whether the SSHD was correct in making the deportation order, or whether the appellant's deportation is conducive to the public good, is not justifiable before him.

25. This is unquestionably correct and there was no challenge to this, correctly, by Mr Lay. This statement of the Judge does not give away a misapprehension on his part that the balancing exercise and the consideration of the public interest are fixed. In our judgment the brevity of the reasons given to the assessment under Article 8 speak more to the overall strengths, or lack thereof, of the appeal before him, rather than to the Judge erring in applying a fixed view of the public interest.

26. For all of the above reasons we do not consider that the Judge materially erred in law and we dismiss this appeal.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

T.S. Wilding

Date 20th August 2023

Deputy Upper Tribunal Judge Wilding