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

**Case No: UI-2023-002275**
**First-tier Tribunal Nos: PA/50406/2022**
**IA/01431/2022**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**
**On the 25 October 2023**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE JUSS**

**Between**

**Mr A P**
**(ANONYMITY ORDER MADE)**

Appellant

**and**

**The Secretary of State for the Home Department**

Respondent

**Representation:**
For the Appellant: Ms A Radford (Counsel)
For the Respondent: Mr T Melvin (Senior Home Office Presenting Officer)

**Heard at Field House on 18 September 2023**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. This is an appeal against the determination of First-tier Tribunal Judge Bunting (promulgated on 30th May 2023), following a hearing at Taylor House on 16th May 2023. In the determination, the judge dismissed the appeal of the Appellant, whereupon the Appellant subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before me.

**The Appellant**

2. The Appellant is a male, a citizen of Albania, and was born on 1st January 1992. He appealed against the decision of the Respondent dated 26th January 2022 refusing his protection claim on asylum and human rights grounds.

**The Appellant's Claim**

3. The basis of the Appellant's claim is twofold. First, that he fears violence from his father. Second, that he is addicted to gambling, having borrowed 10,000 euros in June 2017 from a man in Albania on condition that the Appellant repay the man a month later with 10% interest. The Appellant was unable to do so because he lost all the money and could not repay the man, whereupon he was approached at the carwash by this man where the Appellant was working and attacked together with four other people and knocked unconscious. He was then told he would be killed if he did not repay the loan. The Appellant borrowed money from a colleague and left Albania and arrived in the UK on 15th June 2018.

**The Judge's Findings**

4. The judge referred to the medical evidence before him suggesting that the Appellant had a mental disorder and suicidal ideation which was "not challenged", and the judge found this to be "fully reasoned" and I accept the evidence, including that the Appellant has not feigned or exaggerated his current symptoms" (paragraph 62). On this basis the judge held that the Appellant "meets the criteria for a diagnosis of PTSD and adjustment disorder" (paragraph 63). However, the judge was not satisfied why the Appellant had not claimed asylum earlier upon arrival. As he explained, "there are many reasons why someone would not claim asylum on arrival, particularly someone who has mental health issues", but that "there does not appear to be a good reason why the appellant did not claim asylum in this case", bearing in mind that, "he arrived on 15 June 2018, but he did not claim asylum until some 18 months later, and only then when he was encountered by the police" (paragraph 73). The judge went on to say that, "I take into account his mental health difficulties, but do not consider that that can explain such a lengthy delay as exists in this case" (paragraph 77). In the event, therefore, the judge held that the Appellant's delay in claiming asylum "fundamentally undermines his credulity" (paragraph 78). The appeal was dismissed.

**Grounds of Application**

5. The grounds of application are twofold. First, that in attaching overwhelming weight to the Appellant's delay in claiming asylum, the judge had failed to evaluate the evidence "in the round" because he elevated a peripheral feature of the Appellant's claim to outweigh the evidence relating to the core claim. This was especially given that the judge failed to heed the guidance in **JT (Cameroon) [2008] EWCA Civ 878**, which was to the effect that a failure to claim asylum before arrest without a reasonable explanation is only *potentially* damaging to credibility, thus enabling a factfinder to consider the evidence in the round without distortion (see **JT** at paragraphs 19 to 21). Second, the Appellant had wished his brother to give evidence from abroad. The Appellant informed the Tribunal of this desire in accordance with the guidance given in **Agbiaka (evidence from abroad; Nare guidance) [2021] UKUT 00286**. Albania, however, did not permit its nationals to give remote oral evidence in UK proceedings and the Tribunal ascertained this on 24th January 2023. The Appellant's brother, nevertheless could give evidence in writing with written questions

from the Respondent, in accordance with the decision in **Agbiaka** (at paragraph 43) and directed that the Respondent submit its questions fourteen days after the brother's second statement was filed and served.

6. However, the Respondent then on 23rd February 2023, applied for this direction to be set aside on the basis that the responses to the written questions would not assist the Tribunal, even though the Appellant objected to this application on 9th March 2023, without success. Judge Bunting does refer to this historical background (at paragraph 83) and actually stated that "Whilst [the witness] has not been tested on this account, it could be said that the respondent did not take the opportunity to explore it further, although I can understand the reasons".

7. He added, nevertheless, that the brother's evidence is broadly supportive of the appellant's account, but in the absence of further testing, I do consider that it is relatively 'generic' and cannot be relied on although it does provide some support for the appellant's claim" (at paragraph 84).

8. The second ground of appeal, accordingly, went on to say that it was procedural unfair for the Tribunal, on the Respondent's application, to set aside the direction of the Appellant's evidence to be tested, and then to reduce the weight of the Appellant's evidence because it had not been tested.

9. Permission to appeal was granted by the First-tier Tribunal on 23rd June 2023.

**Submissions**

10. At the hearing before me on 18th August 2023,, Ms Radford, appearing on behalf of the Appellant, submitted that the Appellant's delay was the only negative finding that the judge could make in this appeal because everything else was found positively in his favour, but to have elevated it as a decisive factor, was to have fallen into an error of law. This is because the evidence had to be considered together in its entirety, and that what the judge had done was to have extrapolated the delay and held it out specifically as having controlling weight. This went against the stricture in **JT (Cameroon) [2008] EWCA Civ 878**, which made it clear that the delay is only "potentially" damaging. The judge had no regard to this decision.

11. Second, the Respondent had elected not to test the evidence of the brother, even though it was made available to the Respondent, and given that it was supportive of the Appellant as the judge had found, it was wrong to denigrate it on the basis that it had not been subjected to cross-examination.

12. For his part, Mr Melvin submitted that the judge was entitled to place reliance on the unexplained delay of eighteen months before the Appellant claimed asylum. As the judge stated, "It seems to me that the most significant point in the case is the extremely lengthy delay in the asylum claim, for which there is no real reason, and is not something addressed in the brother's evidence or the medical evidence" (paragraph 85). This showed that the judge had taken into account the medical evidence, as well as the brother's evidence, in attaching the weight that he did to the unexplained delay.

**Error of Law**

13. I am satisfied that the making of the decision by the judge involved the making of an error on a point of law. My reasons are as follows. First, in referring to "lengthy delay as exists in

this case", (paragraph 77), the judge was wrong to give it controlling weight when he stated that, "this is a point that, I consider, fundamentally undermines his credibility", paragraph 78. This is because the judge considers the delay to have irretrievably damaged the Appellant's credibility (see paragraph 86), notwithstanding all the other evidence which was broadly supportive of the Appellant's claim. The judge simply stated that, "I do not consider that I can rely on his account, even taking account of the lower standard of proof" (paragraph 87) given the delay.

14. Second, in relation to the Appellant's brother's evidence, which was in the form of witness statements, but observes "he has not been tested on this account", whilst recognising that "the respondent did not take the opportunity to explore it further" (paragraph 83), even though "It is broadly supportive of the appellant's account", and yet the judge concludes that "in the absence of further testing, I do consider that it is relatively 'generic' and cannot be relied on although it does provide some support for the appellant's claim" (paragraph 84). Again, as with the Appellant's own evidence, to say that evidence may be given lesser or greater weight is one thing, but to say that it "cannot be relied on" is another.

**Notice of Decision**

15. The decision of the First-tier Tribunal involved the making of an error of law such that it falls to be set aside. I set aside the decision of the original judge. This appeal is remitted back to the First-tier Tribunal to be determined by a judge other than Judge Bunting, pursuant to Practice Statement 7.2.(b) because the nature or extent of any judicial fact-finding which is necessary in order for the decision and the appeal to be remade is such that, having regard to the overriding objective in Rule 2, it is appropriate to remit the case to the First-tier Tribunal.

**Satvinder S Juss**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**18th October 2023**