IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004351
First-tier Tribunal No: HU/00635/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 23rd September 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

GG (ALBANIA)
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr S. Mustafa, Counsel, instructed by Briton Solicitors
For the Respondent: Mrs A. Nolan, Senior Home Office Presenting Officer

Heard at Field House on 4 September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent 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

Introduction

1. Although the Secretary of State is the appellant in this Tribunal, for consistency I refer to the parties below as they were before the First-tier Tribunal.

2. I was not asked to make any anonymity order. However, this is an appeal to which, in my view, ss.1-2 of the Sexual Offences (Amendment) Act 1992 applies, as the Appellant has made allegations of being a victim of human trafficking. In those circumstances, his identity is required to be anonymised and I make the Order set out on the front sheet of this decision.

3. This is an appeal by the Respondent against the decision of First-tier Tribunal Judge Chowdhury ("the Judge") promulgated on 6 July 2023, whereby he allowed GG's appeal against the Secretary of State's decision dated 17 January 2023 refusing him leave to remain as the spouse of a British national.

4. The appeal before me took place via CVP. There were no significant technical difficulties, and I was satisfied that the Tribunal and each party could hear and communicate with each other without difficulty.

The decisions of the Respondent and First-tier Tribunal

5. The Respondent's decision of 17 January 2023 was taken on the basis that the Appellant was in the UK without valid leave and there were no insurmountable obstacles to the continuation of his family life with his wife continuing in Albania, his country of nationality. He could return to Albania to apply for entry clearance to join his wife in the UK, or they could relocate to Albania together.

6. The Judge addressed the question of whether the Appellant was in breach of the immigration rules at para.10 of his decision. He stated,

> "*The Appellant has sought asylum in the UK and therefore is not a visitor with leave limited to six months or less. He is not on immigration bail. I find that the Immigration Rules allow entry in the UK for the sake of a protection claim having regard to paragraph 327AB of the Immigration Rules. He has to be in the UK in person in order to make a valid asylum claim. In the premises I find that the Appellant meets the immigration status requirements under Appendix FM of the Immigration Rules.*"

7. In relation to the question of whether there were insurmountable obstacles, the Judge stated as follows in para.11,

> "*The Appellant has an asylum claim pending and therefore clearly there are insurmountable obstacles. The Appellant claims to have been a victim of trafficking who had been forced into illegal work. The Sponsor is a British national, a home owner and employed in the UK, with her family resident here. I find there would be insurmountable obstacles in her continuing her family life with the Appellant in Albania.*"

8. The Judge then considered paragraph 276ADE of the Immigration Rules and Article 8 ECHR. As to this, the Judge said,

> *"13. I have had regard to the case of Agyarko v SSHD [2017] UKSC 11 in the Supreme Court's guidance as to how 'insurmountable obstacles' test is to be applied. It was said that the test is interpreted in a sensible and practical way rather than referring solely to obstacles which make it literally impossible for family to live together in the Appellant's country of origin. The Appellant has sought asylum in this country and his claim remains pending 3 years afterwards. He has in that period of time gone on to form a family here. The circumstances and evidence as at the date of hearing is what I am concerned with and assessing.*
>
> *14. I find the Appellant meets the requirements of the Rules. There is no legitimate aim that could be pursued applying TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109 that where a person satisfies the Rules whether or not by reference to Article 8 informed requirement this will be positively determinative of that person's Article 8 appeal."*

9. It is not entirely clear to me why, but the Judge then proceeded to consider Article 8 through the lens of the Chikwamba principle. He considered it not to be disputed that the Appellant would meet the requirements of the Immigration Rules for entry clearance. He found that the Appellant's removal would be disproportionate. He gave weight (para.19) to the fact that the Appellant continues to await the outcome of his asylum application, made 3 years ago and was lawfully in the UK when the Appellant and his wife initially formed their relationship. He noted that the Appellant had maintained contact with the Respondent throughout his stay in the UK since claiming asylum. At para. 20, the Judge stated, "*Having also fully considered statutory matters under Section 117B of the Immigration Act 2014 [sic] I consider all matters highlighted with reference to the Rules in addition to the impact of the Respondent's decision to refuse leave to the Appellant.*" At para.21, he then placed great weight on the importance of maintaining immigration control and considered that the fact that the Appellant was a fluent English speaker and not a burden on the taxpayer were neutral factors.

10. The Judge therefore allowed the appeal on Article 8 grounds.

The appeal to the Upper Tribunal

11. The Respondent's grounds submit, in summary, that:

    a. The Judge erred in concluding that the Appellant meets the immigration status requirement.
    b. The Judge erred in finding that the Appellant's relationship was formed at a time when the Appellant was in the UK lawfully. This led him to fail to attach weight as required by s.117B(4) of the Nationality, Immigration and Asylum Act 2002.
    c. The Judge failed to identify the unduly harsh outcomes that would be faced by the Appellant or his wife when concluding that the Appellant would face insurmountable obstacles to the continuation of family life if required to leave the UK.
    d. The Judge's reliance on the Appellant's undetermined asylum claim is "erroneous" (by which I assume the Respondent means perverse), given the lack of findings as to whether it is made out in fact or not.
    e. The Judge erred in placing positive weight on the Appellant's lack of absconding.

f. The Judge has failed to provide reasons why he considered the Appellant and his wife to be credible witnesses of fact.
g. The Judge has failed to provide adequate reasons for his conclusion that the Appellant and his wife would face insurmountable obstacles to their family life continuing in Albania.

12. Permission to appeal was granted by First-tier Tribunal Judge Burnett on 13 September 2023 on all grounds.

13. The Appellant did not file a rule 24 response.

Analysis

14. I address the Respondent's grounds under the following headings: (i) breach of immigration laws; and (ii) insurmountable obstacles.

Breach of immigration laws

15. E-LTRP.2.1 and E-LTRP.2.2. provide that to meet the immigration status requirement, an applicant for leave to remain as a partner must not be in the UK (a) as a visitor; (b) with valid leave granted for a period of 6 months or less, subject to certain exceptions; (c) on immigration bail unless the Secretary of State is satisfied that the applicant arrived in the UK more than 6 months prior to the date of application and paragraph EX.1 applies; or (d) in breach of immigration laws, unless paragraph EX.1 applies.

16. In the Secretary of State's decision, reliance was placed on the last of these.

17. To consider whether the Appellant is in breach of immigration laws, it is necessary to take the relevant provisions in turn:

a. Breach of immigration laws is a defined term pursuant to paragraph 6.2(b) of the Immigration Rules. By that definition, "*a person is in breach of immigration laws for the purpose of these rules where the person is an overstayer; is an illegal entrant; is in breach of a condition of their permission; or used deception in relation to their most recent application for entry clearance or permission*" [emphasis added].
b. Illegal entrant is also defined under paragraph 6.2(b) of the Rules as having the same meaning as in section 33(1) of the Immigration Act 1971.
c. Under s.33(1), illegal entrant means a person (a) unlawfully entering or seeking to enter in breach of a deportation order or of the immigration laws, or (b) entering or seeking to enter by means which include deception by another person, and includes also a person who has so entered.
d. "Immigration laws" in that definition means the 1971 Act and any law for purposes similar to that Act.
e. By section 3(1)(a) of the 1971 Act a person who is not a British citizen "*shall not enter the United Kingdom unless given leave to do so in accordance with the provisions of, or made under, this Act*".

18. It is clear therefore that someone who is not a British citizen who enters the UK without leave to do so is someone who has unlawfully entered in breach of the immigration laws and is therefore an illegal entrant and in the UK in breach of

immigration laws for the purpose of E-LTRP.2.2. Unless EX.1 applies, they will accordingly not meet the immigration status requirements for being granted leave to remain as a partner.

19. The Appellant, it appears to be accepted, arrived in the UK illegally and has never had leave to be here. In accordance with the above analysis, he is therefore here in breach of immigration laws and, subject to EX.1, his application properly fell to be refused under the Rules.

20. The Judge's conclusion to the contrary, which Mr Mustafa sought valiantly to defend, was based on the fact that "*the Immigration Rules allow entry in the UK for the sake of a protection claim having regard to paragraph 327AB of the Immigration Rules*". This is in my judgment wrong in two respects:

    a. First, to avoid being here in breach of immigration laws, a person who is not a British national must be "*given leave*" to enter (or remain, as applicable). The Rules do not themselves give leave. Leave is given by a decision of the Secretary of State. The Rules are simply a statement of the practice to be followed in the administration of the 1971 Act for regulating the entry into and stay in the UK of persons required to have leave to enter: see s.3(2) of the 1971 Act.
    b. Second, even if, contrary to the above, the Rules could themselves confer leave, paragraph 327AB does not do so. Paragraph 327AB provides that an application for asylum will only be recorded as valid if made at a designated place, in person, by a person who is not a British Citizen, is particularised and does not fall for refusal under paragraph 353 of the Rules. Paragraph 327AB is concerned with the validity of asylum claims, nothing else. The fact that an asylum claim must be made in person does not mean that the Rules have somehow modified the requirement in the 1971 Act (even if they were capable of so doing) that leave to enter must be granted.

21. For completeness, I was referred by Mrs Nolan to [39] of Akinyemi v SSHD [2017] EWCA Civ 236 at [39]. That paragraph is concerned with decisions concerning whether someone is "*lawfully*" in the UK for the purposes of the Refugee Convention and "*lawfully present in the United Kingdom*" for the purpose of entitlement to income support. That paragraph (and the cases there cited) are not about the requirement not to be in the UK in breach of immigration laws in Appendix FM. Given the technical nature of laws in this area, it is in my view dangerous to try to read across between contexts such as this. The correct analysis is, in my judgment, that which I have set out above by reference to the definitions that apply in this context, not others.

Insurmountable obstacles

22. As set out above, the Judge considered that there would be insurmountable obstacles to the Appellant and his wife continuing their family life in Albania. There was no dispute before me that the threshold which this test sets is a high one.

23. The Judge analysed the Appellant's and his wife's situations separately. In relation to the Appellant he considered that the fact that the Appellant had a pending asylum claim meant that there were "clearly" insurmountable obstacles. I am afraid that I am unable to understand that reasoning. It has nothing to do

with the obstacles that would be faced on return. The Judge noted too that the Appellant claimed to have been a victim of trafficking who had been forced into illegal work, but he did not attempt to assess whether that claim was in fact made out and, if so, it (or a risk of re-trafficking) amounted to an insurmountable obstacle. In the circumstances, it seems to me that the Judge has not in fact assessed whether there are insurmountable obstacles, only whether there are claimed obstacles, which is not the test.

24. It might have been said that, in finding the Appellant and his wife to be credible witnesses, the Judge was implicitly accepting the Appellant's claim to be a victim of trafficking, and it was on that basis, rather than the fact that asylum had been claimed on that basis that was the reason for the Judge's conclusion that the Appellant would face insurmountable obstacles on return, but in my judgment that attempts to read far too much into the language used by the Judge. In para.11, it is the Appellant's claim that is said to be the obstacle. Further in para. 13 it is the fact that "t*he Appellant has sought asylum"* on which the Judge bases his reasoning.

25. In relation to the Appellant's wife, the Judge relied on the fact that she was a British national, a home owner and employed in the UK, with her family resident here to support his conclusion that she would face insurmountable obstacles in relocating to Albania. I am unable to follow what about the Appellant's wife's circumstances, as described, takes her situation from one of hardship or inconvenience over the threshold for a finding of very significant obstacles. I therefore agree with the Respondent that this is not adequately reasoned.

Relief

26. In light of the above, I conclude that the decision of the First-tier Tribunal does involve the making of an error of law and should be set aside. In the circumstances, it is not necessary for me to go on to consider the Respondent's other grounds of appeal.

27. The parties were agreed that if the Respondent's appeal succeeded the case should be remitted to the First-tier Tribunal to be heard by another Judge. I agree with that approach. However, the finding that the Appellant is in the country in breach of immigration law is one that follows inexorably from the fact that the Appellant accepts that he entered the UK unlawfully and I therefore preserve that finding for the purposes of the redetermination by the First-tier Tribunal. All other matters are for the First-tier Tribunal.

Notice of Decision

The decision of First-tier Tribunal Judge Chowdhury involved the making of an error of law and is set aside. The appeal is remitted to the First-tier Tribunal for redetermination by a different Judge and with the preserved finding that the Appellant is in the UK in breach of immigration laws for the purposes of E-LTRP.2.2.

Paul Skinner

Deputy Judge of the Upper Tribunal

Immigration and Asylum Chamber

15 September 2024