



**Upper Tribunal
(Immigration and Asylum Chamber)**

Case No: UI-2023-005109

First-tier Tribunal No: PA/52364/2022

THE IMMIGRATION ACTS

Heard at Field House

On 20th February 2024

**Decision & Reasons
Promulgated**

6th March 2024

Before

**THE HON. MRS JUSTICE THORNTON
UPPER TRIBUNAL JUDGE KAMARA**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**BH
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Mr Clarke, Senior Presenting Officer for the Home Office.
For the Respondent: Mr Coleman, instructed by Morgan Pearse Solicitors.

DECISION AND REASONS

Introduction

1. The Secretary of State appeals against the decision of the First Tier Tribunal Judge, promulgated on 8 August 2023, allowing the appeal of BH, a citizen of Albania, pursuant to section 82 of the Nationality Immigration and Asylum Act 2002. BH appealed against the decision of the Secretary of State, dated 7 June 2022, refusing his claim for asylum and humanitarian protection.
2. At the end of the hearing, we informed the parties of our decision to allow the appeal and to remit the matter to the First Tier Tribunal for redetermination, with reasons to follow. These are our reasons.

Background

3. By way of brief background: BH arrived in the UK in 2016 as a minor, and claimed asylum on 16 December 2016. He did so on the basis he feared persecution as a member of a particular social group, namely a victim of drug trafficking and of a blood feud in Albania.
4. The Secretary of State's decision was not made until 7 June 2022. The Secretary of State concluded that BH did not qualify for refugee status or for humanitarian protection. The Secretary of State considered, and rejected, applications that removal from the UK would breach BH's rights under Articles 3 and 8 of the European Convention on Human Rights. The Article 3 claim was based on BH's depression and PTSD.
5. By way of notice of appeal dated 22 June 2022, BH appealed against the Secretary of State's decision to the First Tier Tribunal.
6. On 19 August 2022, before his appeal had been heard, BH was involved in a car accident. On 5 October 2022, the Secretary of State was advised of the accident by BH's representatives and told that BH had been in a coma since the accident. A letter dated 16 December 2022 from the Brain Injury Clinic at Kings College Hospital was before the FTT. It stated that BH had suffered a traumatic brain injury and had undergone six operations between 20 August - 29 November 2022. BH was said to present in a disorder of consciousness, although he appeared to be emerging from this. Due to the severity of the brain injury, he was said to be unable to participate in tribunal proceedings.
7. The FTT ruling also referred to a letter dated 4 April 2023 which was the day before the FTT hearing. The letter was from Whipps Cross University hospital. The letter confirmed that BH remained incapacitated.

The hearing before the FTT

8. The FTT hearing took place on 5 April 2023. The judge allowed the appeal under Article 8 of the ECHR. She gave the following reasons for her decision:

16. Mr Coleman stated that the appellant remained in hospital, semi-conscious and not lucid. The appellant was not in a fit state to be removed and the family were having to pay privately for the legal fees. He explained that there was no up to date medical evidence but the appellant remained in intensive care and was not in a fit state to be removed.

17. Miss Damaj was asked to seek instructions from the respondent which she did and she advised that the respondent was not in a position to deal substantively with the issue.

18 There has to be a delay in these proceedings until the appellant is fit to proceed. There was no prognosis for the appellant before me but it will obviously take some time for him to recover.

19. The appellant is clearly not removeable at present and it is considered that the asylum proceedings should be postponed until he is fit to participate in his appeal. The usual method in adjourning the appeal on future occasions is not considered satisfactory as this will require involvement by the appellant's representatives and increasing fees and an excessive use of the Tribunal resources in the management of the appeal.

20. The appellant's position under Article 8 is clear as it would be disproportionate to return him to Albania in his current state.

21. It follows that some discretionary leave, outside the immigration rules, should be granted to the appellant. It has also been accepted that the appellant is a victim of trafficking and there is no evidence before me to find that the NRM will also not make that finding and the appellant may be granted a short period of leave in connection therewith.

22. Clearly the issue of asylum remains outstanding but in the interim a period of discretionary leave or leave to remain outside the rules should be granted whilst the appellant recovers from his injuries. This is an appeal where the circumstances are rare in being compassionate and compelling.

Grounds of appeal

9. The Secretary of State appeals on the basis the FTT judge made material errors of law in failing to decide the asylum claim, which remains outstanding. Secondly, BH's accident and coma is a "new matter" and required the consent of the Secretary of State in order to proceed before the Tribunal. Consent was not given by the Secretary of State.

Discussion

New matter

10. Section 85 of the Nationality Immigration and Asylum Act 2002 provides, in relevant part, as follows:

(4) On an appeal under section 82(1) against a decision the Tribunal may consider any matter which it thinks relevant to the substance of the decision, including a matter arising after the date of the decision.

(5) But the Tribunal must not consider a new matter unless the Secretary of State has given the Tribunal consent to do so.

(6) A matter is a “new matter” if—

*(a) it constitutes a ground of appeal of a kind listed in section 84, and
(b) the Secretary of State has not previously considered the matter in the context of—*

(i) the decision mentioned in section 82(1), or

(ii) a statement made by the appellant under section 120

(underlining is our emphasis)

11. Before us, Mr Coleman conceded that the car accident and BH’s injuries amount to a new matter. In our view, he was correct to do so. In Mahmud v Secretary of State [2017] UKUT 00488 (IAC), the Upper Tribunal identified a new matter as, in practice, a factual matrix which has not previously been considered by the Secretary of State. It requires the matter to be factually distinct from that previously raised by an appellant, as opposed to further or better evidence of an existing matter. The Tribunal stated that the assessment will always be fact sensitive. Applying that framework, it is readily apparent that BH’s car accident and subsequent coma is altogether distinct from the evidence previously put before the Secretary of State.
12. It is also apparent from a review of the FTT ruling that the Secretary of State did not consent to the new matters being pursued before the Tribunal. Mr Coleman sought to criticise the Home Office presenting officer for not specifically raising the issue of whether the accident/injuries constituted a ‘new matter’. Even if she did not, the ruling records the presenting officer’s position, on instructions, as being that the Secretary of State “was not in a position to deal substantively with the issue”. This cannot, on any interpretation, be construed as consent to proceed by the Secretary of State. Accordingly, the FTT judge erred in proceeding, contrary to section 85(5) of the Act, to consider the implications of the accident and injuries.

Failure to determine the asylum aspect of the appeal

13. Section 86 of the 2002 Act provides that:

86 Determination of appeal

(1) This section applies on an appeal under section 82(1)

(2) The Tribunal must determine—

(a) any matter raised as a ground of appeal [...], and

(b) any matter which section 85 requires it to consider.

(underlining is our emphasis)

14. In her reasons, the FTT judge refers to the asylum proceedings being 'postponed' until BH is fit to participate in his appeal. The judge did not, however, consider it appropriate to adjourn the hearing for reasons she explained. Instead, she proceeded to uphold the appeal on Article 8 grounds. The result was that the judge decided the appeal without determining the asylum claim. On inquiry, Mr Coleman confirmed before us that there are no live proceedings before the FTT in relation to the asylum aspect of the appeal. Accordingly, the judge failed to comply with section 86(2) of the Act.
15. Mr Clarke also criticised the judge for apparently directing that BH be granted discretionary leave on the basis that this is no longer an option available to a Tribunal following the repeal of section 87 of the 2002 Act. Mr Coleman objected to Mr Clarke raising this point on the basis it was not advanced in the grounds of appeal. In light of the errors identified above we have not found it necessary to address Mr Clarke's submissions in this respect.
16. Accordingly, we allow the appeal and remit the matter to the First Tier Tribunal for redetermination by a different judge. During the course of his submissions Mr Clarke raised a query about the extent of BH's current capacity to participate in the proceedings. The point was not explored in any detail with us by either representative but indicates the need for careful case management of the matter going forwards.

Notice of Decision

The appeal is allowed.

Signed: Mrs Justice Thornton

Date: 21/02/24

The Hon. Mrs Justice Thornton sitting as an Upper Tribunal Judge.