IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001078
First-tier Tribunal No: HU/24736/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 September 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
UPPER TRIBUNAL JUDGE LINDSLEY

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FATMIR BLETA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms S Cunha, Senior Home Office Presenting Officer
For the Respondent: Ms H Foot, of Counsel, instructed by Oliver & Hasani Solicitors

Heard at Field House on 10 September 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania born on 6th July 1960. He came to the UK in 1998 claiming to be a Kosovan refugee. He was joined by his wife and children who arrived in 2000. The claimant's asylum claim was refused but the family were all granted indefinite leave to remain on 14th March 2015 in their Kosovan identities. In 2017 the claimant naturalised as a British citizen.

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2. On 9th May 2018 he was convicted of making an untrue statement to procure a passport and three other counts of dishonesty to make a gain for himself or cause a loss to another or expose another to risk at Isleworth Crown Court and was sentenced to 33 months and two weeks imprisonment. These offences related to his having obtained leave to remain in the UK, British citizenship and benefits by dishonesty. On 25th June 2018 the claimant was served with a notice of intention to deport, and on 6th July 2018 he made human rights representations, which were refused by the Secretary of State in decisions dated 27th November 2018.

3. A supplementary decision dated 5th September 2023 was made in relation to further representations from the claimant's solicitors that he would not receive a fair trial if returned to Albania due to his having been convicted in absentia of murder in Albania. The contended murder is said to have taken place on 15th September 1998 and the claimant was convicted in his absence on 19th May 1999 and sentenced to 13 years imprisonment for murder and possession of an illegal weapon by the First Instance Court of Tirana. Relevant to this issue is the fact that the High Court refused to permit the extradition of the claimant requested by the Albanian government in Government of Albania v Fatmir Bleta and Bow Street Magistrates Court [2005] EWHC 475 (Admin).

4. The claimant's appeal against the decisions was allowed by First-tier Tribunal Judge L Gibbs in a decision promulgated on 18th January 2024.

5. Permission to appeal was granted by Judge of the First-tier Tribunal ID Boyes on 19th February 2024 on the basis that it was arguable that the First-tier judge had erred in law for the reasons set out in the grounds which relate to the burden of proof and what had to be proved.

6. The matter now comes before us to determine whether the First-tier Tribunal had erred in law, and is so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside. At the start of the hearing it was clarified that it is correct that there is no anonymity order.

Submissions – Error of Law

7. In the grounds of appeal and in oral submissions from Ms Cunha it is argued for the Secretary of State, in short summary, that the First-tier Tribunal erred in law as follows.

8. In the grounds it is argued, that the First-tier Tribunal erred by making a material misdirection of law by placing the burden of proof on the Secretary of State to provide assurances that the claimant would receive a fair trial. It is argued that the country of origin evidence in Country Policy and Information Note Albania: Actors of Protection Version 2.0 December 2022 states that the constitution provides for a

fair and public trial without undue delay. It is argued that the decision of the UK High Court given in 2005 is 18 years old and so that circumstances in Albania have changed. Ms Cunha accepted before us however that the Secretary of State had produced no assurances of a retrial from the Albanian authorities or specific evidence that a retrial would now be available in the claimant's circumstances. She argued that the claimant had provided no evidence he could not obtain a retrial if he were to return to Albania, and so he should not have succeeded on this point.

9. In the grounds it is also argued that it is unclear whether the High Court thought that the claimant was a Kosovan citizen, as he was claiming to be one at that time and the Secretary of State did not establish he was not until 2017, and thus they did not know that the claimant had used deception to leave Albania and evade justice, but Ms Cunha said that she did not pursue this point. It is argued in the grounds that Article 6 ECHR does not provide protection for a claimant who wishes to evade prosecution. It is argued that the claimant absented himself from Albania and so was tried in absentia and that he would have had the right to be present at his trial had he not done so. As a result the case of Stocihkov v Bulgaria [2007] 44 EHRR 14, relied upon by the First-tier Tribunal, is not relevant.

10. Ms Cunha added to these grounds by arguing that the decision errs in a more fundamental way because the appeal is allowed on Article 6 ECHR grounds and this is not permissible. She argued that in light of the judgement of the European Court of Human Rights in Maaouia v France (application no. 39652/98) 5th October 2000, in which it had been found that Article 6 ECHR was not relevant to the determination of immigration matters and appeals because these were not determining criminal charges or civil rights and obligations, that this was an error of law and the First-tier Tribunal had entangled and confused Articles 2 and 3 with Article 6 ECHR. She also relied upon the decision in Othman v UK (2012) 55 EHRR 1 at paragraphs 258 to 262 concerning the "flagrant denial of justice" test under Article 6 ECHR.

11. Ms Cunha asked that the Upper Tribunal deal with this argument despite it not being in the grounds because it was Robinson obvious and so it should be taken on board. She took the Upper Tribunal to AZ (error of law: jurisdiction; PTA practice) [2018] UKUT 245 at paragraph 69 where it is said that the only circumstances where there should be a grant of permission to appeal not based on the grounds where the Secretary of State raised an appeal would be if there is a decision which "if undisturbed, would breach the United Kingdom's international treaty obligations". Ms Cunha could not however articulate how the allowing of this appeal breached any of the UK's international Treaty obligations.

12. In a Rule 24 response, skeleton argument and in oral submissions from Ms Foot it is argued, in short summary, for the claimant as follows.

13. It is argued that the First-tier Tribunal properly placed weight on the decision of the High Court in Government of Albania v Fatmir Bleta and Bow Street Magistrates Court which found that the claimant did not deliberate absent himself from the criminal proceedings and would not be entitled to a retrial at paragraphs 10 -15 of that decision, and thus that his removal would be a breach of Article 6 ECHR.

14. It is argued that the First-tier Tribunal did not place the burden of proof on the Secretary of State as a correct direction that the burden of proof was the balance of probabilities and was on the claimant is to be found at paragraph 9 of the decision. It is argued that in accordance with the doctrine of res judicata that it was correct for the First-tier Tribunal to place significant weight on the judgement of the High Court whilst acknowledging, as it does at paragraph 10 of its decision, that it was not binding. There was no other evidence before the First-tier Tribunal which showed that the claimant would obtain a retrial on return to Albania, or indeed before the Upper Tribunal today, and the evidence relied upon by the Secretary of State before the First-tier Tribunal was generic evidence regarding the constitution of Albania and was not even properly filed and served in full before the First-tier Tribunal.

15. Further, that evidence also states that “constitutional guarantees of due process are upheld inconsistently” and “trial procedures can be affected by corruption within the judicial system and are sometimes closed to the public.” It is clear from the judgment of High Court that it was found that the claimant did not deliberately absent himself from the criminal proceedings as he was unaware of them. It is also argued that the Secretary of State would have been aware of the fact that the claimant was actually Albanian from this time due to the documentation served in the extradition proceedings and did not raise it in those proceedings. Further this argument was not made to the First-tier Tribunal and so cannot be made now.

16. With respect to the new Article 6 ECHR argument it is argued that it is not one that should be entertained by application of the Robinson obvious principles. It is not possible to argue that the decision breaches the UK’s international Treaty obligations. In any case the argument is flawed, she submitted, for the following reasons.

17. The Secretary of State had consented to the Article 6 ECHR issue being a new matter in the appeal before the First-tier Tribunal. Ms Foot referred us to an extract from MacDonald Immigration Law and Practice textbook which sets out that at paragraphs 7.70 -7.73 on pages 454-457 that Article 6 ECHR is not relevant to immigration appeals as of themselves as the determination of immigration status does not engage the determination of civil rights and obligations or criminal charges, but as per Soering v UK (1989) 11 EHRR 439 that it can be relevant to expulsion decisions where there is the real risk of a flagrant denial of a fair trial in the receiving country. A prime example of such a flagrant

denial was where a person was convicted in absentia and there was no possibility of a fresh determination of the merits of the charge.

18. The text book goes on to cite an Albanian case (Cupi v Government of Albania [2016] EWHC 3288 (Admin)) in which there was found to be no flagrant denial of Article 6 rights because that particular appellant, who had been convicted in absentia, would be entitled to a retrial. Ms Foot argued that therefore the application of Article 6 ECHR by the First-tier Tribunal was entirely legally proper. She also took us to her original skeleton argument before the First-tier Tribunal to show how s.85 of the Extradition Act 2003 mirrors the requirements to show a flagrant breach of Article 6 ECHR, as set out in the decision in Stoichkov v Bulgaria (2007) 44 EHRR and Othman v UK, requiring an in absentia conviction where the person had not deliberately absented himself from the trial and where there would be no retrial or review on appeal amounting to a retrial, and thus showed us how the judgements of the District Judge and High Court in the extradition case were findings that Article 6 ECHR would be flagrantly breached if the extradition order had not been discharged.

19. Ms Foot also drew our attention, in both written and oral submissions, to the fact that the First-tier Tribunal did not deal with the Article 8 ECHR case put by the claimant. It is argued that a cross appeal is not relevant as it would make no material difference to the outcome, as per Smith (appealable decisions; PTA requirements; anonymity) [2019] UKUT 216. However if an error of law is found then it is argued that this aspect would also need to be remade and this would involve extensive remaking and should be remitted to the First-tier Tribunal.

20. At the end of hearing we reserved our decision.

Conclusions – Error of Law

21. We find that it was clearly not an error of law to have allowed the appeal on Article 6 ECHR grounds, and that there is no basis to permit this amendment of the grounds on a Robinson obvious basis applying the decision in AZ. The amendment should not be permitted on a Robinson obvious basis as Ms Cunha did not identify how the allowing of this appeal breaches the UK's international treaty obligations, and we find that it does not do so. It is clearly correct that a human rights appeal may be allowed on the basis of a real risk of a flagrant breach of Article 6 ECHR, the right to a fair trial, for the reasons argued by Ms Foot. The case of Soering was confirmed as being correct on this point in the UK courts in the case of R(on the application of Ullah) v Special Adjudicator [2004] UKHL 26. As Ms Foot has identified the case law identifies conviction in absentia to a non-fugitive with no prospect of any form of retrial as a prime example of a flagrant breach of Article 6 ECHR rights.

22. We find that the High Court understood that the claimant was a citizen of Albania when giving its judgment in 2005, as the application from the Albanian Ministry of Justice, as set out at paragraph 12 of the judgment, states that the request for extradition of the claimant is as a citizen of Albania, and the response of the claimant to the allegations was to deny that he had committed the crime but not to deny that he had lived and worked in Albania as claimed by the government, as set out at paragraph 15 of the judgment.

23. The decision of Senior District Judge Workman, upheld by the High Court, was that he was satisfied that the claimant had not been charged and did not know of the proceedings or that a trial would proceed in his absence and so had not deliberately absented himself from the trial, as set out at paragraph 20 of the judgement. Judge Workman then went on to conclude, as conceded by the UK government, that the time limits had expired and the claimant would not be entitled to a retrial. The High Court had new evidence in the form of further assurances from the Albanian government but found that they were too unclear to amount to sufficient assurance that the claimant would receive a retrial. It also re-considered whether the claimant had in fact deliberately absented himself the trial: it is concluded that he deliberately absented himself from Albania but not the trial, as there was no evidence he was notified of any trial or proceedings, as per paragraph 48 of the judgement.

24. We are therefore satisfied that the decision of the High Court considering s.85 of the Extradition Act 2003 mirrors the requirements to show a flagrant breach of Article 6 ECHR, as set out in the decision in Stoichkov v Bulgaria (2007) 44 EHRR and Othman v UK, requiring an in absentia conviction where the person had not deliberately absented himself from the trial and where there would be no retrial or review on appeal amounting to a retrial.

25. As noted by Ms Foot the First-tier Tribunal properly directs itself to the burden and standard of proof at paragraph 9 of the decision. It was properly open to the First-tier Tribunal to have placed significant weight on the decision of the High Court in Government of Albania v Fatmir Bleta and Bow Street Magistrates Court at paragraph 10 of the decision and to note evidence that might have been obtained by the Secretary of State to counter the findings of the High Court was not put forward. This does not amount to a reversal of the burden of proof: it is evaluating the evidence on both sides, and absent irrationality, and there is no rationality challenge in the grounds, the weight to be given to evidence is one for the First-tier Tribunal Judge. The generic country of origin evidence regarding fair trials relied upon by the Secretary of State is considered by the First-tier Tribunal at paragraph 12 of the decision, and that reasons are given for preferring the evidence contained in the decision of the High Court are set out by the First-tier Tribunal.

26. As submitted by Ms Foot there was no ultimately no evidence regarding the availability of a retrial in Albania for the claimant before the First-tier Tribunal or indeed before us in the Upper Tribunal. In the absence of any evidence that displaced the conclusion of the High Court that the claimant had not deliberately absented himself from Albanian to avoid the legal process and could not access a retrial, it was open to the First-tier Tribunal to conclude, in line with the judgements in Stocihkov v Bulgaria and Othman v UK, that there was a real risk that returning the claimant would amount to a flagrant breach of Article 6 ECHR as set out at paragraphs 13 and 14 of the decision.

27. We therefore find that the grounds put forward by the Secretary of State do not disclose any error of law, and the appeal is correctly allowed as the claimant falls within the first exception at s.33 of the UK Borders Act 2007 because his removal pursuant to the deportation order would breach his Convention rights.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

2. We uphold the decision of the First-tier Tribunal allowing the appeal on human rights grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

24th September 2024