IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001102

First-tier Tribunal Nos: PA/52566/2023
LP/03273/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 14th of May 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

The Secretary of State for the Home Department

Appellant

and

ED
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms S Nwachuku, Senior Home Office Presenting Officer
For the Respondent: Mr T Nawaz, Legal Representative from ACS Visas

Heard at Field House on 1 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent (also styled "the claimant") is granted anonymity.

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

I affirm this anonymity order because the respondent seeks international protection and publicity might endanger his safety.

DECISION AND REASONS

1. The respondent, hereinafter "the claimant" is a citizen of Albania. He was born in the summer of 2000. He claimed international protection on 26 April 2018. The application was refused on 2 May 2003 and he appealed that decision to the First-tier Tribunal. The appeal was allowed. The Secretary of State has permission to challenge that decision.

2. It is necessary to look carefully at what the First-tier Tribunal actually did. The Judge, at paragraph 13 of her Decision and Reasons, noted the issues between the parties. Predictably these concerned whether the claimant had a well-founded fear of persecution from non-state actors and, alternatively, whether the claimant's return to Albania would be a disproportionate interference with his private and family life within the meaning of Article 8 of the European Convention on Human Rights.

3. It is a feature of the case that there is a Positive Conclusive Grounds decision that the claimant had been trafficked from Albania at the instigation of his father. It is his case that he entered the United Kingdom concealed in a lorry in April 2018. He claimed asylum the day the arrived. This was a few months short of his 18th birthday.

4. It was always his contention that he was trafficked and there was a Positive "Reasonable Grounds" decision in his favour on the 11 October 2018 and a Positive Conclusive Grounds decision on 14 May 2020.

5. The judge found that the claimant was a minor when he was the victim of trafficking. It was accepted that he was aged between 15 and 17½ years when he was subject to the control of traffickers. Nevertheless, after carefully reviewing the background evidence. The judge concluded emphatically at paragraph 40:

> "I find that the [claimant] has not proved to the lower standard that he faces a risk of serious harm on return."

6. The judge went on to dismiss the appeal on asylum grounds.

7. The judge began the consideration of the "Article 8 ECHR" claim at paragraph 41 with the finding that the claimant "would not face very significant obstacles to his return". Unremarkably the judge found that it was accepted that removing the claimant would interfere with his "private and family life" but the interference was limited to the "private life" end of the "private and family life" continuum.

8. The judge then referred to two decisions in the Administrative Court. These are **KTT v SSHD [2021] EWHC 2722 (Admin)** and **XY v SSHD [2024] EWHC 31 (Admin)**. At paragraph 8 the judge said:

> "In **XY**, the High Court found that the [Secretary of State] had been avoiding making a decision on discretionary leave to those otherwise entitled to it and had done so without declaring openly that it was their policy to do so. The earlier decision in **KTT** ruled that applicants who had been found to have been trafficked and who were pending the determination of an asylum claim based in part on the trafficking should be granted discretionary leave at least until the conclusion of the asylum claim. **KTT** was promulgated on 12th October 2021. The [claimant] in this case claimed asylum on 26th April 2018 and was given a Positive Conclusive Grounds ('PCG') Decision by the Single Competent Authority ('SCA') on 14th May 2020. He was refused Discretionary Leave on 27th January 2022. His asylum claim was refused in March 2023."

9. I find the following paragraph, paragraph 9, in the Decision and Reasons a little puzzling. There the judge said:

> "I determined that there was a good reason for the appeal to continue on the basis that this appeal did not concern discretionary leave in any event, the respondent had refused DL after the decision in **KTT** and the [claimant] had already suffered undue delay by the [Secretary of State]. Despite getting a PCG decision in May 2020, he had remained without any form of leave since then and the [claimant] would inevitably face a further delay whilst the [Secretary of State] reviewed their decision. It was a significant factor that the [Secretary of State] was not indicating they were reviewing with a view to granting leave - but simply 'reviewing the decision in light of the decision in **XY**'. This could mean that the [claimant's] case be delayed until the conclusion of any appeal process for **XY**."

10. Although parts of the judge's Decision and Reasons suggest that the decision that is the subject of the appeal was going to be withdrawn it is common ground that the decision was not withdrawn and the judge went on to determine the appeal.

11. The judge identified the issues in dispute. The judge outlined the asylum and protection issues, which were resolved against the claimant, and outlined the human rights issues as

> "(f) whether the [claimant] meets the requirements of 276ADE (1) of the Immigration Rules HC395 as amended ('the Rules').
>
> (g) whether the [claimant's] return would be a disproportionate interference with his Article 8 right to family and private life under the European Convention on Human Rights ('ECHR')."

12. The judge made it plain that it was *not* argued before her that there was an Article 3 claim based on health issues.

13. I note here that paragraphs 8 and 9 of the Judge's Decision and Reasons indicate error in the Judge's approach. The grounds of appeal to the First-tier Tribunal are determined by statute. Section 84 of the Nationality, Immigration and Asylum Act 2022 provides for an appeal on the ground that "removal of the appellant from the United Kingdom would be unlawful under Section 6 of the Human Rights Act 1988 ..."

14. I emphasise the point because it seems to be lost that the permissible ground of appeal is that removal causes the breach to Article 8 rights.

15. The judge then outlined the evidence before her and explained her conclusions that the claimant was not at risk on return.

16. At paragraph 41 the judge started to consider the claim under Article 8 and there found that the claimant did not face very significant obstacles on return.

17. The judge directed herself, correctly, that she had to determine if Article 8(1) is "engaged" and concluded, uncontroversially, that it was. The judge noted that the claimant had received a Positive Conclusive Grounds decision and concluded that, following **KTT**, particularly as explained in **XY**, the claimant should have had Discretionary Leave pursuant to Article 8.

18. The judge found that the failure to give Discretionary Leave had had a negative impact on the quality of the claimant's private life.

19. The judge then conducted the balancing exercise, noting the strong public interest in maintaining immigration control and directing herself that the claimant's immigration status was only capable of being "precarious" and therefore little weight should be given to his "private life".

20. At paragraph 60 the judge said:

> "In balancing the weight to be given to the protection of the public interest in immigration control against the little private life that the [claimant] has, I find that in this case, the balance falls in the [claimant's] favour as the [Secretary of State's] actions have undermined the public interest to such a degree that it must be disproportionate for his rights to be interfered with further, in particular when the person concerned was a minor and a confirmed victim of modern slavery."

21. It is not surprising that this provoked a response from the Secretary of State.

22. There are two grounds. First it is said that the First-tier Tribunal Judge made a material misdirection of law. Having found that the claimant did not satisfy the Immigration Rules and there were not very significant obstacles to his return, the judge considered **XY** and concluded the claimant had been refused a grant of leave and that was something that was relevant to the proportionality assessment. It is said that the "the Judge has erred by attempting to remedy a decision which was not before him".

23. I have reflected on this and considered the submissions but this point is plainly well-made apart from the judge being wrongly assigned to the male gender. It was not for the judge to consider the lawfulness of the failure to grant Discretionary Leave. That failure was not pertinent to the issue of whether removing the claimant would breach the United Kingdom's obligations under the Human Rights Act by returning the claimant to Albania. I am struggling to see that it is relevant at all. Although subject to much qualification, Article 8 is a very far-ranging right. I hesitate to say that any factor is completely irrelevant but the fact, if it is a fact, that the claimant was not treated properly by the Secretary of State is of very little significance when considering the proportionality of removal in the case of a person who can be removed safely.

24. Mr Nawaz, on the claimant's behalf, expressed his concern that the claimant had not been given the Discretionary Leave to which he thought the claimant was entitled. That is not the point.

25. I do not necessarily endorse the judge's conclusion that the claimant should have had interim relief in the form of Discretionary Leave. I can see why it might be thought that should have happened but that was just not something that had to be determined by the First-tier Tribunal and is not something on which I express any view. What is quite clear to me is that if it had any significance at all in the Article 8 balancing exercise it was of the absolute outer extremes of the periphery and should not have been given great weight but the judge has given it great weight and indeed that is the reason the judge has allowed the application. Put simply, that cannot be right and the Secretary of State's appeal succeeds on ground 1.

26. Ground 2 is a general complaint that the judge ought to have adjourned. It is very difficult to say a decision to adjourn or, more typically, not to adjourn is unlawful. We are assumed to know the law and I am far from suggesting that judges should routinely adjourn to allow parties to consider new decisions. It might have been wise to have adjourned in this case or at least to have read the decision more carefully but I have decided not to determine this point because I do not have to. Ground 1 is clearly made out.

27. I now have to look at the decision that I have to make. Clearly, I must, and do, set aside the decision of the First-tier Tribunal. I find it very significant that there is no challenge to the findings that the claimant can be returned safely to

Albania. That is not always the case with citizens from Albania but that is the judge's clear conclusion and it is not challenged in a Rule 24 notice or at all.

28. It follows therefore that the appeal can only succeed on Article 8 grounds if there is a strong "pull factor" based on the claimant's private and family life in the United Kingdom. This is not a family life case and though I do not doubt that he has created some social contacts in the United Kingdom there is just nothing here that would, in my judgment, permit an appeal on Article 8 grounds to succeed. The claimant has not been in the United Kingdom for a very long time. He does not draw attention to anything that is a compelling point. The failure to be granted Discretionary Leave, which carried considerable weight in the mind of the First-tier Tribunal Judge, in my judgment, is not and cannot be a compelling point.

29. It follows therefore that I substitute a decision dismissing the appeal.

Notice of Decision

30. The Secretary of State's appeal is allowed. I set aside the decision of the First-tier Tribunal and I substitute a decision dismissing the claimant's appeal against the decision of the Secretary of State.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

8 May 2024