IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004499

First-tier Tribunal No: HU/63270/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st of January 2025

Before

UPPER TRIBUNAL JUDGE PINDER

Between

NDERIM BUSHAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr R Sharma, Counsel instructed by Marsh & Partners.
For the Respondent: Mr E Tufan, Senior Presenting Officer.

Heard at Field House on 3 December 2024

DECISION AND REASONS

1. The Appellant appeals with the permission of Upper Tribunal Judge Jackson, granted on 4th October 2024, against the decision of First-tier Tribunal Judge Easterman promulgated on 12th August 2024.

2. By his decision, Judge Easterman ('the Judge') dismissed the Appellant's appeal against the Respondent's decision to refuse the Appellant's human rights claim as the partner of a person, with limited leave to remain in the UK.

Background

3. Insofar as is relevant to this appeal, the Appellant is an Albanian citizen, who arrived in the UK on 22nd May 2020 without any lawful status. A previous application under the EU Settlement Scheme, as a family

member of a former partner, was refused in August 2023. In September 2023, the Appellant submitted his human rights application based on his family life as an unmarried partner to the Respondent. This application was refused on 2nd November 2023 because the Appellant did not meet the requirements of Appendix FM as an unmarried partner and because the Respondent deemed that the Appellant could continue his family life outside of the UK.

4. The Appellant appealed against that decision and his appeal was heard by the Judge on 20th May 2024. The Appellant pursued his appeal on the basis that the Respondent's decision was not a proportionate interference with his and his partner's rights under Article 8 ECHR. He accepted that he could not meet the requirements of the Immigration Rules.

5. Before the Judge, the Appellant was represented by Mr Wilding, Counsel, and the Respondent by a Presenting Officer. At the hearing, the Judge heard oral evidence from the Appellant and his partner. It also appears from the summary of the evidence that the Judge heard from two other witnesses on behalf of the Appellant also attesting to the couple's relationship (see [26] and [28]), although this is not recorded at [9]. The Judge then heard submissions from both parties before reserving his decision.

The Decision of the First-tier Tribunal

6. The Judge recorded at [4]-[8] the relevant and applicable legal framework and at [12]-[38], the Judge summarised the case pursued by the Appellant, including the evidence given and the submissions made. At [39]-[50], the Judge did the same with the Respondent's case and arguments.

7. At [51]-[69], the Judge set out his findings of fact and conclusions on the issues in dispute. I summarise these as follows:

   (i) The Appellant's partner was pregnant at the time of the hearing but the child, when born, will not be British since the child's mother does not hold Indefinite Leave to Remain ('ILR') in the UK ([52]);
   (ii) It was not disputed that the Appellant could not meet the requirements of the Immigration Rules and he relied on Article 8 ECHR more generally ([53]);
   (iii) The Respondent raised a number of concerns with regards to whether the Appellant's relationship was genuine and those nearly all revolved around the length of time that the relationship was said to have been in place ([54]);
   (iv) The Appellant had been in a previous relationship (which formed the basis of his previous EUSS application), which ended in April 2023 and "no sooner does that end that the current relationship with (his partner) starts" and within a very short time, the Appellant's (current) application is made ([55]);

(v) Throughout this time, the Appellant has been in the UK unlawfully ([56]);
(vi) Whilst also noting that the partner is pregnant, the previous history (of the Appellant's previous relationship) does cause the Judge to "wonder what would happen if this application was turned down, and whether the Appellant would go looking for another person, with whom he might make a successful application to remain" ([57]);
(vii) The Judge found "it is a matter of concern that the couple could not agree on the reasons why they had not undertaken an Islamic marriage when, if the relationship is as it is claimed, that would have seemed the logical step" ([58]);
(viii) These matters gave the Judge "major cause for concern" as to whether the Appellant is genuine in his feelings in his relationship and the Judge is not therefore satisfied that *on his part*, it is a genuine relationship ([58]) (my emphasis);
(ix) In the alternative, if the relationship is genuine, it should not take long for the Appellant to make an appropriate application from Albania (to rejoin his partner and soon-to-be-born child ([59]-[60]);
(x) Any reason why such an application may not be successful, is not a reason for not expecting such an application to be made and his partner could also return to Albania with him ([61] & [66]-[67]);
(xi) The psychiatric report relied upon by the Appellant shows that his partner "is very upset" at the prospect of the Appellant having to return to Albania. However this is the inevitable result of forming a relationship with a person who has no right to be here and in the Judge's view, the report adds little to the overall position ([63] & [67]).

8. No findings appear to have been reached on the Appellant's witness' evidence (other than the evidence of his partner) by the Judge (see §5 above).

The Appeal to the Upper Tribunal

9. Permission to appeal was granted on all grounds. In particular, Judge Jackson noted when granting permission that it was arguable that the primary finding that there was no genuine and subsisting relationship based primarily on the Appellant's immigration and relationship history was based on speculation rather than focusing on the evidence as to the current relationship. Judge Jackson also noted that materiality would need to be addressed at the hearing.

10. The Respondent had not sought to file a response under Rule 24 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Sharma, who appeared on behalf of the Appellant, made oral submissions before me maintaining the Appellant's grounds of appeal. Mr Tufan responded accordingly on behalf of the Respondent maintaining her position to defend the Judge's decision. I have addressed those respective

submissions in the section below when setting out my analysis and conclusions.

11. It is also appropriate to record that the Appellant had submitted an application to file and serve further evidence pursuant to Rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. Mr Sharma confirmed that that application did not go to support the Appellant's appeal in relation to the material errors of law pursued so both parties agreed to return to this once I had determined that aspect of the appeal.

12. After hearing the parties' respective oral submissions on the errors of law pursued by the Appellant, I was able to indicate at the end of the parties' respective submissions that I would be finding in favour of the Appellant. That I was satisfied that material errors of law had been made in the FtT, which were sufficient to set aside the Judge's decision. I gave brief reasons for my decision orally at the hearing and set these out in full below.

Analysis and Conclusions

13. Mr Sharma pursued all grounds of appeal pleaded. These were as follows:

(i) The Judge took irrelevant matters into account, namely a speculation on the Appellant's past relationship and his motivation for the relationship in issue;
(ii) The Judge did not resolve the issue of the partner's intention for the claimed relationship, which the Judge had himself raised;
(iii) When considering the proportionality of removal, the Judge failed to take into account relevant matters, namely a likely re-entry ban of at least one year as a result of the Appellant's immigration history;
(iv) The Judge erred in law when assessing the partner's mental health and the expert report relied upon.

14. Mr Sharma confirmed that the Respondent had disputed the genuineness of the Appellant's relationship because this did not meet the 'partner' definition – the Appellant had not cohabited with his partner for a period of at least two years. No other reason is given for raising concerns as to the Appellant's relationship and its genuineness. This is clear from the decision itself and the relevant passage is to be found at [57] of the consolidated bundle. Nothing further is raised by the Respondent under the section of 'exceptional circumstances' either, where submissions are made instead that the Appellant can continue his family life outside of the UK or return to seek the appropriate entry clearance – [58]-[59] of the consolidated bundle.

15. I also note that whilst the Respondent's Presenting Officer cross-examined and made submissions concerning the issue of whether the relationship was genuine, it does not appear from the Judge's comprehensive summary of the Respondent's case and arguments at

[39]-[50] that the Respondent alleged that the Appellant's previous relationship was not genuine. In those circumstances, I am satisfied that the Appellant's first ground of appeal is made out with the Judge speculating at [57] on the Appellant's previous relationship.

16. I am satisfied that this is a material error since it is clear from the Judge's reasons and findings that the Judge placed significant weight on this issue, seeking to distinguish the Appellant's motivation and intentions from those of his partner. It is also a material error since this affected the Judge's assessment on one of the core issues he needed to determine, whether the Appellant's relationship was genuine and whether there was family life for the purposes of Article 8 ECHR. It is also the case that there is no engagement by the Judge with the evidence of the two other witnesses, who gave evidence attesting to the genuineness, in their respective views, of the Appellant's and his partner's relationship. The core issue of the Appellant's relationship was disputed and following his appeal, the Appellant was entitled to have this determined properly with reasoned findings of fact devoid of any errors of law. A finding that the Appellant entered into a relationship with ill-intentions is a serious allegation to make and find. Whilst the Judge has also considered matters in the alternative, namely on the basis that the Appellant's relationship is genuine, I am satisfied for the reasons immediately above that the errors were material and for the reasons set out below that the Judge's alternative assessment also contains errors of law.

17. Turning briefly to the Appellant's second ground of appeal, Mr Sharma argued that this may not have been a material error on its own but read together with the Appellant's first ground it was. I am of the view that that is correct since, in a couple/relationship, the motivations and the intentions of both members of that couple and relationship need to be genuine. It would not be an error therefore for the Judge to have reached divergent findings in relation to the Appellant's motivations and those of his partner but for the reasons that I have set out above, the distinction that the Judge appears to have drawn at [57] and [58] between the Appellant and his claimed partner cannot stand.

18. As part of the Appellant's third ground of appeal, the Appellant argued that the Judge had failed to take into consideration the likely re-entry ban for a mandatory period of one year, which would fall to be applied to the Appellant should he seek the appropriate entry clearance to return to the UK as the dependant of his partner, a holder of Skilled Worker permission to stay in the UK. Mr Tufan agreed that the Immigration Rules on their face, provide for such a mandatory ban, and that this matter had been raised before the Judge (see [35]). This leads me to conclude that the Judge's finding at [60] that it should not take long for the Appellant to make an appropriate application from Albania (to rejoin his partner and soon-to-be-born child), was reached without the taking into consideration of this likely re-entry ban.

19. I do not consider that it would amount to speculation for the Judge to consider whether this re-entry ban would likely be applied to the Appellant, as stated by the Judge at [60]. This matter is grounded on a plain reading of the relevant mandatory grounds of appeal, read together with the fact that the Appellant has previously overstayed for a period of longer than permitted by those same mandatory rules and the fact that the Appellant's claimed partner holds limited leave to remain only as opposed to settlement.

20. Thus, the Judge did not resolve this issue at [60] and confirmed at [61] that, in any event, it was reasonable to expect such an application to be made. It is not clear from [61] whether this is even if a re-entry ban was to apply. The Judge further found at [61] that any impact on the Appellant could be remedied by his partner staying in Albania with him while he makes the further application. However, this does not take into consideration that if the Appellant cannot re-enter the UK for a period of at least 12 months, the partner will have likely lost her sponsored employment. Furthermore, this is in a context when the Appellant and his partner were, at the time of the appeal hearing expecting their first child together. For these reasons, I am satisfied that the Judge has made errors of law as pleaded within the Appellant's third ground of appeal. I do accept that this conclusion would be less material, as submitted by Mr Tufan, since the Judge has also, as mentioned, considered the alternative, namely that the Appellant's relationship and family life can continue in Albania but as indicated at §16 above that alternative assessment is also deficient.

21. Lastly, the Appellant argues in his fourth and last ground of appeal that the Judge appears to have minimised the partner's circumstances, and specifically her mental health, as evidenced in the expert psychiatric report relied upon. At [63], the Judge recorded having considered the psychiatric report and found that this shows the partner to be "very upset" at the prospect of the Appellant having to return to Albania. The Judge then concluded, almost seamlessly that "this is the inevitable result of forming a relationship with a person who has no right to be here and in (the Judge's) view the report adds little to the overall position".

22. I am satisfied for the reasons pleaded before me that this amounts to a material error of law. The Judge had before him an expert report, with the expert's conclusions set out at §§25-27 of that report. The expert's conclusions include the following:

(i) The partner was in the third trimester of pregnancy, which appeared to be going well. She had a history of miscarriage in 2023 and it was not within the expert's area of expertise to comment on whether stress caused the miscarriage in 2023;
(ii) In mid-April 2024, the partner presented to her GP with stress related symptoms, and this prompted the GP to refer her to the local Perinatal Mental Health Service;

(iii) During the expert's assessment, she presented with nightmares, insomnia, anxiety, and stress related symptoms;
(iv) She had good coping strategies and was not receiving any psychiatric or psychological treatment for any mental disorder;
(v) The stress of the current situation in relation to the Appellant's immigration proceedings is evidently having a negative impact on her mental wellbeing during pregnancy;
(vi) There is a risk of prolonged exposure to the effects of stress during pregnancy and following birth which is likely to have a detrimental impact and could precipitate a mental disorder such as a depressive episode. The consequences of a depressive episode particularly in the post-partum period is likely to be harmful to her wellbeing and potentially harmful to the baby if there is evidence of neglect. The likelihood of a depressive episode is low to moderate at the present situation given the absence of a significant psychiatric history.
(vii) Long term separation from her partner is likely to be detrimental to her wellbeing and her unborn child, given that the relationship is supportive, psychologically, emotionally and practically. She is clearly distressed at the prospect of separation from her partner who she is planning to marry.

23. As can be seen from my summary at §7xi and §21 above, there is little engagement, if any, with this report and the expert's conclusions. In the context of the Appellant's partner being pregnant at the time of the appeal hearing before the Judge and the expert's references to the risk of post-partum depression occurring, which the expert placed at the time of the assessment at 'low to moderate', I am satisfied that it was incumbent on the Judge to engage with this report and to set out his reasons for finding that the report did not add anything to the overall position, which he did not.

24. Mr Tufan argued that any errors made by the Judge were not material, including any lack of engagement with the expert report. I do not accept Mr Tufan's submission. I have already set out my reasons for finding why the errors of law committed for the reasons pleaded under the Appellant's first to third grounds of appeal are material. With regards to the expert report and the Appellant's fourth ground of appeal, I am satisfied that the errors are also material. This is because the partner's health and well-being, in the context of her pregnancy and/or caring for a new-born baby, is clearly a relevant matter when considering the proportionality of expecting a separation between the Appellant and his partner while the Appellant returns to seek entry clearance, especially if there is a delay in him being able to return. Similarly, the matters reported upon by the expert support the Appellant's and partner's contention that she would not be prepared to return to Albania with the Appellant and this has not been considered by the Judge either.

25. It is of course the case that the Appellant's health, well-being and expressions of her future intentions may not ultimately result in an

appeal being allowed in the Appellant's favour, but I am not prepared to find that the errors committed are not material - even if the issues may be finely balanced - when these matters have not been engaged with, properly or at all.

26. For the reasons above, and as indicated at the hearing, I am satisfied therefore that the Judge has materially erred in law and the Judge's decision to dismiss the appeal is therefore set aside pursuant to s.12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

27. Both parties agreed that since a decision needs to be re-made in respect of the core of the Appellant's appeal, pursuant to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal at [7.2], it is appropriate to remit the matter back to the FtT for a hearing *de novo.* This is considering the level of fact-finding that will need to be re-made.

28. I return to the Appellant's Rule 15(2A) application. This disclosed further and updating evidence mainly concerning the Appellant's new-born baby. There was no objection from Mr Tufan for this to be admitted and there were good (obvious) reasons why this evidence would not have been available earlier. I therefore granted the Appellant's application.

29. Mr Sharma also raised with Mr Tufan whether the Respondent would give consideration to providing consent to the new matter of the Appellant's son being raised and considered by the FtT, on remittal, if indeed this amounted to a new matter. Mr Tufan very pragmatically provided that consent at the hearing before me, to which I am grateful, and so both parties are in agreement that this matter can be considered by the FtT even if statutorily classed as a new matter.

Notice of Decision

30. The decision of the First-tier Tribunal is set aside. No findings of fact from Judge Easterman's decision are preserved.

31. The Appeal is remitted to the First-tier Tribunal for a hearing *de novo*, before any Judge of the First-tier Tribunal, other than Judge Easterman.

Sarah Pinder

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13.01.2025