Neutral Citation Number: [2023] EWHC 2758 (Admin)

Case No: AC-2023-LON-001431

IN THE HIGH COURT OF JUSTICE
KING'S BENCH DIVISION
ADMINISTRATIVE COURT

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 03/11/2023

Before :

KAREN RIDGE SITTING AS A DEPUTY HIGH COURT JUDGE

- -

Between :

THE KING (on the application of H)	**Claimant**
- and -	
THE SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Defendant**

- -
- -

Mr Alex Grigg (instructed by **Duncan Lewis Solicitors**) for the **Claimant**
Ms Hannah Thornley (instructed by **Government Legal Department**) for the **Defendant**

Hearing date: 13 September 2023

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JUDGMENT

Approved Judgment

Deputy High Court Judge Karen Ridge:

Background

1. The Claimant is a citizen of Albania who made an application for asylum. The Secretary of State rejected the claim for asylum and his human rights claims and certified his application as 'clearly unfounded' under section 94(3) of the Nationality, Immigration and Asylum Act 2022 ("the 2002 Act"). The consequence of certification is that the Claimant was deprived of the right of appeal against the decision to refuse asylum pursuant to s.82 of the 2022 Act. The application for judicial review is, in part, a challenge to the certification decision and, in part, a challenge to the Defendant's decision to detain the Claimant between 11 January 2023 and 7 June 2023.

2. The Claimant is a male, now aged 27 years. He arrived in the United Kingdom on 11 January 2023 hidden in a lorry and he claimed asylum on 24 January 2023. The claim for asylum was based on, what the Claimant says is, a well-founded fear of persecution if returned to Albania as a result of a blood feud. The Claimant said that he fled Albania to avoid a blood feud dating back to the murder of his maternal uncle in 1997 by a distant cousin named X. When X subsequently died, one of the Claimant's uncles was accused of murdering him as an act of revenge. The Claimant says that he was then attacked by X's nephews in early 2022 and that he fled the country when the police failed to help him. Additionally, the Claimant contends that he fears money lenders from whom he had borrowed £15,000 to fund his journey to the United Kingdom.

3. The Upper Tribunal's current country guidance on blood feuds is contained within *EH (blood feuds) Albania CG [2012] UKUT 00348 (IAC).* The Defendant's decisions, both to refuse the asylum claim and to certify it as clearly unfounded were made on 13 April 2023. The Defendant then, on 19 April 2023, set directions for the Claimant to be removed from the UK. In response, the Claimant submitted a handwritten letter giving further information about his asylum claim. The Defendant treated that letter as an attempt to make a 'fresh claim', which she declined to recognise under paragraph 353 of the Immigration Rules. Removal directions were cancelled on 26 April 2023.

4. The present application for judicial review was filed on 4 May 2023. Permission was refused on the papers by HHJ Karen Walden-Smith on 29 June 2023. The Claimant was released from detention on 7 June 2023 and an Amended Statement of Facts and Grounds was filed. The Defendant makes no objection to those amended grounds. This judgment relates to the renewed application for permission to commence judicial review proceedings on the amended grounds.

5. At the renewal hearing a request for an anonymity order was made and granted under CPR r39.2(4). The principles summarised in *XXX v Camden LBC* [2020] EWCA Civ. 1468, [2020] 4 WLR 165 are applicable. The Defendant's rejection of the asylum claim is based on arguments that the Claimant would benefit from state protection or internal relocation in Albania, rather than any challenge to his credibility. Therefore, a grant of anonymity is justified to minimise any risk to the Claimant.

Legal Framework

6. S. 94(1) of the 2002 Act empowers the Defendant to "*certify a protection claim or human rights claim as clearly unfounded*". Where satisfied that the claimant is entitled to reside in a state listed at s. 94(4) (which states include the Republic of Albania), that power is converted into an obligation, unless the Defendant is satisfied that the claim is not clearly unfounded (s. 94(3)). This serves to remove the discretion that the Defendant otherwise enjoys not to certify a claim even if persuaded that she has the power to do so: *FR (Albania)* [2016] EWCA Civ. 605 §56, Beatson LJ. The effect of certification is to deprive the claimant of the right to appeal the refusal of their protection or human rights claim to the First-tier Tribunal which they would otherwise enjoy under s. 82 of the 2022 Act.

7. The nature of the 'clearly unfounded' test was considered by the House of Lords in *ZT (Kosovo)* [2009] UKHL 6, [2009] 1 WLR 384 at §58 where Lord Carswell referred to the provisions as a "formidable power" conferred upon the Secretary of State and referred to the earlier iteration of the test as being where a claim is "clearly lacking in substance".

8. Further, in the ZT case Lord Phillips said at §23:

> "*Where, as here, there is no dispute of primary fact, the question of whether or not a claim is clearly unfounded is only susceptible to one rational answer. If any reasonable doubt exists as to whether the claim may succeed then it is not clearly unfounded. It follows that a challenge to the Secretary of State's conclusion that a claim is clearly unfounded is a rationality. There is no way that a court can consider whether her conclusion was rational other than by asking itself the same question that she has considered. If the court concludes that a claim has a realistic prospect of success when the Secretary of State has reached a contrary view, the court will necessarily conclude that the Secretary of State's view was irrational*"

9. Therefore where, as in this case, there is no issue of primary fact, the approach set out was one of the court making up its own mind on the question of whether there was a realistic prospect of success before an immigration judge. This approach was subsequently endorsed by the Court of Appeal in *QY (China)* [2009] EWCA Civ. 680 and *KH (Afghanistan)* [2009] EWCA Civ. 1354 and *R (YH)* [2010] EWCA Civ. 116.

10. In 2016 the Court of Appeal again considered the approach to certification, emphasising on this occasion that the reviewing court's role remained supervisory, at §§48-62:

> "*To conclude, the intensity of review in a certification case is at the more and possibly most intensive end of the spectrum to which I have referred at [48] above, but the jurisdiction remains a supervisory and reviewing one. It is also important not to lose sight of the fact that provisions in the 2002 Act give the Secretary of State a certain "gate-keeping" or "screening" function as to the availability of an in-country appeal by the process of certification. As I stated in* R (Toufighy) v Secretary of State *[2012] EWHC 3004 (Admin) at [73], while*

> *recognising the intensity of review in this context, care must be taken not inappropriately to deprive the Secretary of State of that function.*"

11. Principles concerning the use of immigration powers to detain a person were stated by Woolf J. in *R (Hardial Singh) v Governor of Durham Prison [1983] EWHC 1 (QB), [1984] 1 WLR 704*. They were restated by Dyson LJ. In R (I) [2002] EWCA Civ. 888 at §46:

> "i) The Secretary of State must intend to deport the person and can only use the power to detain for that purpose;
>
> ii) The deportee may only be detained for a period that is reasonable in all the circumstances;
>
> iii) If, before the expiry of the reasonable period, it becomes apparent that the Secretary of State will not be able to effect deportation within that reasonable period, he should not seek to exercise the power of detention;
>
> iv) The Secretary of State should act with the reasonable diligence and expedition to effect removal.
>
> 47. Principles (ii) and (iii) are conceptually distinct. Principle (ii) is that the Secretary of State may not lawfully detain a person "pending removal" for longer than a reasonable period. Once a reasonable period has expired, the detained person must be released. But there may be circumstances where, although a reasonable period has not yet expired, it becomes clear that the Secretary of State will not be able to deport the detained person within a reasonable period. In that event, principle (iii) applies. Thus, once it becomes apparent that the Secretary of State will not be able to effect the deportation within a reasonable period, the detention becomes unlawful even if the reasonable period has not yet expired."

12. In terms of detention decisions, the Defendant's statutory powers are contained within Schedule 2 to the Immigration Act 1971. There are limits imposed upon those powers by public law principles established in Hardial Singh. In particular, a detainee cannot be detained for a period that is longer than is reasonable in all the circumstances and where it becomes apparent that the Secretary of State will not be able to effect deportation within a reasonable period.

13. There can be a 'realistic prospect' of removal without it being possible to specify or predict the date when removal can reasonably be expected to occur and without any certainty that removal will occur. Also, the extent of certainty or uncertainty regarding removal can affect the balancing exercise but there must be sufficient prospect of removal to warrant continued detention when account is taken of all relevant factors. *R(MH) v SSHD [2010] EWCA Civ. 1112.*

14. The issue of public law errors on prior decisions affecting the legality of decisions to detain a protection claimant was further considered in *R (Lumba) [2012] UKSC* in which it was confirmed that the error must be one which is material in public law terms. Detention will be unlawful where there is a public law error in a distinct decision affecting the detainee and that decision 'bears on and is relevant to' the decision to detain.

The Decision Letter of 13 April 2023

15. The Defendant accepted that, on the face of it, the asylum claim engaged the Refugee Convention on the basis of the Claimant's membership of a particular social group. The Claimant's fear of being beaten by a money lender, or his family losing their home if the Claimant returned to Albania was determined not to engage the United Kingdom's obligations under the 1951 United Nations Convention on the Status of Refugees. The whole claim was considered at its highest, namely as if events were as described by the Claimant.

16. The Defendant assessed future fear at §45 onwards and the case of *EH (blood feuds) Albania CG [2012] UKUT 348 (IAC)* was considered when determining the existence of a blood feud. The following factors were assessed:

> "(i) the history of the alleged feud, including the notoriety of the original killings, the numbers killed, and the degree of commitment by the aggressor clan toward the prosecution of the feud;
>
> (ii) the length of time since the last death and the relationship of the last person killed to the appellant;
>
> (iii) the ability of members of the aggressor clan to locate the appellant if returned to another part of Albania; and
>
> (iv) the past and likely future attitude of the police and other authorities towards the feud and the protection of the family of the person claiming to be at risk, including any past attempts to seek prosecution of members of the aggressor clan, or to seek protection from the Albanian authorities. In order to establish that there is an active blood feud affecting him personally, an appellant must produce satisfactory individual evidence of its existence in relation to him. In particular, the appellant must establish:
>
> (v) his profile as a potential target of the feud identified and which family carried out the most recent killing; and
>
> (vi) whether the appellant has been, or other members of his family have been, or are currently, in self-confinement within Albania."

17. The Defendant concluded that there was nothing to suggest that any of the Claimant's family members had been killed or that his father or brother had been targeted; that

the Claimant had not demonstrated that X's family was powerful or had influence over state agents or the ability to locate the Claimant throughout Albania. In conclusion the Defendant said that "*It is considered that any subjective fear that you may retain is not objectively well founded because there is sufficient protection available by the Albanian authorities given the circumstances you describe". §51*

18. The Claimant said that he feared the money lender 'Bami' and the Defendant noted that the Defendant and his family had not been harmed by Bami to date; that there was no demonstration that Bami or his gang had any active interest or motivation in pursuing the Claimant or his family. The Defendant concluded that the Claimant could return to Albania and relocate to avoid problems. The Defendant further concluded that the Claimant had not demonstrated that he was unable to seek protection from the police or that the people he feared had police or political connections or means to restrict him from seeking protection. It was concluded that any subjective fears of the Claimant are not objectively well founded because of sufficient protection available from the Albanian authorities.

19. The decision letter considered the claim for humanitarian protection pursuant to articles 2 and 3 of the ECHR. It was concluded that sufficiency of protection and internal relocation would be available such that there were no substantial grounds for believing that, if returned to Albania, the Claimant would face a real risk of serious harm and he was unable or, owing to such risk, unwilling to avail himself of protection from the Albanian authorities.

20. The Defendant then goes on separately to consider the question of certification at §143-§148. It was concluded that the people feared were non-state actors; there was no evidence to suggest that they could influence the Albanian authorities or that the Claimant would not be offered sufficient protection; there was no evidence to show how the feared individuals would be able to locate the Claimant on a return to Albania. The protection claim was certified as clearly unfounded.

21. The Human Rights claim was also considered bound to fail because the Claimant's article 3 medical claim did not meet the high threshold required and because medical treatment is available in Albania. The claim under article 8 was certified as bound to fail because the Claimant does not have any dependent family members, partner or children in the United Kingdom and the Claimant had been in the United Kingdom for less than one year.

Ground 1

22. The first challenge rests on the Claimant's contention that the Defendant failed to treat the country guidance in the EH case as the starting point and/or failed to justify departing from such guidance when finding that there would be sufficiency of protection.

23. The practice of 'country guidance' is a well-established system for ensuring consistency of decision making in the Immigration First Tier Tribunal (FTT). In *MST and Others (national service – risk categories) Eritrea CG* [2016] UKUT 443 (IAC), the Upper Tribunal (UT) stated:

> "the concept of country guidance is a long-established part of the UK legal system and Practice Directions identify "country guidance" as an emanation of the Upper Tribunal (formerly the AIT and IAT)…
>
> It is entirely legitimate of the Home Office to issue not just Country of Origin information but also policy and operational guidance setting out the position of the UK government. The fact that the Upper Tribunal ("UT") (unlike the Home Office) is not in a position to update its guidance on different countries regularly only underlines the need for the executive to identify its own position on a regular basis so that caseworkers can make decisions based on the latest evidence…."

24. After commenting upon the confusion arising from the naming of such guidance as "Country Information Guidance" the UT reiterated that…"the Home Office has no legal competence to decide whether or not a UT country guidance case is to be followed or not." The UT made it clear that there would have been no adverse comment if the Country Information Guidance in question had made it clear that caseworkers were entitled to take a view that more recent evidence enabled them not to follow Country Guidance emanating from the UT.

25. It follows therefore that there must be an appreciation by the Defendant and caseworkers that, on any appeal, a FTT remains bound by UT Country Guidance, unless there is "cogent evidence" to justify departure in accordance with the *Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal* (13 May 2022), which provides:

> "A reported decision of the Upper Tribunal, the AIT, or IAT, bearing the letters "CG" shall be treated as an authoritative finding on the country guidance issue identified in the decision, based upon the evidence before the members of the Upper Tribunal, the AIT, and the IAT that decided the appeal. As a result, unless it has been expressly superseded or replaced by any later "CG" decision, or is inconsistent with other authority that is binding on the Tribunal, such a country guidance case is authoritative in any subsequent appeal, so far as that appeal:
> (a) relates to the country guidance issue in question; and
> (b) depends upon the same or similar evidence."

26. The UT in Roba [2022] UKUT 1 (IAC) confirmed that the treatment of country guidance as a presumption of fact means that it will be for the parties seeking to persuade the Tribunal to depart from it to adduce the evidence justifying that departure. An assessment as to whether to depart from a CG decision is to be undertaken as to: (i) whether material circumstances have changed; and (ii) whether such changes are well established evidentially and durable. That decision further confirmed that the law, and the principle, are not affected by the age of the CG decision. It may be that as time goes on, evidence will become available that makes it more likely that departure from the decision will be justified. But the process remains the same, and unless in the individual case the departure is shown to be justified, the guidance contained in the CG decision must, as a matter of law, be adopted.

27. In certifying a claim as clearly unfounded, it is important therefore for all decision-makers to remain cognisant of the role of country guidance within the FTT. Had the Claimant not been deprived of his right of appeal to the FTT, the FTT would have been bound to follow EH, unless it had been superseded or was inconsistent with any other authority binding on the Tribunal or there was cogent evidence to justify such a departure

28. The country guidance in EH is, in part, as follows:

> "1. While there remain a number of active blood feuds in Albania, they are few and declining. There are a small number of deaths annually arising from those feuds and a small number of adults and children living in self-confinement for protection. Government programmes to educate self-confined children exist but very few children are involved in them..
>
> 2. The existence of a 'modern blood feud' is not established: Kanun blood feuds have always allowed for the possibility of pre-emptive killing by a dominant clan.
>
> 3. The Albanian state has taken steps to improve state protection, but in areas where Kanun law predominates (particularly in northern Albania) those steps do not yet provide sufficiency of protection from Kanun-related blood-taking if an active feud exists and affects the individual claimant. Internal relocation to an area of Albania less dependent on the Kanun may provide sufficient protection, depending on the reach, influence, and commitment to prosecution of the feud by the aggressor clan."

29. The Defendant considers sufficiency of protection at §62 to §85 of the decision letter where the factual background is quoted. The House of Lords decision in *Horvath [2000] UKHL 37* was directly referred to, before consideration is also given to background information contained in various sources: *US Department of State Human Rights Report (USSD) – Albania 2021, Country Policy and Information Note Albania: Actors of protection Version 2.0 December 2022 (the CPIN)*. The caveat in relation to sufficiency of protection contained within *EH (Albania)* at headnote 3 was not referred to. That is the material which formed the basis on which the Defendant made her decision that the authorities in Albania are able to provide effective protection to the standard set out in Horvath §85.

30. The CPIN summarises the reasons why the Defendant considers departure from *EH* to be appropriate at §2.5.3

> "The UT's assessment of the availability of protection in EH was based on the country situation up to mid-2012. Since the promulgation of EH the state has taken a number of steps to strengthen its legal system for the detection, prosecution and punishment of acts constituting persecution, which is accessible to persons fearing harm generally (see Country Policy and Information Note: Actors of protection)"

31. The Claimant takes issue with the reliance which the CPIN places upon quotations from the Albanian Government sources and the extent to which measures against blood feud have proved to be successful. In addition, the Claimant contends that independent sources suggest that there may be reasons to lack confidence in the actions taken by the Albanian Government. The Claimant asserts therefore that it is arguable that there is a realistic prospect of a FTT Judge finding that the evidence does not support departing from *EH*.

32. Whilst the decision letter provides its reasons for concluding that there would be sufficiency of protection, it does not deal with the issue of areas where Kanun law predominates not necessarily providing sufficiency of protection. The Claimant was born in Tirana and lived in Fushe Kruje, a location north of Tirana. This is pertinent in a case where the Claimant says that he sought protection from the police following the attack on him to no avail.

33. A failure to deal head-on with the issues raised by headnote 3 in the *EH* country guidance case when considering sufficiency of protection is carried forward into the Defendant's assessment in the certification decision. The question of country guidance and its implications for the FTT's decision-making was not taken into consideration during this second exercise.

34. It is therefore arguable that the Defendant's decision to certify as clearly unfounded, did not allow for the prospect of a FTT, when applying EH, coming to a different view on the facts of this case. For these reasons I conclude that ground 1 is arguable.

Ground 4

35. The Summary Grounds of Defence assert that the Claimant's protection claim was one which was bound to fail. This was based, in part, on the Defendant's conclusions that the Claimant had not demonstrated that the family responsible for killing his uncle were powerful or would be able to find him if he relocated anywhere in Albania at §50 of the Decision Letter. In addition, at §98 it was concluded that the money lender, Bami, did not have the means or motivation to trace the Claimant elsewhere in Albania.

36. Those conclusions were arrived at without consideration being first given to relevant country guidance decisions and thereafter whether there were cogent reasons for departure from the guidance within such decisions. In *AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC)* the UT concluded that Albania is a country in which internal relocation is problematical for a victim of trafficking and that internal relocation was unlikely to be effective for most victims of trafficking who held a well-founded fear of persecution. In the later case of *BF (Tirana- gay men) Albania CG [2019] UKUT 93 (IAC)* it was accepted that evidence of a person's whereabouts may become known in Tirana by word of mouth because Albania is a relatively small country, and it was entirely plausible that a person might be traced via family or other connections.

37. The Claimant points to the Defendant's CPIN of September 2022 citing evidence confirming that the same position pertains to victims of blood feuds. §11 of the September 2022 CPIN deals with internal relocation and references several

independent sources reporting that movement "can reduce tension but does not guarantee safety" and "no person is safe from blood feud in any city in Albania".

38. The January 2023 CPIN omits these sources but does not explain on what basis. The Defendant concluded that the Claimant had not demonstrated that the family responsible for killing his uncle were powerful or had the ability to locate him anywhere in Albania. However, the FTT would apply *EH* and other country guidance as a starting point in the absence of cogent justification for departure.

39. It is therefore arguable that, if a hypothetical FTT concluded that the Claimant was the victim of an active blood feud or was at risk to those he owed money to, it would be open to the FTT to make a finding that internal relocation would not protect the Claimant from being targeted by his persecutors. It is arguable therefore that certification of the claim as clearly unfounded on this basis is erroneous.

Grounds 2 and 3: certification

40. The second and third challenges rest on the Claimant's contention that the Defendant failed to take into account material evidence in relation to whether a blood feud exists and there was no well-founded fear of harm, when deciding to refuse the claim for protection. However, she did not rely on these matters for certification. Given that I have concluded that grounds 1 and 4 are arguable, I do not consider it necessary to address these matters. They can be pursued at a substantive hearing if they are considered material.

Grounds 5-7: the challenges to detention

41. The Claimant was detained by the Defendant under s.16 of Schedule 2 of the Immigration Act 1971 between 11 January 2023 and 7 June 2023. Removal directions were set for 27 April 2023, but removal was deferred on the 26 April 2023. The application for judicial review was lodged on 4 May 2023.

42. The Defendant reviewed detention at various points during the detention period. On 11 January 2023, at the Claimant's initial detention review, it was estimated that he could be removed within 3 weeks. On 24 January 2023, it was noted that removal directions were set for 25 January 2023. However, these removal directions were deferred following submission of the Claimant's asylum claim. After the Claimant's asylum claim was refused and certified on 13 April 2023, removal directions were again set for 27 April 2023. These too were deferred following receipt of further submissions, however it was still estimated his removal could be achieved within one to two weeks. The Defendant accepts that this claim for judicial review presents a barrier to removal, but should the claim fail then the Defendant estimates that removal could occur within six to eight weeks.

43. The Claimant says that his detention was unlawful on a number of grounds. Ground 6 contends that the decision to detain after 13 April 2023 was predicated on an unlawful decision to certify his claim as clearly unfounded and that certification did bear on, and was relevant to, the decision to detain. There are a number of authorities in relation to public law errors in prior decisions which feed into subsequent decisions to detain claimants. The test is whether the unlawful first decision did bear on, and was relevant to, the detention decision.

44. Permission has been given to proceed on grounds 1 and 4. I am satisfied that it is arguable that certification did bear on, and was relevant to, the decision to detain in this case. It follows that if, ultimately, the claim is successful in relation to the illegality of the certification decision, then there is an argument to be had about the decision to detain the Claimant from 13 April 2023. If the claim had not been certified as clearly unfounded, then it is highly probable that the Claimant would have pursued avenues of appeal at that point. The detention decision would have fallen to have been reviewed in light of that appeal and all other factors, including the length of detention at that point and the likely timescales for appeal to the FTT. Ground 6 is therefore arguable.

45. The fifth and seventh grounds contend that detention was contrary to the Hardial Singh principles. The fifth ground alleges that it would have been apparent from around the end of January 2023 that removal would not be possible until the Claimant's asylum claim and referral under the National Referral Mechanism had been determined and any appeal avenues exhausted. The asylum claim was determined on 13 April 2023.

46. The Claimant had travelled to the United Kingdom clandestinely and did not have any ties in the United Kingdom. Given his financial circumstances and other matters, I agree with the Defendant's assessment that he was at medium risk of absconding and unlikely to comply with bail conditions. The claim was determined in a little over 3 months. I am satisfied that during the period up to 13 April 2023 there remained a realistic prospect of removal and that detention was a proportionate response. Ground 5 is not arguable.

47. Following the decision letter of 13 April 2023, the Claimant notified the Defendant on or around 26 April 2023 that a judicial review claim was to be pursued. At this point the Claimant had been in detention for three and a half months and it is likely to have been apparent that removal would not be possible until the judicial review application had been resolved. The Defendant's own policy is not to effect removal where there is a first judicial review pending.

48. Given the prospect of a judicial review challenge and the knowledge that imminent removal was not in prospect, it is likely that these matters would provide the Claimant with an incentive to comply with any relevant bail conditions. It is arguable therefore that detention after the 27 April 2023 breached the Hardial Singh principles. Ground 7 is therefore arguable.

49. I would ask the parties to draw up a draft order reflecting the above and incorporating any necessary case management directions in relation to a substantive hearing. I would ask that a separate order be drawn up in relation to the anonymity provisions.