



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

Appeal Number: HU/08395/2019

THE IMMIGRATION ACTS

**Heard at Field House
On 16 November 2020**

**Decision & Reasons Promulgated
On 23 November 2020**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

**XHEVAHIR TERZIA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms S Lengar of Counsel, instructed by Evolent Law

For the Respondent: Ms A Everett, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against a decision of the First-tier Tribunal dismissing the appeal of the appellant against a decision of the Secretary of State refusing him leave to remain in the United Kingdom.
2. The big difficulty facing the appellant is that he has been assessed to be an “unsuitable” person. According to the Secretary of State, the unsuitability arises largely from his absconding and living irregularly in the United Kingdom for a period of about five years when he ought to have been reporting to the Secretary of State.

3. The First-tier Tribunal Judge was not helped by a dearth of evidence from the Secretary of State but it is not absolutely clear that the judge accepted and recognised that it was for the Secretary of State to prove the precedent facts to support the conclusion that the appellant was unsuitable. There are two directions where there is reference to the burden being on the appellant and in this respect it is not. As Ms Everett pointed out, correctly, there is a saving provision at paragraph 9 which refers to the onus being on the respondent to adduce the relevant evidence but that is not quite the same point as recognising that it is for the respondent to prove the case but in any event, there is not a clear direction and that is a matter of considerable importance.
4. This problem is compounded by the judge speculating on what sort of procedure would have been followed and what material would have been made available to the appellant telling him that he was required to report. The judge may or may not have got that right although there is reason to think it was wrong but most importantly, there was just no evidence for it and it is not for judges to guess about what might have happened but to decide the case on the evidence that was there and if the party that bears the burden does not produce the evidence, that is the party's problem. It must not become the judge's.
5. On this occasion the decision is fundamentally flawed.
6. I have been assisted in this conclusion by entirely realistic concessions by Ms Everett, who said that if she did not concede "she would end up defending the case on a lot of little fronts to the point where it was not possible to defend the decision". With respect, I found that wise and clear and I adopt her phrase here. This is a fundamentally unsatisfactory decision. The consequence of that is it has to be set aside and both parties agree with me that it is a failing of such magnitude that the appellant is entitled to a rehearing in the First-tier Tribunal, so I direct that the case be heard again.

Notice of Decision

The appeal is allowed. I set aside the decision of the First-tier Tribunal and I direct that the case be heard again in the First-tier Tribunal by a different judge.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 19 November 2020