IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000545

First-tier Tribunal No: HU/59807/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th of December 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE BOWLER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

LOTOR BAJRAKTARI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr G. Lee, counsel, instructed by M Reale Solicitors
For the Respondent: Mr S. Walker, Senior Presenting Officer

Heard at Field House by Microsoft Teams on 27 September 2024

DECISION AND REASONS

1. The Appellant in the appeal before me is the Secretary of State for the Home Department and the Respondent to this appeal is Mr Bajraktari. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Bajraktari as the Appellant, and the Secretary of State as the Respondent.

2. The Appellant is an Albanian citizen who applied for entry clearance on 27 May 2023 on the basis of his relationship with his partner. He appealed the Respondent's refusal of his application in July 2023.

3. At the error of law hearing before me on 30 August 2024 Mr Lee conceded that there had been an error of law in the decision of the First-tier Tribunal Judge (which is annexed as Annexe A hereto). That error was a failure to apply a mandatory refusal rule in the Immigration Rules. I decided that the error was material and a rehearing was required. However, subsequent to that hearing

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Mr Lee sent written submissions to explain that there had been an error in his concession.

The hearing

4. The parties agreed that the mandatory refusal rule contained in paragraph 9.8.1 of the Immigration Rules did not in fact apply to the Appellant. The Respondent did not seek to make any further challenge to the First-tier Tribunal judge's decision which should therefore stand.

5. Mr Lee asked that the error of law decision was set aside or reviewed and the decision of the First-tier Tribunal affirmed.

My decision

6. On further investigation, after the error was drawn to my attention, it is clear that the mandatory rule in paragraph 9.8.1 does not apply to the Appellant because the application made by him was under Appendix FM.

7. The case of Jan (Upper Tribunal: set aside powers) [2016] UKUT 00336 (IAC) makes clear that:

    a. The Upper Tribunal has no inherent jurisdiction to set aside its decisions other than in the circumstances set out in rules 43 and 45-46 of the Upper Tribunal Procedure Rules;
    b. That means that the power to set aside is limited to:
        i. Setting aside a decision that terminates proceedings on the ground of procedural error; and
        ii. Setting aside a decision by way of review where an application for permission to appeal to the Court of Appeal is being considered and one of the two circumstances in rule 45(1) applies.

8. Neither of those powers applies in this case.

9. Mr Lee referred me to the case of AZ (error of law: jurisdiction; PTA Practice) Iran 2018 UKUT 00245 which describes the exceptional cases where an Upper Tribunal's decision can be varied. The headnote of that case says:

    (1) Before it has re-made the decision in an appeal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007, the Upper Tribunal has jurisdiction to depart from, or vary, its decision that the First-tier Tribunal made an error of law, such that the First-tier Tribunal's decision should be set aside under section 12(2)(a).

    (2) As Practice Direction 3.7 indicates, that jurisdiction will, however, be exercised only in very exceptional cases. This will be so, whether or not the same constitution of the Upper Tribunal that made the error of law decision is re-making the decision in the appeal.

10. I am satisfied that this is a very exceptional case in that both parties, represented by experienced and highly competent representatives, made an error in agreeing that the mandatory refusal rule applied. Therefore I am satisfied that I should vary my decision that the First-tier Tribunal made an error of law such that it should be set aside. I attach as Appendix B the varied error

of law decision which concludes that there is no error of law and the First -tier Tribunal's decision is affirmed.

11. However, even if the circumstances in this case did not fall within the category of "very exceptional cases" I would remake the First-tier Tribunal decision adopting the analysis of the First-tier Tribunal and allow the appeal.

Notice of Decision

12. On the basis that I have concluded that this is "a very exceptional case" within paragraph 3.7 of the Practice Direction I have varied the error of law decision to conclude that the making of the decision of the First-tier Tribunal did not involve an error of law and that decision is affirmed.

13. However, for the avoidance of any doubt, if this is not a "very exceptional case" I remake the First-tier Tribunal's decision and allow the Appellant's appeal.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9/10/2023

Appendix A

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Representation:
For the Appellant: Mr G. Lee, counsel, instructed by M Reale Solicitors
For the Respondent: Mr S. Walker, Senior Presenting Officer

Heard at Field House by Microsoft Teams on 30 August 2024

DECISION AND REASONS

This has been a remote hearing. The form of remote hearing was V (video). A face to face hearing was not required in the circumstances because the parties were represented, no evidence would be heard and all of the issues could be determined in a remote hearing.

14. The Appellant in the appeal before me is the Secretary of State for the Home Department and the Respondent to this appeal is Mr Bajraktari. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Bajraktari as the Appellant, and the Secretary of State as the Respondent.

15. The Appellant is an Albanian citizen who applied for entry clearance on 27 May 2023 on the basis of his relationship with his partner. He appealed the

Respondent's refusal of his application in July 2023. Prior to his application he had twice been removed and had re-entered the UK illegally. He last re-entered the UK illegally in 2018, was detained in 2023 and then left at this own expense.

16. First-tier Tribunal Judge Mathews ("the Judge") allowed the appeal in a decision dated 4 February 2024 ("the Decision"). The Judge did so on the basis of the Appellant's family life with his partner in the UK, relying on amongst other findings, a conclusion that the Appellant satisfied the Immigration Rules. It is stated at [55] of the Decision that "the meeting of the rules is determinative of this appeal."

17. Permission to appeal was granted by Judge Hollings-Tenant in a decision dated 22 February 2024 in which it was decided that the Decision arguably contained an error of law in that the Judge decided that the Appellant satisfied the Immigration Rules despite the fact that the timing of his application had breached a mandatory refusal rule contained in paragraph 9.8.1 of the Immigration Rules.

The Respondent's Ground of Appeal

18. The Respondent appeals on the ground that paragraph 9.8.1 of the Immigration Rules applies and mandates refusal of applications where a person has previously breached immigration laws and the application for entry clearance is made within the relevant time, which in this case was 12 months from departure.

The hearing before me

19. Mr Lee conceded that the Decision contained an error of law because of the application of paragraph 9.8.1 of the Immigration Rules. The Appellant had made the application within the 12 month period.

20. However, Mr Lee submitted that the error was not necessarily material. Given the other findings made by the Judge it was inevitable that the proportionality exercise would be concluded in the Appellant's favour.

21. Mr Walker submitted that it would be necessary to address whether the circumstances (particularly regarding the Appellant's relationship with his wife) remained the same if the Decision is set aside and remade. Mr Lee said that a remaking with regard to current circumstances would require listing on another day.

My decision

22. I gave the parties my decision at the hearing, which I now set out more fully.

23. The Decision is detailed and clearly written with some considerable care. However, as conceded by Mr Lee, the Judge failed to recognise that the correct Immigration Rule was that contained in paragraph 9.8.1. That was no doubt at least in part due to the fact that the Respondent's refusal letter referred to paragraph 9.8.2 incorrectly. However, 9.8.2 applies where an application is made outside of the relevant period (in which case there is discretion as to refusal) whereas 9.8.1 applies to an application made within the relevant period (in which case refusal is mandatory).

24. The fact that the Appellant made his application within the relevant period means that the Immigration Rules cannot be satisfied by him. As a result the Decision contained an error of law.

25. I considered Mr Lee's submission that the proportionality exercise would inevitably lead to allowing the Appellant's appeal. However, I do not agree. The Decision (as a result of concluding that the Immigration Rules were satisfied) did not engage with the encapsulation of Article 8 in GEN.3.2 and in particular whether "there are exceptional circumstances which would render refusal of entry clearance, or leave to enter or remain, a breach of Article 8 of the European Convention on Human Rights, because such refusal would result in unjustifiably harsh consequences for the applicant, their partner, a relevant child or another family member whose Article 8 rights it is evident from that information would be affected by a decision to refuse the application."

26. This means that the error of law was material. The proportionality exercise undertaken by the Judge was flawed and the findings are insufficient to conclude that the appeal should still be allowed. The Decision must therefore be set aside although the findings of fact made by the Judge in paragraphs [29, 31, 32 – 37, 41-44] are retained.

27. Given the lack of any findings relating to GEN3.2, fairness requires that the parties have the opportunity to address the encapsulation of the proportionality test with regard to circumstances as at the date of the rehearing. This means that the remaking will take place at a resumed hearing.

Notice of Decision

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside but with the findings made at paragraphs [29, 31, 32 – 37, 41-44] retained.

2. The decision will be re-made at a resumed hearing on 27 September 2024. This will take place in the Upper Tribunal.

3. The Appellant will be giving evidence by way of video link from Albania. The Foreign Commonwealth and Development Office TOE guidance states that:

"Citizens or residents of Albania can voluntarily give evidence from Albania by video link (either as a witness or when appealing a case) in immigration cases only. "

4. All other participants will attend the hearing in person at Field House.

5. In the circumstances, full and detailed skeleton arguments need to be produced for the resumed hearing setting out the case for each party. The Appellant may also choose to provide updated Witness Statements.

6. I therefore DIRECT that:

(a) No later than 7 days before the hearing, the parties shall file and serve skeleton arguments setting out in full their legal submissions in relation

to the ability of the Appellant to qualify for entry clearance on the basis of family life with his partner.

(b) No later than 7 days before the hearing the Appellant shall file and serve any updated Witness Statements (together with any exhibits thereto)

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

04/09/2023

Appendix B

IN THE UPPER TRIBUNAL
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LOTOR BAJRAKTARI
(NO ANONYMITY ORDER MADE)
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Representation:
For the Appellant: Mr G. Lee, counsel, instructed by M Reale Solicitors
For the Respondent: Mr S. Walker, Senior Presenting Officer

Heard at Field House by Microsoft Teams on 30 August 2024

DECISION AND REASONS VARIED AFTER SUBMISSIONS

This has been a remote hearing. The form of remote hearing was V (video). A face to face hearing was not required in the circumstances because the parties were represented, no evidence would be heard and all of the issues could be determined in a remote hearing.

1. The Appellant in the appeal before me is the Secretary of State for the Home Department and the Respondent to this appeal is Mr Bajraktari. However, for ease of reference, in the course of this decision I adopt the parties' status as it was before the FtT. I refer to Mr Bajraktari as the Appellant, and the Secretary of State as the Respondent.

2. The Appellant is an Albanian citizen who applied for entry clearance on 27 May 2023 on the basis of his relationship with his partner. He appealed the Respondent's refusal of his application in July 2023. Prior to his application he had twice been removed and had re-entered the UK illegally. He last re-entered the UK illegally in 2018, was detained in 2023 and then left at this own expense.

3. First-tier Tribunal Judge Mathews ("the Judge") allowed the appeal in a decision dated 4 February 2024 ("the Decision"). The Judge did so on the basis of the Appellant's family life with his partner in the UK, relying on amongst other findings, a conclusion that the Appellant satisfied the Immigration Rules. It is stated at [55] of the Decision that "the meeting of the rules is determinative of this appeal."

4. Permission to appeal was granted by Judge Hollings-Tenant in a decision dated 22 February 2024 in which it was decided that the Decision arguably contained an error of law in that the Judge decided that the Appellant satisfied the Immigration Rules despite the fact that the timing of his application had breached a mandatory refusal rule contained in paragraph 9.8.1 of the Immigration Rules.

The Respondent's Ground of Appeal

5. The Respondent appeals on the ground that paragraph 9.8.1 of the Immigration Rules applies and mandates refusal of applications where a person has previously breached immigration laws and the application for entry clearance is made within the relevant time, which in this case was 12 months from departure.

The hearing before me

6. Mr Lee conceded that the Decision contained an error of law because of the application of paragraph 9.8.1 of the Immigration Rules. The Appellant had made the application within the 12 month period.

7. However, Mr Lee submitted that the error was not necessarily material. Given the other findings made by the Judge it was inevitable that the proportionality exercise would be concluded in the Appellant's favour.

8. Mr Walker submitted that it would be necessary to address whether the circumstances (particularly regarding the Appellant's relationship with his wife) remained the same if the Decision is set aside and remade. Mr Lee said that a remaking with regard to current circumstances would require listing on another day.

Submissions post hearing

9. In submissions from Mr Lee received after the hearing Mr Lee apologised for his error, explaining that in fact the mandatory refusal rule in paragraph 9.8.1 does not apply to the Appellant because he has made an application under Appendix FM. Mr Walker has conceded that the Respondent was incorrect to assert that the paragraph did apply. Mr Walker confirmed that there was no other challenge to the Decision.

My decision

10. I am satisfied that the parties are correct that paragraph 9.8.1 does not apply to the Appellant.

11. The parties have agreed that there is no error of law otherwise in the Decision. It is therefore incumbent on me to affirm the Decision.

Notice of Decision

12. The making of the decision of the First-tier Tribunal did not involve the making of an error of law and is therefore affirmed.

T. Bowler

Judge of the Upper Tribunal
Immigration and Asylum Chamber

04/09/2023