Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2024-002364
HU/58003/2023
LH/06250/2023

THE IMMIGRATION ACTS

Decision & Reasons Promulgated

On 16th October 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE KELLY

Between

ALBAN BODURRI

(ANONYMITY NOT ORDERED)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr B Ahmed, Counsel instructed by Goodfellows Solicitors
For the Respondent: Mr Parvar, Senior Home Office Presenting Officer

Heard at Field House on the 18th September 2024

DECISION AND REASONS

Introduction

1. The Appellant is a citizen of Albania. The respondent refused his application for leave to remain in the United Kingdom on private and family life grounds on the 20th June 2023, and his appeal against that

refusal was dismissed by First-tier Tribunal Judge Lemur on the 8th March 2024. The appellant was granted permission to appeal against Judge Lemur's decision, and hence the matter came before me for hearing on the 19th September 2024.

Background

2. The essence of the appellant's case before the First-tier Tribunal was that he had established private and family life in the United Kingdom with his wife, Renilda, and his stepson, AB. Renilda is also a citizen of Albania, whereas AB is a British citizen.

3. Judge Lemar recorded the evidence at paragraphs 8 and 9 of their decision. It will be necessary to consider this in more detail below, but for present purposes it may be conveniently summarized as follows.

4. Renilda had limited leave to remain in the United Kingdom until the 18th October 2024. This had been granted because she was the mother of AB, a British citizen by descent from his father, with whom he does not have a relationship. At the date of the hearing, Renilda had recently given birth to the appellant's child, who is also a citizen of Albania. Renilda was due to start working in the month following the hearing, whereupon it was intended that the appellant would stay at home and look after the children.

The First-tier Tribunal's reasons

5. In giving reasons for their decision, Judge Lemar acknowledged that the appellant spoke English, but found that there was no evidence as to how he supported himself. Judge Lemar was not therefore satisfied that the appellant was financially independent [32]. There was no dispute at the hearing but that the appellant had a genuine and subsisting parental relationship with AB, a British citizen. Judge Lemar nevertheless concluded that it would be reasonable to expect AB to follow the appellant, his mother, and his recently born half-sibling, to Albania. In so concluding, Judge Lemar noted that (i) AB was born in September 2021 and would not therefore have established any meaningful relationships in the UK other than with his parents, (ii) AB did not have an existing relationship with his biological father [36], (iii) there was no suggestion that AB would be unable, as a British citizen, to access education in Albania [37], (iv) both the appellant and Renilda had entered the UK illegally, albeit that Renilda had subsequently been granted limited leave to remain due to AB's British citizenship [40], and (v) there was no good reason why the appellant, Renilda, their newly-born child, and AB, could not move together to Albania, a country which Renilda and AB had recently visited, and where the appellant had a history of employment in contrast with his lack of employment in the UK [41].

The grounds of appeal.

6. The grounds of appeal can be conveniently summarized as follows:

(1) The judge "inexplicably" found that it was reasonable for AB to leave the United Kingdom under section 117B(6) of Nationality, Immigration and Asylum Act 2002;

(2) "[8] The FTTJ made reference to s117(b) and indicates that as there is no evidence of how he supports himself he can't be said to be financially independent. The Judge has erred in law given that this was not reasonably put to the Appellant by either party or the Judge at the hearing. Furthermore, his partner clearly indicated she worked whilst the Appellant looked after the children indicating how the family household was ran, therefore, the FTTJ has erred in his assessment of the facts. [9] In R v SSHD ex parte Maheswaran [2002] EWCA Civ 173, is relied upon in which the Court of Appeal rule: Undoubtedly a failure to put to a party to litigation a point which is decided against him can be grossly unfair and lead to injustice. He must have a proper opportunity to deal with the point. Adjudicators must bear this in mind"

Permission to appeal was refused by the First-tier Tribunal on the first ground but granted in relation to the second. This was done in the following terms:

> It is not arguable that the judge erred in their application of subsection 117B(6) of the Nationality, Immigration and Asylum Act 2002. There is no arguable error in the judge's consideration of whether it would be reasonable to expect the relevant child to leave the United Kingdom. The judge identified that the evidence before them was that there was no existing relationship between the child and their biological father, and there is no arguable error in the consideration of the child's best interests or the hardship that the family would be likely to experience if relocating to Albania.
>
> It is arguable that the judge materially erred in law in the proportionality assessment in finding that there is no evidence as to how the Appellant supports himself, and therefore not finding the Appellant to be financially independent. It is arguable that such evidence was before the judge, such as the statement made at paragraph 21 of the Appellant's 20/11/2023 written.

Analysis

7. The passage in Judge Lemar's decision that gives rise to the only ground for which permission to appeal has been granted, appears at paragraph 32 (ii). It reads as follows:

> There is no evidence as to how [the appellant] supports himself, and so I do not find that he is financially independent (s.117B(3))

I shall return to the reference to section 117B(3) of the 2002 Act when considering the relative weight attaching to the public interest in a person's financial independence. However, this appeal is not concerned with that issue. Rather, it is concerned with (a) the claimed procedural unfairness in failing to put to the appellant the supposed lack of evidence concerning his financial independence, and (b) whether there was in fact evidence before the judge to show that the appellant was financially supported by his wife, Renilda. I will take the two limbs of this ground in turn.

8. It is trite law that fairness requires that a party be given an opportunity, when giving oral evidence, to address any issue that may subsequently be decided against them. I emphasise this because the requirement does not extend to an obligation to draw the attention of a party who bears the burden of proof to gaps that may exist in the evidence upon which they rely in order to discharge it. Contrary to the implication within this ground, the judge did not make an adverse finding against the appellant by finding that the appellant was not financially independent. The judge simply found that the appellant had failed to provide any evidence to prove that he was. Put another way, the judge found an absence of proof, rather than proof of absence. The principal limb upon which this ground of appeal is founded is accordingly misconceived. I therefore turn to consider the second limb.

9. The judge's summary of the evidence that was relevant to this issue appears at paragraph 9(iii) of their decision:

> [Renilda] is due to start working next month and the Appellant will be looking after the children.

10. Mr Ahmed drew my attention to passages in the witness statements of the appellant and his wife, Renilda, that he submitted demonstrated that the appellant was financially dependent upon his wife, rather than upon state benefits, at the date of the hearing. Both statements are dated the 20th November 2023; that is to say, some two months prior to the hearing in the First-tier Tribunal. The relevant part of the appellant's statement appears at paragraph 21, and reads as follows:

> Renilda continues to financially support our household. She is currently working but we are expecting her to stop soon as she is nearing her expected delivery period.

The relevant part of Renilda's statement is paragraph 17, and it reads as follows:

> I wholeheartedly believe that Alban's role in my son's life and towards our expected newborn child will be crucial as I intend to financially support our household and want to return work, in the future. I am currently working, although I would be stopping soon as I am heading closer to my expected delivery date. I have attached proof of my employment.

The attached wage slips to which she refers demonstrated that she was employed at that time by 'MM Turkish Kitchen Ltd' and was paid £1,582.09 after deductions.

11. It is clear from both the judge's summary of the evidence and the witness statements made by the appellant and his wife, that the latter was no longer working at the date of the hearing. However, it remains unclear as to whether the income of the appellant's household was at that time derived from state benefits, his wife's income/savings, or a mixture of the two. One possibility is that there was evidence to the effect that Renilda had resigned from her position at 'MH Turkish Kitchen Ltd' prior to her confinement, and that whilst she was intending to seek further employment in the future, she was entirely reliant upon state benefits in the meantime. Another possibility is that the evidence was to the effect that Renilda remained in her employment with MH Turkish Kitchens Ltd, albeit currently on maternity leave, and that she intended to return to work with her current employers once her maternity leave had come to an end. A third possibility is that nobody sought to clarify this aspect of the evidence at the hearing, in which case the judge's summary of the position would have been entirely accurate. It was of course open to the judge, in such circumstances, to have asked questions of the witnesses with a view to clarifying the position. They were not however obliged to do so for the reasons that I gave at paragraph 8 (above). It would also have been open to the appellant's legal representatives to exhibit their note of the evidence with a view to showing that the judge's record of the evidence was inaccurate. It is not however possible to substantiate any such claimed inaccuracy in its absence.

12. Finally, even had it been the case that the appellant had established that he was financially independent of the state at the date of the hearing, I am satisfied that this could not have changed the outcome of the appeal. To explain why I have reached this conclusion, it is first necessary to consider the terms of sub-sections 1, 2, and 3 of section 117B of the 2002 Act -

> (1) The maintenance of effective immigration controls is in the public interest
>
> (2) It in the public interest, and in particular in the interests of the eocnomic well-being of the United Kingdom, that person who seek to enter or remain in the United Kingdom are able to speak English, becuase person who can speak English -
>
> (a) are less of a burden on taxpayers, and
> (b) Are better able to integrate into society
>
> (3) It is in the public interest, and in particular the interests of the economic well-being of the United Kingdom, that person who seek to enter or remain in the United Kingdom are financially independent, because such persons -
>
> (a) are not a burden on taxpayers, and
> (b) are better able to integrate into society.

13. It will be seen from the above that economic independence is but one facet of the public interest in "the maintenance of effective immigration controls". Its existence does not enhance a person's human rights, any more than its absence diminishes the public interest in maintaining effective immigration controls. Given the countervailing factors that the judge considered and placed in the balance at paragraphs 36 to 41 of their decision (summarised at paragraph 8, above), including the best interests of the child AB and the precarious nature of the immigration status of both his mother and step-father, the question of whether the appellant was financially independent of the state was matter that in my judgement was incapable of tipping the proportionality balance in the appellant's favour. I must emphasise, however, that my primary reason for dismissing this appeal is that it has not been shown that the First-tier Tribunal was in error in stating that the appellant had failed to provide evidence that he was financially independent of the state.

Notice of Decision

14. The appeal is dismissed, and the decision of the First-tier Tribunal therefore stands

Judge Kelly: David Kelly Date: 15th October 2024

Deputy Judge of the Upper Tribunal