Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/06757/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6th December 2019	**On 24th December 2019**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR X A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Mr L Youssefian, Counsel, instructed by Malik & Malik Solicitors

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The application for permission to appeal was made by the Secretary of State but nonetheless, hereinafter I shall refer to the parties as they were described before the First-tier Tribunal, that is Mr X as the appellant.

The Secretary of State applies with permission to appeal the decision of the First-tier Tribunal Judge K M Verghis in allowing the appellant's appeal on human rights grounds. The appeal on asylum and humanitarian protection grounds was dismissed.

The appellant is a citizen of Albania born on 11th March 2000 and it was accepted that he had been a victim of trafficking and as such, the judge had regard to the Joint Presidential Guidance Note No 2 of 2010, Child, vulnerable adult and sensitive appellant guidance. His mother whilst in Albania had a relationship with a man called A, the leader of a criminal gang in Albania who took the appellant's mother to Italy to become a prostitute. She and the appellant travelled to Italy, but the mother made arrangements to escape. The mother was discovered and detained by police and he has not seen her since 5th January 2014. The appellant has a sister in Albania who lives with her husband in Burrell and his grandparents died in 2014 and 2017. His brother lives in the UK, fifteen minutes' walk away from where he lives, and he sees him almost every day.

The judge recorded in the evidence at paragraph 13 that:

> *"The appellant does not feel safe in Albania. All he knows is that A has power over people, and he does not know any more about him. He is a danger. Albania is a very corrupted country and the police don't do things in the right way there are lots of protests as the government is not helping the country. The appellant does not see the point in going back there and does not see a difference."*

At paragraph 14 of the evidence the judge recorded:

> *"His brother has just got his visa and the appellant has his own. He does not rely on his brother. The appellant does not remember anyone back home. He has been with his partner for two years and it is a serious relationship. They want to take things slowly and be a family. He sees her every week and stays at her parents' house. It would be problematic if he didn't see her. She has bipolar disorder relies on the appellant. He is the only person who is able to help her with her illness and the way she feels emotions."*

The judge made the following findings at paragraph 33:

> *"The appellant has made enquiries through the British Red Cross about his mother, (those enquiries have been negative) and so he does not know her whereabouts. … Given that the last place A was seen as Italy in 2014, it is far from certain that he is in Albania."*

At paragraph 34 the judge found that:

> *"The appellant's claim for international protection rests substantially upon his fear of being found and killed by A; this is because the appellant's mother escaped with the appellant from A. The appellant asserts that his mother was the victim of trafficking and that he would be at risk of being trafficked upon his return to Albania as a lone male and at risk of serious violence or death at the hands of A.*

The judge did not find that he had engaged a Convention reason and that although the journey and the circumstances which led him to the UK were troubling it did not fulfil the test of real risk of serious harm.

The judge stated at paragraph 36: "I accept the respondent's submissions on sufficiency of protection. … There is no suggestion that A has any links or influence on the police in Albania. Appellant has never been identified."

At paragraph 37 the judge found:

> *"The appellant in strict terms was not trafficked. As he has a sister in Albania with whom he is in contact, it is open to him to seek her help and support in settling there. He is therefore not a lone male on return. The appellant is able to communicate in the native language and is now an adult. He is in good health. He has attained qualifications whilst in the UK. He has not since entering the UK been at risk of domestic abuse. He has not been the victim of sexual abuse within the family."*

In sum, at paragraph 37 the judge stated: "I conclude that relocation within Albania would be possible for this appellant."

The judge found that the appellant would have some vulnerability but that was not the same as persecution and was not entitled to international protection.

Similarly, at paragraphs 39 and 40 the judge found that he was not at risk of serious harm from A and that he could obtain sufficiency of protection.

Those findings in relation to international relocation and humanitarian protection were not challenged by the appellant. The judge proceeded in terms of Article 8 and stated at paragraph 45:

> *"If an applicant fails to meet the Rules, it should only be in genuinely exceptional circumstances that there would be a breach of Article 8. In this context 'exceptional' means circumstances in which a refusal would result in unjustifiably harsh consequences for the individual so would not be proportionate. The same considerations would apply to paragraph 276ADE."*

The judge proceeded to apply Section 117B of the Nationality, Immigration and Asylum Act and found the appellant having attended mainstream school in the UK since he was 13 and was able to speak English.

At paragraph 49 the judge noted that little weight should be given to private life established at a time when a person is in the UK unlawfully or at a time when the person's immigration status is precarious and noted that the public interest in ensuring immigration controls were maintained by removing those who had no right to remain, paragraph 55. At paragraph 52 she stated this:

> *"52. The Appellant's leave has always been precarious. The respondent accepts that the account as to the appellant's mother's trafficking is plausible and therefore his connection to that scenario. He sought assistance in a timely way when in the UK. The appellant therefore attempted to regularise his position as soon as he could and has lived as a supported minor since entry to the UK.*
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> *53. In terms of his private life, the respondent concedes that this aspect of the appeal is the appellant's strongest. The appellant is in the fortunate position that he has found his brother in the UK. The appellant has no relationship with his biological father as his parents' relationship broke down before he was born. He has a sister in Albania with whom he has electronic contact. His grandparents with whom he lived within Albania, have both died. The most tenable and nurtured relationship for the appellant is the relationship with his brother and his sister-in-law. When giving evidence about this relationship, I found that the appellant somewhat underplayed the value of the relationship when describing the level of dependency. What is clear from his evidence, is that the appellant sees his brother and sister-in-law very regularly and this is an important and nourishing form of family contact for this young appellant, especially so given he cannot draw on the support of parents or grandparents. At the time of writing, this appellant is 19 years of age and on the threshold of adult life. I accept to the ordinary civil standard the closeness of this relationship which I find goes beyond a normal sibling relationship and that the appellant's older brother stands in a quasi-parental role.*
>
> *54. I take account of the appellant's relationship with his partner. I accept her evidence and that of her mother. This is a relationship of less than two years duration. I accept the health issues of the appellant's partner but have not seen medical evidence to support the assertions made. Although still developing I accept that this is a genuine and subsisting relationship."*

The judge stated that she took account of his important years of development here, a traumatic journey where he lost all contact with his only parent, he had made good use of the opportunities and that he had a very close relationship with his brother and sister-in-law. His brother in essence was acting in a quasi-parental role. The judge took into account the progress in education and his close relationship with his partner.

The judge also acknowledged he had a sister in Albania, spent all his life in Albania until he travelled to the UK and it was possible, he could relocate to Albania "although this would be very difficult for him".

The Secretary of State in the grounds of appeal stated that the judge had made a material misdirection in law on a material matter by stating that the appellant had established family life with his UK sibling. It was argued that there was nothing in the appellant's case which went beyond normal emotional ties to constitute family life for the purposes of Article 8. The judge at paragraph 11 had recorded that his brother lives in the UK and is fifteen minutes' walk away from where he lives. He sees him almost every day. He does not reside with his brother and paragraph 14 stated "he does not rely on his brother".

Reliance was placed on **Singh & Anor v SSHD [2015] EWCA Civ 630**:

> *"The love and affection between an adult and his parents or siblings will not of itself justify a finding of a family life. There has to be something more. … On the other hand, a young adult living independently of his parents may well not have a family life for the purposes of Article 8."*

Ground 2 asserted that the judge had failed to correctly carry out the proportionality balancing exercise in accordance with the requirements of 117B of Part 5A of the Nationality, Immigration and Asylum Act. The judge stated at paragraph 56 that the appellant had "significant private life".

It was argued that this was contrary to the requirements of Section 117B (4) and Section 117B(5), which require little weight to be attached to a private life established with unlawful or precarious immigration status.

Analysis

At the hearing Mr Tufan produced the authorities of **Miah (section 117B NIAA 2002 – children) [2016] UKUT 00131**, which held that Section 117B made no distinction between adult and child immigrants. Albeit the appellant had entered the UK at the age of 13 following an incident of trafficking that did not negate the application of Section 117B (5). Also cited was **AAO v Entry Clearance Officer [2011] EWCA Civ 840** at paragraph 35, which held that:

> *"35. As for the position of parents and adult children, it is established that family life will not normally exist between them within the meaning of article 8 at all in the absence of further elements of*

> *dependency which go beyond normal emotional ties: see S v. United Kingdom (1984) 40 DR 196, Abdulaziz, Cabales and Balkandali v. United Kingdom [1985] 7 EHRR 471, Advic v. United Kingdom [1995] EHRR 57, Kugathas v. SSHD [2003] EWCA Civ 31, and JB (India) v. ECO [2009] EWCA Civ 234. That is not to say that reliance on the further element of financial dependency will bring a breach of article 8: no case in which it has in the present context has been discovered."*

There was initially a discussion as to whether the appellant had relied on the private life with his brother owing to the production of a further decision dated 29th January 2019 in relation to Article 8 protected right with the appellant's girlfriend, C. That relationship could not come within the scope of Appendix FM because they had not been living together or had been in a relationship for the previous two years.

The Secretary of State's decision, however, did consider the relationship with his brother and found that it was not demonstrated that it remained one of dependency between adult siblings and contact could be maintained through modern forms of communication.

The Secretary of State effectively argued two grounds, the first that the appellant had not established a family life with his brother because the relationship did not go beyond normal emotional ties and secondly that the judge did not carry out the proportionality balancing exercise in accordance with the requirements of Section 117B(4) and (5), which required little weight to be attached to a private life established when it was precarious.

The consideration of the family life with the brother was not a new issue, as can be seen from the decision dated 29th January 2019 of the Secretary of State, and effectively considered through the lens of his private life. Mr Tufan took issue with the judge's approach to the extent of the relationship, particularly the reference to finding

> *"the appellant somewhat underplayed the value of the relationship when describing the level of dependency"*

but the judge did proceed to find that "the appellant sees his brother and sister-in-law very regularly and this is an important and nourishing form of family contact for this young appellant, especially so given he cannot draw on the support of parents or grandparents." The judge noted that the appellant was an adult at the age of 19 but found that the relationship went beyond normal sibling relationship and that the appellant's brother stood in a quasi-parental role. Clearly the judge found, in these particular circumstances, a close relationship with the brother, owing to the young age of the appellant, the loss of his parent, the experience of his mother being trafficked, did equate to being beyond normal emotional ties. This is implicit in the findings.

Even so, the relationship with the brother effectively was considered as an integral part of the appellant's private life.

It was the judge who listened to the oral evidence given by the appellant and had a first-hand opportunity to examine his evidence. She also found that there was a genuine and subsisting relationship with the girlfriend, albeit that it did not fall within the ambit of the Immigration Rules. The grounds of appeal refer to the appellant's evidence that "he does not rely on his brother". That, however, was in relation to his visa. The full context of that statement was recorded as follows:

> *"His brother has just got his visa and the appellant has his own. He does not rely on his brother. The appellant does not remember anyone back home."*

That, to my mind, is the reference to the visa and nothing more and thus, it was open to the judge to find that the appellant had a very close relationship with his brother. The grounds have sought to rely on a misunderstanding of the decision. The reasoning of the judge, although brief, illustrates the reliance of the appellant on his brother.

It is not manifest that the judge failed to appreciate that Section 117B applies to minors as well as adults as per **Miah (section 117B NIAA 2002 – children).** This is because it is clear that the judge did direct herself appropriately in relation to Section 117B(4) and (5), as can be seen from her legal self-direction at paragraph 49, stating that little weight should be given to a private life established when a person's immigration status is precarious.

The judge noted the public interest and specifically made findings in relation to the appellant's ability, for example, to speak English. There is no challenge in relation to the fact that the appellant was not self-sufficient and that he had lived as a supported minor since entry to the United Kingdom. The judge found that the appellant had developed a significant private life and Section 117B governs the weight to be accorded to that private life.

As set out at paragraph 50 by the judge, **Rhuppiah v Secretary of State for the Home Department [2016] EWCA Civ 803** confirms that Section 117B intended a structured approach but does not impose a straitjacket on the decision maker and all relevant factors have to be taken into account. It is not conceivable that the judge would not have been aware of the provisions of Section 117B, when making her decision. She was aware, for example, that the appellant had only been in the United Kingdom since 2014 but equally, the appellant had spent "important years of development here" particularly that he had been at school here since the age of 13 years, a very significant period of time of the appellant's formative years. The judge had set out in detail the circumstances of the appellant when refusing the asylum claim, for example the traumatic experience the appellant had undergone in losing his parent and the context of the trafficking.

The judge did apply a balance sheet approach and applied the correct test as set out by **R (Agyarko) [2017] UKSC 11**, that of unjustifiably harsh consequences.

Albeit that the appellant had only been in the UK for five years, he had come here at the age of 13 owing to the travails of his mother, and significantly, the judge stated at paragraph 59 that "with reference to all the cumulative factors in this appeal" that she found that to separate this appellant from his brother, sister-in-law and partner would have, in the context, unjustifiably harsh consequences for the appellant and thus, the refusal of grant of leave would be in these circumstances disproportionate.

The judge's decision may have been generous but the approach to proportionality did not disclose legal error. It should be noted that mere disagreement about the weight to be accorded to the evidence is a matter for the judge and should not be characterised as an error of law, **Herrera v The Secretary of State for the Home Department [2018] EWCA Civ 412**.

I am further emboldened by **UT (Sri Lanka) [2019] EWCA Civ 1095**, which held at paragraph 19:

> *"Although 'error of law' is widely defined, it is not the case that the UT is entitled to remake the decision of the FtT simply because it does not agree with it, or because it thinks it can produce a better one.*
>
> *Baroness Hale in **AH (Sudan) v Secretary of State for the Home Department** at [30] held:*
>
> > *'Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently.'"*

For these reasons, I find no error of law and the decision of the First-tier Tribunal should stand.

Signed Helen Rimington Date 21st December 2019

Upper Tribunal Judge Rimington