IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000707
First-tier Tribunal No: HU/06370/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 12 April 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE
DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

ORGEST HOXHA
(no anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Chirico, instructed by Wilson Solicitors LLP
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

Heard at Field House on 17 February 2023

DECISION AND REASONS

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his human rights claim following the making of a deportation order against him under section 32(5) of the UK Borders Act 2007.

2. The appellant is a national of Albania born on 9 June 1990. He claims to have arrived in the UK on 18 October 2012. On 2 October 2014 he applied for leave to remain on the basis of his Article 8 human rights, but that application was refused without a right of appeal on 13 November 2014. He was served with a notice of liability to removal on 23 October 2014 and was placed on reporting restrictions, but he absconded from 22 December 2014. His application of 2 October 2014 was subsequently reconsidered and re-refused on 3 February 2015 and certified as clearly unfounded under section 94(2) of the Nationality, Immigration and Asylum Act 2002. The appellant sought to challenge that decision by way of judicial review but was

© CROWN COPYRIGHT 2023

refused permission and he then remained at large and was listed as an absconder on 24 November 2016.

3. The appellant was caught by the police on 22 September 2019. On that occasion the police had intervened in a fight between the appellant and another man and had discovered a significant amount of cocaine and cannabis in his possession. Checks made on his identity had revealed that he was in breach of the immigration regulations and he was arrested. The appellant was subsequently convicted, on 21 October 2019, of possession with intent to supply a controlled Class A drug, cocaine, and possession with intent to supply a controlled Class B drug, cannabis. He was sentenced to a total of 34 months' imprisonment.

4. On 18 November 2019 the appellant was served with a decision to deport under section 32(5) of the 2007 Act. On 24 October 2019 (I assume the stated date was intended to be 24 November 2019) the appellant's solicitors made representations in response to the decision to issue a deportation order, relying upon the fact that he was in a long-term relationship with a qualified person, Alina Necula, a Romanian national, for the purposes of the Immigration (EEA) Regulations 2016. It was asserted that the appellant met his partner Ms Necula through social media. She was residing in Italy at the time but came to the UK to meet the appellant. They met for the first time in person on 29 July 2018, from which time they resided together, with his brother and his brother's wife and children, until his arrest on 22 September 2019. It was asserted that although the relationship was less than two years in duration, it was a genuine and durable one and that "he can seek to be an extended family member of a qualified person for the purposes of the Immigration (EEA) Regulations". It was asserted that, as the family member of an EEA national, the appellant met an exception to deportation and that he also met the exception under s33 of the UK Borders Act 2007 on the basis of his private life in the UK including his relationships with his brother and his brother's wife and children.

5. On 13 January 2020 the respondent signed a Deportation Order against the appellant and on 14 January 2020 she made a decision to refuse his human rights claim. In that decision the respondent did not consider that the evidence produced by the appellant was sufficient to demonstrate that a durable relationship existed for the purposes of the EEA Regulations and considered that there was not sufficient for there to be consideration of whether the requirements of regulation 8 of the EEA Regulations were met. The respondent considered that it would not be unduly harsh for Ms Necula to live in Albania and that there were no insurmountable obstacles to family life continuing in Albania or Romania. The respondent considered further that it would not be unduly harsh for Ms Necula to remain in the UK even though the appellant was deported. The respondent considered that the exception to deportation on family life grounds under paragraph 399(a) of the immigration rules was therefore not made out. It was considered further that the appellant could not meet the requirements of paragraph 399A of the immigration rules on the basis of his private life as he had not been lawfully resident in the UK for most of his life, he was not socially and culturally integrated in the UK and he would be able to re-integrate in Albania. The respondent concluded that there were no very compelling circumstances outweighing the public interest in the appellant's deportation.

6. The appellant's appeal against that decision was initially heard by Judge Chohan in the First-tier Tribunal on 14 April 2021. At that hearing, the appellant's legal representative raised a preliminary issue, namely that the respondent had failed to make a decision under the EEA Regulations 2016 and that, whilst it was accepted that the appeal before the First-tier Tribunal was a human rights appeal, it was asserted

that the matter should be considered through the lens of the EEA Regulations. Judge Chohan did not accept that and said that he would only consider the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002. He went on to consider the exceptions to deportation under section 117C of the 2002 Act. He concluded that the serious nature of the appellant's offences justified his deportation. He accepted that the appellant had established a family life in the UK with his Romanian partner but considered that it would not be unduly harsh on her if he was deported and he did not accept that either the family life or the private exceptions to deportation applied to him.

7. Following an application made on behalf of the appellant for permission to appeal Judge Chohan's decision, the decision was reviewed under Rule 35 of the Tribunal Procedure (First-tier Tribunal)(Immigration and Asylum Chamber) Rules 2014 on 8 June 2021. It was proposed to set aside Judge Chohan's decision on the grounds that, since the respondent had accepted at the hearing that the appellant was in a durable relationship with an EEA national, the judge should have gone on to consider the appellant's position on that basis in the proportionality balance rather than excluding it from consideration. The judge's decision was subsequently set aside and directions were made by First-tier Tribunal Judge Froom, on 28 September 2021, for the appellant to file and serve a bundle of documents together with a skeleton argument setting out his position as to how his deportation ought to be considered through the EEA lens.

8. The appeal then came before First-tier Tribunal Judge Rothwell on 29 November 2021 and both the appellant and his partner gave oral evidence before her, his partner having returned to the UK from Romania to attend the hearing. The appellant's community offender manager also gave oral evidence at the hearing. Judge Rothwell noted that no skeleton argument had been served as per the directions previously given. She set out the appellant's case again, noting that he disagreed with the OASys report stating that he was a drug dealer and claiming that he had bought the drugs to distribute between friends at a party. Judge Rothwell noted further, and raised the issue at the hearing, that the appellant had previous convictions for drug dealing in 2010, in Italy, for which he received a suspended sentence of two years and nine months, and was deported, and in 2012, in Spain, for which he also received a suspended sentence and was awaiting deportation. These had been mentioned in the 2014 decision letter.

9. The judge also had before her a statement from the appellant's partner which had not been before Judge Chohan and which provided additional reasons why the appellant should not be deported. The appellant's partner's evidence in her statement was that she had moved to Italy in 2016 when her marriage to her husband in Albania ended, in order to obtain a better paid job, and she had worked there. She had two sons in Romania and she supported them financially. She met the appellant in 2018 and came to the UK. She returned to Romania in the summer of 2021 to see her children, intending to bring them back to the UK with her, but her ex-husband was abusive to her and the children and she was forced to find alternative accommodation for them in Romania and leave them there. She went back to Romania on 23 September 2021 and was in the process of applying to the Romanian court for custody and to be allowed to relocate her sons to the UK. She had been granted pre-settled status in the UK and she and the appellant intended to get married. The appellant's partner's evidence at the hearing was that she had to return to Romania to deal with the proceedings and that the proceedings would end before the divorce, after which she would bring her sons to the UK. She said that she had a cleaning company in the UK.

10.Judge Rothwell found that the appellant and his partner were in a committed relationship and had been in such a relationship since meeting in person on 29 July 2018. She noted that the appellant had been detained from 22 September 2019 until 5 March 2021 and that since 23 September 2019 the appellant’s partner had been in Romania, only returning to the UK for the appeal hearing. She found that, even without the appellant and his partner cohabiting for two years, there was a committed relationship, but considered that it was not certain the appellant could be considered as an extended family member because of his convictions for dealing drugs. The judge noted the lack of evidence about the custody proceedings in Romania and the situation of the appellant’s partner’s sons and noted that the appellant’s partner was unable to give a time frame as to when the custody proceedings would be resolved. She noted that there was no evidence about the appellant’s partner’s cleaning company and the profits she made from that and she found that the appellant’s partner was not exercising treaty rights. The judge concluded that the appellant could not meet the exceptions to deportation under paragraph 399, as the appellant’s partner was not British or settled in the UK and her children were not qualifying children. She found that there were no very compelling circumstances for the purposes of section 117C of the 2002 Act and concluded that the public interest in the appellant’s deportation was not outweighed by his family or private life. She accordingly dismissed the appeal.

11.The appellant sought permission to appeal to the Upper Tribunal. Permission was refused in the First-tier Tribunal, but was granted in the Upper Tribunal on a renewed application. The appellant’s three grounds were that: the judge had erred in her approach to the question whether the appellant’s partner was exercising treaty rights in the UK such as to entitle her family members to residence rights (with reference to Article 16(3) of the Citizens Directive); the judge had made errors in her approach to the question whether the appellant was an extended family member of his partner; the judge had erred by failing to approach the question of the relevance of past and potential criminality lawfully. Permission was granted on ground one, with grounds two and three being dependent upon ground one.

12.The respondent filed a rule 24 response opposing the appeal on the grounds that the case now being advanced by the appellant was not one that had been argued before the judge and that there had been no challenge made under the EEA Regulations 2016 in the First-tier Tribunal.

Hearing and Submissions

13.The matter then came before us and both parties made submissions.

14.Mr Chirico addressed the rule 24 response first of all. He submitted that there had always been a challenge under the EEA Regulations 2016, as was clear from the appellant’s solicitors’ letter of 24 October 2019 and the reference in the refusal decision to that letter. Despite there having been no skeleton argument served by the appellant’s representatives at that hearing, the issue was squarely before the First-tier Tribunal in the context of the balancing exercise for a human rights appeal. The question of whether or not the appellant had rights under EU law affected the balancing exercise. If he had facilitation rights the relevant test would be that of a “genuine, present and sufficiently serious threat” and not the public interest test under section 117C of the 2002 Act. The reason why the First-tier Tribunal Judge said that she placed little weight on the EU issue was not because it was not before her, but because she found that the appellant’s partner was not in the UK exercising treaty rights. It had never previously been an issue that the appellant’s partner was not exercising treaty rights, but it was something the judge raised herself. The respondent

had only previously raised the issue of whether the relationship was durable. Mr Chirico accepted that the argument raised in his first ground in relation to Article 16(3) of the Citizens' Directive had not been raised before the judge, but he submitted that the question of the interruption of the exercise of treaty rights only arose after the judge raised the issue.

15.As for the substantive issue, Mr Chirico relied upon his grounds of appeal and made some additional submissions. He submitted, with regard to the first ground, that the evidence before the judge was that there was a proper reason for the interruption in the appellant's partner's residence and exercise of treaty rights, namely that she had spent the summer of 2021 in Romania because of the custody issue with her children. The judge had not asked the appellant's partner what she would do if the custody issue was not resolved within six months. As for the assertion in the second ground, that the judge had misdirected herself in law by finding the appellant's criminal convictions relevant to the question of whether he was an extended family member, Mr Chirico accepted that that was immaterial if her finding, that the appellant was in a durable relationship, was sound. With regard to the third ground, the Tribunal needed to consider the consequences of a finding of a low risk of re-offending within EU law, and the different test that would have applied when considering the question of risk.

16.Mr Walker submitted that the respondent maintained reliance upon the rule 24 response, but accepted that if we found that there were live issues before the judge which she had not dealt with, the matter would need to be remitted for all aspects to be considered again in the context of EEA law. Mr Chirico agreed that remittal would be appropriate in such circumstances, as there was a lot more evidence to consider.

17.However, in the event, we have found no error of law in Judge Rothwell's decision and the matter therefore does not arise. We set out our reasons below.

Discussion

18.As a preliminary matter, we would point out that in so far as Mr Chirico's grounds, at [3], assert that it had always been a ground of appeal before the First-tier Tribunal that the respondent ought to have made a decision under the EEA Regulations, it is clear that the EU issue before us was argued only as part of a human rights appeal. At [4] of Judge Chohan's decision, it was accepted by the appellant's solicitors at that time that the appeal was a human rights appeal and that the extent of the EU element was that the human rights appeal had to be considered "through the lens of the EEA Regulations". That was again made clear in the appellant's grounds seeking permission to appeal against Judge Chohan's decision which led to the decision being set aside, whereby [4] of the grounds explicitly stated that the judge was not being asked to make a decision under the EEA Regulations but was being asked to consider his human rights appeal (in particular Article 8 and the assessment of proportionality) in the context of the appellant's relationship with an EEA national exercising their rights under the directive. That was reiterated at [19] of those grounds and Judge Chohan's decision was set aside on the basis that he had failed to consider that matter as part of the Article 8 proportionality balance. Subsequent to Judge Chohan's decision being set aside, the appellant was specifically asked, in an order from FTTJ Froom, to explain how his deportation was to be considered "through the EEA lens" but no skeleton argument was produced.

19.Judge Rothwell therefore proceeded on the basis upon which the appeal was presented to her, namely that the EU element of the appellant's case arising from his relationship with an EEA national was relevant in so far as it played a part of the Article 8 proportionality assessment. It is clear from the submissions she recorded for

the appellant, at [61] to [64], that that was the only context in which the EEA Regulations were raised and argued. We do not see that Mr Chirico was suggesting otherwise and indeed we note that he accepted in his submissions that the EU issue was before the FTT in the context of an Article 8 balancing exercise. In so far as the respondent's rule 24 response appears to suggest that the EU issue was not live before Judge Rothwell, that is clearly wrong. As for the further issues raised in Mr Chirico's grounds relating to Article 16(3) of the Citizens' Directive, we shall address those later.

20.Albeit perhaps not expressed in the clearest of terms (as discussed below), it was Judge Rothwell's finding that the appellant did not derive any benefits under the EEA Regulations himself as the family member of his EEA national partner, having made no relevant application prior to the UK's departure from the EU, and it being uncertain that he could qualify as such in any event, as she found at [96]. It was also her finding that the appellant did not derive benefits as an extended family member because his partner was not a qualified person for the purposes of the EEA Regulations, owing to the lack of evidence to show that she was exercising treaty rights in the UK.

21.The appellant's grounds seek to challenge both elements of that decision. With regard to the first point, the grounds challenge the judge's finding that it was not certain the appellant could be considered as an extended family member because of his convictions for dealing drugs. That was something she said at the end of [68] and [96]. It is asserted that the appellant's criminal convictions were irrelevant to whether or not he was an extended family member. Indeed that is the case and, at first blush, it does seem that the judge erred in that respect. However, when considering the judge's comment in the context of the rest of her findings at [96], it becomes apparent what she meant. At [96] the judge said that "*when the relationship was formed in 2018, the United Kingdom was in the EU, and the appellant being here illegally would not have precluded him from making an application as an extended family member based upon his durable relationship…*". It is clear that she was referring to the possibility of the appellant having applied for facilitation of his residence as an extended family member prior to the UK's withdrawal from the EU, for the purposes of having EU rights as the family member of an EEA national. The point she was making was that there was no certainty that the appellant would be granted a residence card as an extended family member owing to his criminal convictions. That was clearly a finding which was open to her, as consistent with regulation 24(1) of the EEA Regulations.

22.In any event, and irrespective of such a finding, the judge found that the appellant did not derive any EU rights through his durable relationship with his partner because she was not exercising treaty rights in the UK and was therefore not a qualified person for the purposes of the EEA Regulations. That was a finding the judge repeated at several points in her decision, at [80], [83], [93], [100] and [102], and is challenged in the appellant's first ground of appeal. It is the appellant's assertion, in his first ground of appeal, that the basis for the judge's finding that the appellant's partner was not exercising treaty rights in the UK, namely because she had been in Romania since 23 September 2021, was a legally inadequate one. That is because she had already been accepted as a qualified person on the basis of her previous exercise of treaty rights, having been granted pre-settled status, and her absence from the UK would not interrupt the five year process of obtaining permanent residence and thus settled status if it fell within Article 16(3) of the Citizens' Directive. The grounds assert that Judge Rothwell erred in law by failing to consider whether Article 16(3) applied in terms of the length of the appellant's partner's absence from the UK and the reasons for her absence.

23.In so far as that was never a matter raised or argued before the judge, we have to agree with the respondent’s rule 24 response that it cannot give rise to an error of law on the part of the judge. In any event, however, that was a matter to which the judge applied her mind, albeit not by way of a specific citation of Article 16(3). The judge repeatedly referred to the issue of the timeframe for the appellant’s partner’s absence from the UK. At [69] she recorded having asked the appellant’s partner how long before the proceedings in Romania were likely to be resolved and having been given no time-frame in response. She noted at [69] and [70] that there was no evidence relating to the custody proceedings in circumstances where it was reasonable to expect such evidence to have been adduced and that it was therefore difficult to assess what the position was and if the children would be permitted to come to the UK. At [83] and [84] she reiterated that the appellant’s partner was unable to give her a timescale as to when the proceedings might be concluded, that she remained living with her sons in Romania and that the situation was uncertain. At [93] she found again that there was no indication when the appellant’s partner would return to the UK. In addition, the judge noted the lack of evidence to show that the appellant’s partner had not ceased exercising treaty rights in the UK. She noted at [86] that there were a few payslips from 2019 and a P45 but that there was a lack of any evidence of her claimed cleaning business and a lack of evidence of any recent, current or intended future employment and income. In the circumstances, the judge clearly considered matters relevant to Article 16(3) and was perfectly entitled to consider that continuity of residence and exercise of treaty rights in the UK had not been established by the evidence.

24.We reject the assertion in Mr Chirico’s grounds, at [17], that the judge had acted with procedural unfairness in making adverse findings on the appellant’s partner’s exercise of treaty rights. The appellant would have been fully alert to the requirement to address all relevant factors relating to his acquisition of rights under the EEA Regulations if that was an argument he was pursuing. Although the respondent focussed, in her decision, on the lack of evidence of a durable relationship, that did not mean that there had been any concession on the question of the appellant’s partner exercising treaty rights and that was a matter the appellant would have known needed to be addressed, particularly given the fact of her absence from the UK. The judge’s opinion of the appellant’s previous solicitors was immaterial to her assessment of the evidence that was, or was not, before her and she was fully entitled to consider it reasonable for the circumstances relied upon by the appellant for his partner’s absence from the UK to have been supported by evidence. As for the point made in the grounds at [17(d)] about the appellant’s partner’s status, it is clear that the judge was fully aware that she had pre-settled status in the UK and clearly intended to refer, at [80], to an application for settled status having been made.

25.Accordingly, for the reasons properly given, the judge was fully entitled to conclude that the evidence did not demonstrate that the appellant’s partner was a qualified person under the EEA Regulations and was entitled to conclude that the appellant therefore derived no benefit from his relationship with his EEA national partner in terms of EU rights and in terms of the Article 8 proportionality assessment. The judge took into account the relationship in her Article 8 proportionality assessment on the relevant basis and to the extent to which the evidence permitted. That is, as a relationship with an EEA national who was outside the UK with no evidence of a timeframe for her return and who had ceased exercising treaty rights in the UK with no evidence of there being any resumption of the exercise of such rights, and on the basis that he had previously had the opportunity to make an application for facilitation of residence prior to the UK’s exit from the EU but had not done so. The judge considered the impact of the appellant’s deportation to Albania on his partner in that context and

had full regard to the options available to them to maintain their family life, according the appropriate weight to those matters in her Article 8 proportionality assessment and applying the relevant statutory framework in section 117C of the 2002 Act.

26.There was no challenge by the appellant to the judge's findings on Article 8 other than by way of the EU element already discussed. In terms of the judge's assessment of the appellant's criminality and the risk he posed to the public, the challenge was only made in relation to EU law and Mr Chirico accepted that ground three was dependent upon his first ground. Accordingly there is no merit in the assertion that the question of risk the appellant posed to the community ought to have been assessed by the judge in the context of the "genuine, present and sufficiently serious threat" test under the EEA Regulations rather than in the domestic law context. The appellant was not the family member of an EEA national and he therefore did not benefit from EU rights in assessing risk.

27.Although not specifically argued at the hearing, Mr Chirico's grounds at [31] raised some further matters in relation to the judge's assessment of criminality. We find no merit in the assertions made. The judge was perfectly entitled to take account of the evidence of the appellant's past convictions in Spain and Italy when deciding the weight to be given to the professional assessment of the risk he posed, given that those professional assessments were largely made without knowledge of those past convictions. Further, we do not agree that the judge failed to consider the appellant's evidence in his witness statement or made a mistake as to fact when concluding at [73] that he had not demonstrated remorse. The judge was clearly aware of the appellant's evidence in his statement in that regard, as recorded at [31(ii)] of the grounds, but was entitled to give more weight to the matters she recorded at [74] and [75].

28.For all these reasons we conclude that Judge Rothwell made no errors of law in her decision and we uphold her decision.

Notice of Decision

29.The making of the decision of the First-tier Tribunal did not involve an error on a point of law requiring it to be set aside. The decision to dismiss the appeals stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 February 2023