In the Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI -2024-000829
First Tier No: PA/50243/2023
LP/03008/2023

THE IMMIGRATION ACTS

Heard at Field House
On 12 April 2024

Decision & Reasons Issued:
On 29 April 2024

Before

HIS HONOUR JUDGE HANBURY
SITTING AS A DEPUTY UPPER TRIBUNAL JUDGE

Between

GT
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Gajjar of Counsel
For the Respondent: Mr Terrell, a senior Home Office presenting officer

DECISION AND REASONS

Introduction

1. The appellant appeals the decision of FTT Judge Wolfson (the judge). The appeal was heard at the First-tier Tribunal (FTT) at Taylor House (TH) on 16th of January 2024 and it would appear was promulgated on 13th of February 2024.

2. Judge Stuart PJ Buchan gave permission to appeal that decision on 1st March 2024, considering that ground 1 of the grounds of appeal (the grounds) to be at least arguable. Ground 1 states that there had been a material mistake of fact in the FTTJ's decision. The arguable error of fact relates to the appellant's alleged overstaying after expiry of discretionary leave. It is common ground that this is factually incorrect in that the appellant never had discretionary leave to remain. It was argued that this finding might have affected the judge's balancing exercise under article 8 of the ECHR. Therefore, it was said at paragraph 5 of the grounds of appeal (part of ground 1) that as the appellant has never been granted discretionary leave to remain, he had not been in a precarious position as was stated in the decision.

Background

3. The appellant is a citizen of Albania, who was born on 11 April 2005 and was therefore, I was informed at the hearing, 14 years and 11 months old when he arrived in the UK in March 2020. He is now 19.

4. According to the grounds, the correct chronology is as follows:

   - On 26 March 2020 A entered the UK and claimed asylum;

   - On 13 December 2022 the respondent refused the application for permission to stay in the UK on grounds of humanitarian protection, family and private life or discretionary leave (I assume the reference to the application being made on 22nd of May 2017 is an error - as a footnote 1 to the grounds of appeal to the Upper Tribunal (U T) makes clear at p.11 of the PDF, page 14);

   - According to the judge's decision, on 7th January 2023 the respondent decided to refuse the appellant's protection and human rights' claims (this contradicts the respondent's review and other documents which indicate that the refusal was in fact on 13 December 2022);

   - On 13th January 2023 the appellant appealed the respondent's above decisions to the FTT.

- On 20 February 2024 the appellant attempted to appeal the FTT's decision and was subsequently granted the permission to appeal referred to in paragraph 2 above, i.e., to appeal the judge's decision under article 8.

The hearing

5. At the hearing before the UT Mr Gajjar did not seek to expand his grounds of appeal beyond ground 1 – the ground on which permission was given.

6. He pointed out that the judge had been wrong to identify the appellant as having precarious immigration status and it might make material difference to the assessment of this article 8 claim if he was correctly classified as someone who had come here to claim asylum but been unsuccessful. There were several points that could be made in his favour. For example, the appellant had been aged 14 when he came here and had been the victim of trafficking. He had spent four years in the UK. Whilst the appellant did not have a lengthy immigration history it could not be said that the error made by the judge would not make a material difference to the outcome. Nor could it be said that the appellant's case under article 8 was manifestly unfounded.

7. The respondent, on the other hand, accepted the factual error but said it did not make any difference to the actual assessment of the risk on return. The appellant's application under article 8 fell within the "little weight" provisions of section 117B of the Nationality, Asylum and Immigration Act 2002 (2002 Act) in any event. The judge had in fact taken account of all relevant factors in carrying out his assessment. For example, the judge had taken account of the appellant's mental ill - health, saying that he had PTSD, as well as the availability of facilities in Albania (see for example paragraph 24). The judge had also taken account of the appellant's young age and the fact that he had been trafficked. Therefore, despite the mistake in reference to the appellant having been given limited leave to remain the decision was a perfectly sound one even if it contained a minor error of fact.

8. Mr Gajjar responded to the effect that section 117B distinguishes between those who had initially been here unlawfully and those who became unlawful and also those that had been unlawful throughout their stay, and this could have an effect on the balancing exercise. He did not accept that section 117B had clearly been fully considered in the context of the wider case. The appellant had waited 2 ½ years for the respondent to make a decision in his case_and was entitled to the benefit of article 8, partly as a result of this delay. Although the

paragraph 27 has been extensively referred to by the respondent as an exercise of good analysis of the balancing exercise to be performed under article 8, the analysis was nevertheless flawed as long as a factual error was contained within the decision.

9. I was therefore invited by Mr Gajjar to allow the appeal and remit the appeal to the FTT for a fresh hearing.

Discussion

10. Section 117B makes no distinction between those who are here precariously and those who are here unlawfully for the purposes of assessing private life. The position would be otherwise if this was the claim to having established a family life in the UK. As is now well-known, section 117B is directed to the public interest considerations applicable to all cases. It provides that it is in the public interest and the interests of the economic well-being of the UK for persons who seek to enter or remain in the UK to be financially independent and little weight should be given a private life when a person is in the UK unlawfully. Little weight should also be given to private life established by a person at a time when his immigration status is precarious.

11. Section 117B (5) was considered by the Supreme Court in the case of *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58 in which it was held that:

> "… everyone who, not being a United Kingdom citizen, is present in the United Kingdom and who has leave to reside here other than to do so indefinitely has a precarious immigration status for the purposes of section 117B(5)".

12. There is no doubt that the appellant's immigration status is that he is either unlawful, following the refusal of his claim to remain here on the basis of asylum/humanitarian protection, or precarious in that it is tolerated for the purposes of the current appeal. The appellant did not have any right to stay in the UK. At best the difference between his probable actual status (precarious) and status he was assumed to have by the judge (someone who has exceeded a limited period of leave) is the same for the purposes of section 117B (5).

13. He has not been in the UK for a lengthy period time nor was any evidence furnished of significant ties with this country. It appears that all the relevant factors were taken account of by the judge and in particular the fact that the appellant had been a victim of trafficking, was of a young age and suffered from mental ill-health.

14. The question therefore is: did the judge's mistake as to the appellant's former status make any difference to his assessment? Can it be said that the appellant has an arguable claim for leave to remain under article 8/the Immigration Rules by virtue of his being treated as a person who exceed his leave when in fact, he is someone who came here and unsuccessfully claimed asylum?

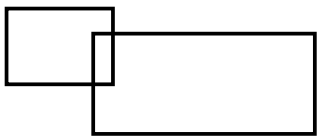
Conclusion

15. In my judgement the judge made a full assessment of the facts relevant at the date of the hearing which could have had a bearing on the decision to remove the appellant. Having looked carefully at all the facts and having accepted much of the appellant's evidence, the judge was right to consider that the appellant's precarious immigration status was a material factor as were, potentially, the other matters set out in the FTT's decision. Thus there was no material error of law in this decision and in particular the decision that the appellant did not qualify under article 8 was a decision open to the judge.

Notice of Decision

The appeal is dismissed.

An anonymity direction was made. I have considered whether it ought to be lifted but have decided it should be continued in accordance with the decision of the FTT.

Signed  Dated this 19th April 2024

HHJ Hanbury sitting as a Deputy Judge of the Upper Tribunal