Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/12390/2019
PA/02323/2020

THE IMMIGRATION ACTS

Heard as a hybrid hearing at Field House	**Decision & Reasons Promulgated**
On 10 September 2021	**On 12 October 2021**

Before

UPPER TRIBUNAL JUDGE BLUM

Between

MIFTAR BAJRATARI
ERJON BAJRAKTARI
(ANONYMITY DIRECTION NOT MADE)

Appellants

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellants: Mr A Chakmakjian, counsel, instructed by Turpin & Miller LLP
For the respondent: Mr T Lindsay, Senior Home Office Presenting Officer

This decision follows a hybrid hearing. Mr Chakmakjian attended the hearing by video link, the platform was Microsoft Teams.

DECISION AND REASONS

Background

1. These are appeals against the decision of Judge of the First-tier Tribunal Bird ("the judge") promulgated on 12 February 2021 in which she dismissed the protection and human rights appeals of Miftar Bajraktari ("the 1st appellant") and Erjon Bajraktari ("the 2nd appellant") against a decision of the Secretary of State for the Home Department ("respondent") dated 3 December 2019 refusing the 1st appellant's protection and human rights claim, and a decision of the respondent dated 24 February 2020 refusing the 2nd appellant's protection and human rights claim which was made after the 2nd appellant entered the UK in breach of a deportation order signed against him on 30 August 2017.

2. Both appellants, who are brothers, are nationals of Albania. The 1st appellant was born on 8 March 1995 and the 2nd appellant was born on 20 December 1993. They claim to have well-founded fears of persecution and/or to fear a breach of their Article 3 ECHR rights from members and associates of the Elezi family, a family residing in Albania.

3. On 5 August 2014 the 2nd appellant was kidnapped and beaten by the members of the Elezi family (Armir, Edmond and Samet Elezi, hereafter "the Elezi brothers") because they suspected him of stealing from their shop in Kukes, a city in north-eastern Albania. The 2nd appellant's father reported the kidnapping and beating to the authorities and the Elezi brothers were arrested together with the "chief of the public order police" in Kukes, who it was claimed was their accomplice. The Elezi brothers and the police officer were arrested and prosecuted. The three Elezi brothers were found guilty, and each sentenced to 3 years imprisonment, reduced by a third in compliance with article 55 of the Penal code, and then suspended for 2 years. The police officer was found not guilty.

4. The 2nd appellant claimed he left Albania in 2014 having received threats from the Elezi brothers and that he feared for his life. He claimed to have entered the UK illegally at the end of 2014. In December 2016 the 2nd appellant was charged with a criminal offence and remanded in custody. He initially claimed to be Lithuanian. On 6 January 2017 he was convicted of possession of a class A drug with intent to supply and sentenced to 2 years imprisonment. He was also sentenced to 4 months imprisonment in respect of an offence relating to fraudulent identity documents, which was served concurrently. A claim to be a victim of trafficking was rejected. A deportation order was signed against him on 30 August 2017, and he was deported on 16 September 2017. The 2nd appellant illegally re-entered the UK and was arrested on 28 April 2018. He claimed asylum on this date.

5. The 1st appellant claimed to have left Albania in fear of his life in January 2016 and to have arrived in the UK illegally in February 2016. He claimed asylum on 15 November 2016.

6. Based on broadly consistent answers given by the appellants relating to the kidnapping and subsequent investigation, as well as court documents and newspaper articles and external evidence considered by the respondent, the claim relating to the 2nd appellant's kidnapping and the subsequent prosecution was accepted by the respondent.

7. The appellants further claimed that, following the reporting of the kidnapping by the appellants' father, he and the 1st appellant were assaulted by the Elezi brothers and the appellants were subsequently threatened by the Elezi brothers. The appellants claimed that they and their father confined themselves to their home fearing an attack from the Elezi brothers. The appellants claimed that the Elezi brothers were powerful and influential and that the authorities would be unable to protect them from a blood feud or vendetta. The respondent did not accept the appellants claim that they or their father had been threatened by the Elezi brothers, or that the appellants and their father had confined themselves to their home, or that the Elezi family were as powerful and influential as claimed. The respondent noted that the appellants' father continued to reside in Albania. The respondent was not satisfied that the appellants were claiming asylum for a Refugee Convention reason. The respondent considered that the Albanian authorities would be able to provide the appellants with a sufficiency of protection and that they could, in any event, internally relocate. In respect of the 2nd appellant the respondent issued a certificate under s.72 of the Nationality, Immigration and Asylum Act 2002 on the basis that he had been convicted of a serious offence and posed a danger to the public.

8. The appellants appealed the respondent's decisions to the First-tier Tribunal pursuant to s.82 of the Nationality, Immigration and Asylum Act 2002.

The Decision of the First-tier Tribunal

9. The judge had before her a bundle of documents prepared on the appellants behalf that included, inter alia, statements from both appellants, an expert country report from Dr James Korovillas, and an opinion provided by Mr Florin Idrizaj, an Albanian criminal lawyer, relating to the sentenced passed on the Elezi brothers. The appellants gave evidence through an Albanian interpreter. The judge summarised the appellants evidence. During cross-examination the 2nd appellant was not questioned or challenged about his claim to have entered the UK in 2014.

10. In her decision the judge first discharged the section 72 certificate. There was no challenge by the respondent to this aspect of the judge's decision in the respondent's Rule 24 response.

11. The judge then considered the expert report from Dr Korovillas, referring at [44] and [45] to the section of the expert's setting out the difference between a blood feud and a vendetta (the respondent had not accepted that a blood feud existed as no-one had been killed). According to the expert a vendetta referred to the taking of revenge for a perceived slight against a family's honour and that a person may be injured or even killed because it was felt they had dishonoured a family. The revenge could be disproportionate to the initial act of dishonour. A blood feud described a situation where the feuding between two families intensified to a point where both families were determined to take a blood revenge against the opposing family until such time as either a reconciliation was reached or all the male members of the family had been killed.

12. At [47] the judge indicated her disagreement with the submissions made by Mr Chakmakjian (who continues to represent the appellants) that blood feuds were the same as vendettas. At [48] et seq the judge referred to EH (blood feuds) Albania CG [2012] UKUT 00348 (IAC) and stated that, in order for there to be a blood feud, there had to be a killing at the hands of one family member by the family of another. The judge noted at [51] that there had been no killing.

13. At [52] and [53] the judge stated:

> "Although the reasons for refusal letter reports under the immigration history that the second appellant claimed that he came to the UK in 2014 but other documentary evidence produced by the appellant shows that in August 2014 he was in Albania. His family had reported his kidnapping to the police and an investigation was underway. The reasons for refusal letter goes on to state that an asylum claim was [*sic*] for the 1st time in 2016.
>
> Without any other evidence showing that the second appellant was in the UK in 2014, to the lower standard I find that it is likely that the appellant came to the UK in 2016 when he claimed asylum. It does not make sense that after going to all the trouble of making a report to the police and initiating proceedings he should leave the country. There is no evidence to show that following the kidnapping any further action to harm him was taken by the Elezi family. There were no reprisals for dishonouring that family by bringing the charge against them. A vendetta might exist but so far there have been no disproportionate reprisals."

14. At [54] and [55] the judge noted the absence of any evidence to support the 1st appellant's claim that threats were sent to his phone by text, and that he continued to remain in Albania until 2016. There

was said to be no evidence that he remained in self-isolation. The judge stated:

> "Evidence could have been provided such as an attestation letter from the Commission of National Reconciliation (see paragraph 5 of EH) to show a vendetta existed or the male members of his family were at risk and had therefore to self isolate. There is nothing. I find that there was no evidence to show that a real risk of reprisals exists in this appeal in relation to both appellants."

15. The judge concluded that the appellants were unable to show that they were members of a Particular Social Group and that there was no evidence of a blood feud.

16. The judge then considered whether the appellants were entitled to humanitarian protection. The judge noted that no harm had befallen the 2nd appellant when he returned to Albania in 2017. The judge found that there had been no further approaches by the Elezi family seeking to harm the appellants or their father. The judge stated at [58], in relation to the 1st appellant:

> "I accept that the evidence shows that at the time of the report to the police there were threats and on one occasion physical beatings. But after 2014 there were no further physical attacks although he says he got verbal threats on his phone."

17. At [59] the judge stated:

> "The evidence I have before me does not show that there are substantial reasons for believing that the appellant on return to Albania will be subjected to serious harm. I and mindful of what the appellants say about the corruption within the police force and the judicial system. This is supported by the objective evidence they produce. This however has to be balanced by what is contained in the objective reports to which the respondent refers in her reasons for refusal letter. These show that attempts are being made by the Albanian authorities to improve the efficiency of the police force."

18. The judge then noted that the kidnapping of the 2nd appellant had been investigated and prosecuted by the police and that, although the appellants claimed that the sentences received by the Elezi brothers was light, it was clear that the sentence was similar to a suspended sentence in the UK. Having then included that there were no substantial reasons for believing that the appellants would be subjected to serious harm upon return, and having rejected their Article 8 ECHR claim, the judge dismissed the appeals.

The challenge to the judge's decision

19. The appellants challenge the decision on seven grounds, although there is a degree of overlap in relation to some of these grounds, all of which were amplified by Mr Chakmakjian in his oral submissions.

20. The 1st and principal ground of challenge involves an assertion of procedural unfairness. At [52] and [53] the judge made a finding that the 2nd appellant had not arrived in the UK in 2014 but that he entered this country in 2016. The respondent had not specifically challenged this element of the 2nd appellant's protection claim, and there had been no cross examination or submissions on this point. The question as to whether the 2nd appellant arrived in the UK in 2014 or 2016 had never been raised with the representatives at the hearing. The 2nd appellant had been denied the opportunity of responding to the judge's concerns, which materially contributed to her overall adverse credibility finding. Had the appellants been made aware of this concern then evidence could have been provided of the 2nd appellant's Albanian passport showing that he had crossed Albania's international borders in November 2014. Photographs of the 2nd appellant's passport accompanied the grounds and were the subject of an application to admit evidence pursuant to rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 in respect of which there was no objection by Mr Lindsay.

21. The 2nd and 3rd grounds contend that the judge failed to apply rule 339K of the Immigration Rules relating to past persecution when assessing whether the appellants would be subjected to serious ill-treatment on return to Albania, and that the judge failed to consider all the evidence relating to future persecution or alternatively made inconsistent findings as to whether there had been threats and physical violence against the 1st appellant and his father. The 4th ground contends that the judge failed to adequately consider the evidence in the expert report that a vendetta or blood feud could lie dormant for several years before coming back to life when the opportunity to restore the family's honour presented itself. The 5th ground contends that the judge misapplied EH (Albania) as she criticised the appellants for failing to produce an attestation letter to confirm that there was a vendetta or a risk of harm, but EH (Albania) noted that attestation letters from Albanian non-governmental organisations should not in general we regarded as reliable evidence of the existence of a feud. It was claimed the judge erroneously accorded weight to the absence of an attestation letter when making adverse credibility findings. The 6th ground contends that the judge erred in her approach to whether there was a Particular Social Group; her approach was overly restrictive and she should have considered that a person subject to a family vendetta also fell within the definition of Particular Social Group. The 7th ground contends that the judge failed to give adequate reasons or failed to apply anxious scrutiny when determining the issue of the existence of a sufficiency of protection. The judge failed to resolve the competing background

evidence relating to this issue and failed to give any reasons why she preferred the respondent's position to that of the appellants.

22. The respondent resists the challenges. The judge was entitled to consider that there were contradictory dates of arrival in respect of the 2nd appellant and any error would not in any event be material given the wealth of alternative reasons identified by the judge for finding that the appellants would not be at risk on return. Any error would not be material as the judge's decision was not simply based on adverse credibility findings but because she found there was no risk of serious harm and that internal relocation was available. There had been no past persecution and reliance on paragraph 339K of the Immigration Rules on the grounds was misguided. The judge was entitled to conclude that there was no blood feud based on her assessment of the expert's evidence and the decision in EH (Albania). The judge was entitled to note the absence of an attestation letter and she did not require one to have been provided but instead was simply observing that one could have been provided. Whether or not the judge made a finding that the appellants were members of a Particular Social Group was not material given that she also found that there was inadequate evidence that they would be at risk on return.

Discussion

23. I am satisfied that the 1st ground of appeal is made out. The respondent did not expressly refute the 2nd appellant's claim that he entered the United Kingdom in 2014 in her Reasons for Refusal Letter. Nor was this raised as an issue either in cross examination of the 2nd appellant or in the Presenting Officer's submissions before the First-tier Tribunal. there was nothing to indicate to the appellants' representative when he made his submissions that issue was being taken with the 2nd appellant's claim to have entered the UK in late 2014. The assertion in the Rule 24 Response that the 2nd appellant gave contradictory dates of arrival was not supported by any evidence drawn to my attention. The 2nd appellant's claim that he arrived in the UK on 28 November 2014 is not inconsistent with his claim to have been present in Albania in August 2014. So far as I can tell the 2nd appellant has never denied that he was in Albania in August 2014, especially given that his kidnapping occurred on 5 August 2014. The photographs of his passport produced pursuant to the application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 was prima facie evidence that the 2nd appellant did leave Albania in November 2014. Although this is not evidence that he entered the United Kingdom later that same month, it is evidence supportive of the 2nd appellant's claim to have done so and was capable of supporting his claim to have fled due to the fear of threats of harm.

24. The judge's finding that the 2nd appellant only arrived in the UK in 2016 is clearly relevant to her overall assessment of whether the appellants gave a credible account of threats received by them from the Elezi brothers and whether they faced a real risk of serious harm in Albania. If the 2nd appellant did not leave Albania until 2016 then this could potentially undermine his claim to fear any reprisals from the Elezi brothers. Nor is it clear why the judge considered that it made no sense that the 2nd appellant would leave Albania after his father reported his kidnapping to the police and legal proceedings were initiated against the Elezi brothers. If the 2nd appellant had feared reprisals from the Elezi brothers then this would have been a good reason for him to leave the country when claims he did. I am satisfied that the judge's assessment of when the 2nd appellant entered the United Kingdom was a factor she took into account in undermining their claim to have received threats from the Elezi brothers and that, in failing to raise this as a concern during the hearing, the judge acted in a procedurally unfair manner.

25. I am additionally satisfied that the judge appears to have made contradictory findings of fact. At [53] the judge found there was no evidence to show that, following the kidnapping, any further action had been taken to harm the 2nd appellant and that there were no reprisals for dishonouring that family by bringing charges against them. However, at [58] the judge accepted that the evidence showed that at the time of the report to the police there were threats and on one occasion physical beatings. These two findings do not sit comfortably with each other.

26. I am further concerned with the judge's reference to the absence of an attestation letter from the Commission of National Reconciliation. Whilst the judge was entitled to take into account the absence of evidence that the appellants and their father had remained in self-isolation, it is unclear when she mentioned attestation letters at [54] whether she was merely referring to the absence of a specific type of evidence that could have been provided, or whether she considered that the absence of an attestation letter was a factor undermining the reliability and genuineness of the appellants claim' to have lived in self-isolation. I note that attestation letters, as considered in EH (Albania), primarily related to blood feuds ('Gjakmarrja') as opposed to vendettas (Hakmarrja') which relate to disputes involving honour that do not necessarily include or amount to a blood feud. In any event, EH (Albania) found that attestation letters from Albanian non-governmental organisations should not in general be regarded as reliable evidence of the existence of a feud. Given the prominence attached by the judge to the absence of an attestation letter, I cannot discount the possibility that she may have erroneously accorded weights to the absence of an attestation letter when making her adverse credibility findings.

27. The errors of law that I have identified above relate to the judge's findings that the appellants and their father were not confined to their home for fear of reprisal attacks from the Elezi brothers and that there were no further threats to the appellants and their family. These errors would however be immaterial if the judge was entitled to find, in the alternative, that there was a sufficiency of protection in any event available to the appellants from the Albanian. The judge considers the availability of a sufficiency of protection at [59]. In this paragraph the judge refers in a generalised manner to the existence of corruption within the police force and the judicial system in Albania being supported by evidence provided by the appellants, but that this evidence is balanced by what is contained in the reports to which the respondent referred in her Reasons for Refusal Letter. There is little if any analysis or evaluation of the competing evidence by the judge and no clear conclusions in relation to that evidence are reached. I am not satisfied that the judge has engaged in a meaningful assessment of the evidence relating to whether a sufficiency of protection exists for these appellants in Albania. Mr Lindsay submitted that the appellants would in any event be capable of availing themselves of the internal relocation alternative but this is an issue with which the judge has not engaged in any meaningful way.

28. I am satisfied that the errors of law identified above are material and render the decision unsafe.

Remittal to First-Tier Tribunal

29. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 18 June 2018 the case may be remitted to the First-tier Tribunal if the Upper Tribunal is satisfied that:

    (a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party's case to be put to and considered by the First-tier Tribunal; or

    (b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

30. The judge's errors of law render her adverse credibility findings relating to the issues of self-confinement and threats unsafe. In these circumstances there will need to be a full re-assessment of all the evidence rendering it appropriate to remit the matter back to the First-tier Tribunal for a full fresh (de novo) hearing, with the exception of the judge's discharge of the s.72 certificate. This was a separate and independent finding and one that was unchallenged.

Notice of Decision

The making of the First-tier Tribunal's decision involved the making of an error on a point of law requiring it to be set aside.

The case will be remitted back to the First-tier Tribunal for a de novo hearing before a judge other than Judge of the First-tier Tribunal Bird, save for the judge's discharge of the s.72 certificate.

D.Blum 10 September 2021

Signed Date
Upper Tribunal Judge Blum