



**Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: AA/04121/2015**

THE IMMIGRATION ACTS

**Heard at Field House
On 17 December 2015**

**Decision & Reasons Promulgated
On 5 January 2016**

Before

DEPUTY UPPER TRIBUNAL JUDGE DOYLE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XHEFRI KETA

Respondent

Representation:

For the Appellant: Mr P Duffy, Senior Home Office Presenting Officer

For the Respondent: Mr A Gilbert (counsel) instructed by Montague solicitors

DECISION AND REASONS

1. I have considered whether any parties require the protection of an anonymity direction. No anonymity direction was made previously in respect of this Appellant. Having considered all the circumstances and evidence I do not consider it necessary to make an anonymity direction.

2. The Secretary of State for the Home Department brings this appeal but in order to avoid confusion the parties are referred to as they were in the First-tier Tribunal. This is an appeal by the Secretary of State against a decision of First-tier Tribunal Judge Bowes, promulgated on 18 September 2015, which allowed

the Appellant's appeal to a limited extent. She found that the appellant's application remains outstanding before the respondent.

Background

3. The Appellant was born on 21 August 1996 and is a national of Albania.

4. On 26 January 2015 the Secretary of State refused the Appellant's application for further leave to remain in the UK. The appellant's asylum claim had been refused on 15 November 2013, but, because of his age, the appellant had been granted discretionary leave to remain in the UK until 18 February 2014.

The Judge's Decision

5. The Appellant appealed to the First-tier Tribunal. First-tier Tribunal Judge Bowes ("the Judge") allowed the appeal against the Respondent's decision "*....to the limited extent that the respondent had not given full reasons for her decision. The application remains outstanding before her*".

6. Grounds of appeal were lodged and on 8th October 2015 Judge Robertson gave permission to appeal stating *inter alia*:

"Whilst the grounds are framed on the basis of perversity and irrationality, and this lacks arguable merit, it is arguable that the Judge had all the relevant evidence before him on which to find that the appellant had in fact burgled the flat in question, which would include an assessment of why, if he had in fact burgled the flat, the police would attack him and threaten him as alleged by the Appellant, rather than simply prosecute him. It is arguable that the Judge failed to make adequate findings on material matters. Permission is therefore granted."

The Hearing

7. Mr Duffy for the respondent told me that there had been discussions between parties' agents before the hearing commenced, and the parties now agreed that the decision is tainted by material errors of law. He told me that the Secretary of State's decision is not defective and that the Judge should have determined all matters before him and come to a conclusion on whether or not the appellant was credible and whether or not the appellant would be at risk on return to Albania. He urged me to set the decision aside and to remit the case First-tier Tribunal to be determined afresh.

8. Mr Gilbert, for the appellant, agreed entirely with what had been said by Mr Duffy. He told me that the Judge's approach was "*strange*" and betrayed a failure to make adequate findings on material matters. He told me that although article 8 ECHR is clearly at large in this case, the Judge had failed to make any findings and has elided that aspect of the appellant's claim. He told me that "*the Judge simply stopped too early*". Mr Gilbert also said that the appellant had not been represented before the First-tier Tribunal & had not appeared at the hearing, because neither the appellant nor his solicitors knew that the hearing was taking place. It was only on 11 August 2015 (when those instructing Mr Gilbert made enquiry about the date this case was likely to be

listed before the First-tier tribunal) the appellant and his solicitors discovered that a hearing had taken place on 30 July 2015 and the Judge's decision would soon be promulgated.

9. I asked parties representatives if this was a matter that could be determined by me if I set aside the decision. Without hesitation, parties' agents chorused their reply in the negative. Mr Duffy went on to say that as the appellant has been deprived of the opportunity to give evidence it would be unfair not to remit this case to the First-tier to be heard of new.

Analysis

10. It is clear from the decision that neither the appellant nor his representatives attended the hearing on 30 July 2015. It is not disputed that neither the appellant nor his representatives received proper intimation of the time, date and place of the hearing. It is now conceded that the appellant was deprived of the opportunity to give evidence.

11. The Judge considered the case on the basis of the documentary evidence, supplemented by submissions made by a Home Office presenting officer. At [3] to [5] the Judge summarises the appellant's claim. Between [6] and [12] the Judge summarises the reasons given by the respondent for refusal of the appellant's applications. Between [21] and [26] the Judge sets out her reasons for finding that central aspects of the appellant's claim are not credible, then at [27] & [28] the Judge shies away from making a decision. Instead of continuing an analysis of the evidence placed before the Judge, the Judge says that she does not have enough material before her to reach a decision. There is merit Mr Duffy's admission that at that stage the Judge was seized of this case and it was incumbent on the Judge to make a decision. There is equally merit in Mr Gilbert's submission that "*the Judge simply stopped too early*".

12. Although the Judge analysed some of the core elements of the appellant's claim the Judge failed to engage with every aspect of the appellant's claim, and did not make findings in fact on material aspects of the appellant's claim which were clearly the subject matter of dispute. At [12] and [16] the Judge records that the respondent considered article 8 ECHR and that submissions were made on article 8 ECHR, but the decision is bereft of findings of fact in relation to article 8 ECHR and contains no analysis of the impact of the facts and circumstances of this case on any ECHR rights that the appellant may have. No balancing exercise is carried out; there is no assessment of proportionality; no conclusion is reached about whether or not ECHR rights are engaged.

13. I find that the decision is tainted by material errors of law. The failure of the First-tier Tribunal to address and determine the central issues in this case, and the appellant's article 8 ECHR claim, constitutes a clear error of law. This error I consider to be material since had the Tribunal conducted this exercise the outcome could have been different. That in my view is the correct test to apply.

14. The Judge's determination cannot stand and must be set aside in its entirety. All matters must be determined afresh.

REMITTAL TO FT

15. Under Part 3 paragraph 7.2(b) of the Upper Tribunal Practice Statement of the 25th of September 2012 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.

16. In this case I have determined that the case should be remitted because parties agree that the Appellant did not have a fair hearing and was deprived of the opportunity to give evidence. In this case none of the findings of fact are to stand.

17. I consequently remit the matter back to the First-tier Tribunal sitting at Hatton Cross, before any First-tier Immigration Judge other than Judge Bowes.

CONCLUSION

Decision

18. The decision of the First-tier tribunal is tainted by material errors of law.

19. I set aside the decision. The appeal is remitted to the First Tier Tribunal to be determined afresh.

Signed

Date 17th December 2015

Deputy Upper Tribunal Judge Doyle