Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/24617/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd March 2018	**On 12th April 2018**

Before

DEPUTY UPPER TRIBUNAL JUDGE D E TAYLOR

Between

[E P]
~~**(ANONYMITY DIRECTION NOT MADE)**~~

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr G Lee, Counsel, instructed by Rashid & Rashid Solicitors (Merton High Street)
For the Respondent: Mr E Tufan, Home Office Presenting Officer

DECISION AND REASONS

1. This is the appellant's appeal against the decision of Judge Loughridge made following a hearing at Newport on 8th September 2017.

Background

2. The appellant is a citizen of Albania born on [ ] 1983. He was diagnosed with a serious mental health problem shortly after his birth. In June 2010 he applied to join his father in the UK.

3. The appellant's father first came to the UK in September 2001 as an asylum seeker. He had separated from the appellant's mother some years previously, in 1997, and the appellant and his sister remained with their mother after the separation. He met his British wife in the UK in 2003 and they started a relationship. He then left the UK in January 2007 and submitted an application for entry clearance as a fiancé. He reentered the UK on 22nd April 2007, and married in February 2008. That marriage has since broken down. He has been here ever since, and is now a British citizen.

4. The appellant remained in Albania, first with his mother and then, after she died, in February 2007 after a long illness, in the care of his sister.

5. The appellant's sister got engaged to her husband in June 2010 and the appellant applied to join his father in the UK. He was refused and the subsequent appeal was dismissed.

6. The appellant submitted a human rights application to remain in the UK on the basis of his mental health and his family life with his father on 20th January 2014. He was refused without a right of appeal. It seems that he entered the UK unlawfully in October 2013. His sister arrived in January 2014 with her husband and two small children. He was encountered by Thames Valley Police in December 2014.

7. The appellant submitted a further human rights claim in July 2016 and it was the refusal of this claim which was the subject of the appeal before the Immigration Judge.

The Immigration Judge's Decision

8. The Judge set out the relevant law, the appellant's claim, the submissions made and then turned to his conclusions. He said that he found the appellant's father to be a straightforward and honest witness. The appellant himself was unable to give evidence. The judge recorded that although the appellant could feed himself he only used a spoon and that although he was able to dress independently he needed prompting and his personal hygiene was poor. The judge accepted that he displayed childlike behaviour from time to time, for example having tantrums and becoming difficult.

9. The judge did not doubt that when the appellant was living in Albania he was cared for first by his mother and then his sister. He said that he did not receive any publicly available support from the healthcare or Social Services in that country, which was strong evidence that the availability of that support was likely to be minimal. It did not necessarily follow that some sort of professional care could not

be arranged privately but that would not adequately address his emotional or psychological wellbeing.

10. In any event, the appellant's father was not in a sufficiently strong financial position to pay for such care. The judge wrote:

> "The harsh reality is that if the appellant returns to Albania on his own he would be extremely vulnerable and would not be capable of integrating into society in that country in any meaningful way. If he went out alone he would be at risk of abuse from members of society who are unsympathetic to people with learning difficulties."

11. The judge concluded that the only sensible way forward was for the appellant to be under the day-to-day care and supervision of his family. He said that whilst the appellant's sister had been in the UK for three and a half years and was here unlawfully it did not seem to him to be reasonable to expect her to return to Albania in order to look after the appellant. She is a young woman with a life of her own with caring responsibilities. She could not be expected to devote her live to caring for her sibling.

12. However, the judge said that what was reasonable to expect of the appellant's father was a different matter. He acknowledged that the father was in a difficult situation and he had the Tribunal's sympathy. He had looked after the appellant admirably for almost four years.

13. The judge concluded:

> "Overall, therefore, whilst I accept that the appellant's father would suffer significant interference with his private life if he returns to Albania with his son, and whilst as a British citizen he clearly cannot be compelled to return, it is not in my view unreasonable to expect him to make that choice with the consequence that the appellant would not be left to fend for himself independently in that country but would instead have his father to look after him. I take into account the fact that the appellant's father is no longer in a relationship with his second wife and that his relationship with his current partner, is relatively recent and has developed at a time when the appellant has been present in eh UK and the future has therefore been uncertain in terms of whether the father might need to consider returning to Albania. If he has not previously thought about that option that is, in my view, an oversight on his part. It is clear that he still has strong connections with Albania given that he has returned on a yearly basis to visit friends and there is no suggestion that he has not retained his Albanian citizenship. I see no reason why those friends could not offer help and support in the early stages if necessary while the appellant and his father are establishing themselves. It may well be that the appellant's sister will also return to be with them assuming she is not successful in seeking lawful status in the UK.
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> In terms of the consequences of these findings to the Rules, and to Article 8, it seems to me the position is as follows: paragraph 276ADE of the Rules is not met because there are no 'very significant obstacles' to the appellant's integration into Albania, given that it is open to his father to return with him and reasonable to expect his father to do so; it is not disproportionate to expect the father to

> compromise his own private life in the UK in order to look after his son in Albania, bearing in mind the very weighty public policy considerations in favour of removal; and the difference in the provision of healthcare/Social Services support, as between the UK and Albania, is not such as to satisfy an Article 8 private life claim on the basis of health, bearing in mind the high threshold for such a claim, the fact that such provision is likely to make only a relatively small difference to the appellant and the fact that until 2013 he had lived in Albania without any significant problems."

14. On that basis he dismissed the appeal.

The Grounds of Application

15. The appellant sought permission to appeal on a number of different grounds. It was submitted, inter alia, that requiring the appellant to return to Albania and forcing his father to leave the UK and relocate to Albania would clearly be unreasonable under Sanade and others (British children - Zambrano - Dereci) [2011] UKUT 00048. Second, it was argued that the judge had failed to have regard to material factors and established case law in relation to Article 8.

16. Permission to appeal was granted by Judge Simpson on 15th January 2018. Regrettably there was no reply filed by the respondent.

Submissions

17. Mr Lee submitted that the basis for this appeal was that the only practical way for the appellant to be cared for was by his father returning with him to Albania. His father was a British citizen and a citizen of the EU. Compelling him to leave would offend against the Zambrano principle. On the findings of the judge, the father had no choice but to leave the UK, which was impermissible.

18. He relied on the decision in Patel v The Secretary of State for the Home Department [2017] EWCA Civ 2028 where the court held that there was no alteration in the test of compulsion, i.e. the question to be decided is whether the British citizen would be compelled to leave the UK and the focus should be not on whether the EU citizen could remain in legal theory but whether they could do so in practice.

19. Mr Tufan observed that there were a number of positive findings made by the judge which the Secretary of State could not challenge because she had won the appeal. He submitted that in practice there would be no compulsion for the father to return to Albania because his own mother had returned there for medical treatment and it was clear that some support was available for the family there. In effect, this was a disguised dependent relative application which could only be made from abroad.

20. By way of reply Mr Lee submitted that on the findings of the judge there was no-one in Albania available to assist the appellant. The judge had found the father to be a credible witness and had accepted his evidence that he did not now have any family remaining in there. The judge had also found that there was unlikely to be publicly available healthcare or Social Services support and had discounted the possibility of

his sister's assistance. No challenge had been made to those findings since no Rule 24 reply had been served.

Consideration of whether there is a material Error of Law

21. This is a detailed, sensitive and well-reasoned determination. The judge has approached his task with care. Nevertheless I am satisfied that the basis of his decision was that the appellant's father would in practice have to return to Albania with his son. But for the father's return, on his findings, there would be very significant obstacles to the appellant's integration into the country to which he would have to go if required to leave the UK (paragraph 276AD(vi)). However, his reasoning offends against the Zambrano principle, which holds that a British citizen cannot be compelled to leave the EU.

22. On that basis the judge's decision is set aside.

Remaking the Decision

23. I heard brief oral evidence from the sponsor. Mr Lee established that the sponsor was comfortable giving his evidence in English and he, Mr Lee, was content that that was appropriate.

24. [AP] told me that his mother lives with his sister in Greece. She is over 80 years old. She has returned to Albania for a couple of operations for kidney stones and a gallbladder problem because it was cheaper for her to have surgery in Albania than to have the operation in Greece. When she was there she was looked after by her daughter, the sponsor's sister, and they stayed with his brother-in-law's cousins. The sponsor said that he himself had three or four cousins in Albania and he sometimes went to see them when he visited there. He had been in the UK for eighteen years but went back to Albania reasonably regularly. His late wife had siblings who remained in Albania as well.

25. His daughter was pursuing applications in the hope of remaining in the UK but so far had been refused.

Submissions

26. Mr Tufan repeated his comment that this in effect was a disguised dependent relative application and it was open to the appellant to return to Albania, possibly accompanied by his father, in order to make that application. It was clear that there were other extended family members with whom the sponsor was in contact since he had been to see them on his various visits.

27. Mr Lee submitted that the appellant met the requirements of paragraph 276ADE(vi). The only way that the test could not be met would be by compelling an EU citizen to leave the EU, which could not be the proper answer. The appellant's grandmother lived in Greece and was in her 80s. The fact that the appellant might have cousins in Albania was not relevant if they could not offer practical support. The appellant's

needs were great and it was not reasonable to expect members of the wider family to offer the kind of assistance which he needed.

28. Mr Lee submitted that the issue of whether the appellant could succeed in making an application from abroad was irrelevant to the decision under paragraph 276ADE(vi). He referred me to paragraph 51 of the judgment of the Supreme Court in R (on the application of Agyarko) v SSHD [2017] UKSC 11 where the court held at paragraph 51:

> "Whether the applicant is in the UK unlawfully, or is entitled to remain in the UK only temporarily, however, the significance of this consideration depends on what the outcome of immigration control might otherwise be. For example, if an applicant would otherwise be automatically deported as a foreign criminal, then the weight of the public interest in his or her removal will generally be very considerable. If, on the other hand, an applicant - even if residing in the UK unlawfully - was otherwise certain to be granted leave to enter, at least if an application were made from outside the UK, then there might be no public interest in his or her removal. The point is illustrated by the decision in Chikwamba v SSHD."

29. There was therefore a spectrum of cases whereby the public interest diminished the more certain the appellant was to be granted entry clearance were he to return. In any event, even if the appellant was not certain of succeeding in an out of country application, the only way in which he could properly have his needs met would be by his father returning with him. He emphasised that there was a significant difference between the theoretical solution of the wider family providing support and practically whether they would do so.

Findings and Conclusions

30. This is an application for leave to remain in the UK on the basis that it would be a breach of the appellant's Article 8 rights were he to be returned to Albania.

31. The only relevant Rule is paragraph 276ADE(vi), which states that in order to succeed, the appellant has to show that there would be very significant obstacles to his integration into the country to which he would have to go if required to leave the UK.

32. The appellant was born in 1984. He lived with his parents in Albania until 1997 when his father separated from his mother. From 2001 his father was in the UK. He left his son in the care of his wife and his elder sister. When his wife died in 2007 the sponsor did not return to Albania but left his son in the care of his sister. It was after that arrangement broke down, following the sister's marriage, that it was decided that the appellant would be better off living with his father and his father has taken care of him for the last five years.

33. On the evidence it would appear that the sponsor's mother returns to Albania voluntarily in order to seek medical treatment. Contrary to the observations of the previous judge, the fact that the appellant did not receive publicly available support

before, does not lead to a conclusion that it is not available. The appellant did not need it at that stage because he had his family looking after him.

34. There is clearly practical support from the wider family. The sponsor returns to see friends and family annually. His mother and sister live with relations when they return for his mother's medical treatment. His late wife has siblings and they have children. Moreover, his daughter has no leave to remain in the UK and whilst the evidence was unclear it seems that her application to remain here has been refused.

35. The sponsor works very hard here. He has two jobs. He would therefore be able to use the resources which he presently spends on his son in providing paid for care in Albania. He himself would not be compelled to live there because of the availability of help from the wider family and the possibility of paying for help for his son. He would be able to see him on a regular basis by visiting or staying for longer periods if he chose to do so.

36. I conclude that the appellant does not meet the requirements of paragraph 276ADE(vi) because of the strong connections which the family retain with Albania. Until 2013 the appellant lived in Albania without any significant problems. For the last twelve years of that time his father was in the United Kingdom. He still has his wider family, the likelihood of his sister's return and the financial contribution which his father could make towards paid care in Albania.

37. The starting point for a wider consideration of whether the appellant meets the requirements for success under Article 8 of the ECHR is his ability or otherwise to meet the requirements of the Immigration Rules. Whilst the requirements of the entry clearance Rules are not directly relevant to the consideration of whether there are very serious obstacles to the appellant's integration into the country, they are relevant in terms of the weight to be attached to the public interest in removal.

38. The Rules with respect to entry clearance for dependent relatives set a very high bar. In order to succeed the appellant would have to show that he was unable, even with the practical and financial help of the sponsor, to obtain the required level of care in the country where he was living because, either it was not available and there was no person in that country who could reasonably provide it, or it was not affordable. It is by no means certain that they are met in this case.

39. There are also strong public policy reasons in favour of the appellant's removal. His presence in the UK will in the future involve a significant burden on UK taxpayers. He would, as the original judge said, most probably qualify for a range of welfare benefits. There is no prospect of his underlying medical condition improving. There would be a drain on public resources were he to stay.

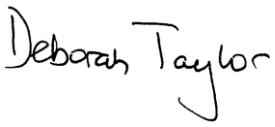
40. I do not doubt the difficulties which he would encounter on a return, having been in the UK for five years, but he has spent the great majority of his life including his formative years in his country of nationality. Support would be available either from the family or from the State or by being paid for privately or a mixture of the three.

41. In these circumstances it would not be disproportionate for him to be removed.

Decision

The original judge erred in law. His decision is set aside. It is remade as follows. The appellant's appeal is dismissed.

No anonymity direction is made.



Signed Date 8 April 2018

Deputy Upper Tribunal Judge Taylor