



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/00545/2019

THE IMMIGRATION ACTS

Heard at Field House
On 17th August 2021

Determination Promulgated
On 27 August 2021

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

ED
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms K Reid, of Counsel, instructed by Sentinel Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in September 2001. He arrived in the UK in February 2015 and claimed asylum. His application was refused but he was granted leave to remain until 13th July 2018 as an unaccompanied child. He applied to extend his leave and for asylum/humanitarian protection on 3rd July 2018, but this application was refused in a decision dated 18th December 2018. His

appeal against this decision was dismissed on human rights and protection grounds by First-tier Tribunal Judge Russell in a determination promulgated on the 20th February 2020.

2. Permission to appeal was granted, and Upper Tribunal Judge Kekic found that the First-tier Tribunal had erred in law in relation to the decision under Article 8 ECHR in a decision promulgated on 8th October 2020. Judge Kekic preserved the findings and decision of the First-tier Tribunal in relation to the protection claim however. Judge Kekic directed that prior to the resumed hearing that the appellant should serve statements from all witnesses including a statement from his sister's social worker about the impact on her of his removal. Her decision is at Annex A to this decision.
3. In light of the decision in R (JCWI) v President of UTIAC [2020] EWHC 3013 Admin I asked the parties if they had any objection to the error of law decision having been taken on the papers under Rule 34 of the Procedure Rules. Neither party raised any objections.
4. The matter came before me to remake the appeal pursuant to a transfer order from Principal Resident Judge Kopieczek dated 1st July 2021. The remaking of the appeal is concerned as to whether it would be a disproportionate interference with the appellant's right to respect for family and private life protected by Article 8 ECHR to remove him from the UK.
5. The updating statements of the appellant and his sister, DD, and the statement of the appellant's sister social worker, Mr KA, were only received by the Upper Tribunal and Mr Tufan immediately prior to the hearing. We had a twenty minute adjournment to read the new documentation after which time Mr Tufan confirmed he was happy to proceed. Ms Reid also took this time to take instructions on the social work report as she too had only just received this document. I noted that the witness statement of the appellant's sister, DD, dated 4th August 2021 said that she and the foster carer had not attended the First-tier Tribunal as they had been unable to get confirmation from the local authority that this was acceptable. Ms Reid said that the foster carer, Ms JK, still was not in attendance as she understood from the appellant's solicitors that this was not needed, but as the appellant's sister was now 16 years old she had attended by herself. The appellant was accompanied by his support worker. An Albanian interpreter was in attendance at the start of the hearing but the appellant and his sister confirmed that they did not wish to use the interpreter and so she was discharged.
6. As a result of what was said in the social work report of Mr KA Mr Tufan looked up the appellant and his sister's mother, ED, on the Home Office database and confirmed that she was in the UK and had been given discretionary leave to remain until 6th April 2022.

Evidence & Submissions Remaking

7. The evidence of the appellant from his written statement dated 4th August 2021 and oral evidence is, in summary, as follows. He arrived in the UK with his sister, DD, on 5th February 2015, and they were both taken into Social Services care, and from there to the Home Office to claim asylum. At the time of his arrival he was 13 years old and DD was 9 years old. He currently lives in temporary accommodation arranged by the local authority, his previous accommodation provided by them having flooded. He is currently doing a Level 3 plumbing course at Acton College, having completed a level 2 course last year. His intention is to do a further one year gas and boiler course and qualify to work as a plumbing engineer after that. His evidence is that he sees DD four or five times a week at the current time. He generally goes to visit her near her foster carer's address in Palmers Green, and they have a coffee or go out to eat. Her foster carer is supportive of their relationship. He also has telephone contact, but DD really needs these face to face meetings. She suffers from anxiety and depression, and she needs him as he is her only biological family and she is a fragile person. He also helps her practically, such as by helping her with her CV to get her current apprenticeship. If he had to leave the UK he believes that this would be devastating for both of them. They were not allowed to see each other between 2017 and 2019. This was due to a decision of the local authority because of their having arguments at that time. He accepts that he had been quite controlling to DD when they were both in care together and that there were sibling issues. However, during the time when he was not there for her DD's mental state became very bad: she ran away from home and her anxiety and depression got worse. He fears that DD would go off the rails again if he were not here for her to provide support as she starts her apprenticeship. Neither he nor DD have current contact with any family in Albania. He was offered the possibility of having contact with his mother, ED, by his then social worker, Mr KA, in late 2018 but he declined to do this because of her ex-boyfriend. He was not aware that DD had had contact with his mother in the UK in 2018 until he read the statement of Mr KA, this was not something she had shared with him.
8. The evidence of the appellant's sister's (DD's) foster carer, Ms JK in her statement of December 2019, is that that the appellant is incredibly supportive of his sister, despite their having been separated by Social Services in the past. He is a mature and caring brother who was there for her nearly all the time when she was in North Middlesex Hospital. Having the appellant in the UK means DD does not feel alone and instead feels that she has family. She talks to him and enjoys visits even when they are brief. Ms JK would be concerned if the appellant was removed from the UK. DD has a history of depression and Ms JK is concerned that if he were removed she might have a relapse. She wrote herself suicide notes when she heard about his refusal. Ms JK feels DD would lose everything if he were removed.
9. The evidence of DD, the appellant's sister, from her statements and oral evidence is, in summary, as follows. She was treated as the dependent of the appellant

when they came to the UK and claimed asylum. She was 9 years old and the appellant 13 and they were accommodated together until 2017 when they were given separate foster carers due to arguments between them and were not allowed to see each other until 2019. She was initially granted leave in line with her brother but now has been given another four years from June 2019 to June 2023. She has now finished her schooling and GCSEs, and is doing a hairdressing apprenticeship at Central London Hairdressing.

10. She has a history of depression and has received counselling from CAMHS, and fears that the appellant not being in her UK will make her mental health worse as she would lose his support. She currently takes Mirtazapine for her depression and to reduce her heart rate and Propofol to help her sleep. Her mental health became worse after she was not allowed to see her brother in 2017 and this is when she started to suffer from anxiety and depression. She has harmed herself in the past, and when he received his refusal notice she wrote herself suicide notes. She feels that the appellant has been the only constant in her life and is the only person who understands her as they have been through the same experiences. The appellant is the only birth family she has not lost and the person she can open up to. She fears that she would go rapidly down hill without his love and support.
11. She has had no contact with her birth family since coming to the UK apart from the fact that she had contact with her mother, ED, through Social Services in 2018 on about 6 or 7 occasions. Ms JK advised her that it would be good to have that contact. She stopped the contact as she felt that her foster carer, Ms JK, was going to tell her mother things that were not true and that this would tarnish the relationship with her biological mother ED.
12. DD currently sees the appellant four or five times a week as she is closer to him as she is doing her apprenticeship in central London, and also has contact via phone. Sometimes they go to the cinema together, sometimes they eat together and chat. She feels she can contact her brother if she has a problem and confide in him. When she needed her appendix removed in 2019 she was in hospital for three days and her brother was with her all of the time, along with her foster carer Ms JK, and provided vital emotional support to cope with the operation. When the appellant blocks her on social media it is only for a short time and is just for reasons such as to put pressure on her to continue her schooling.
13. Mr KA, social worker with the Royal Borough of Kensington and Chelsea provides a statement of truth dated 6th August 2021 in which he gives his academic qualifications and confirms that he has been working for a substantial amount of the time with unaccompanied minor asylum seeking children since 2003. He has been DD's social worker since October 2017. He confirms that DD and the appellant became looked after children in February 2015. He states that he usually visits DD every four to six weeks as a looked after child. The appellant and DD had a common foster placement until May 2018, at which point due to an allegation of rape made by DD against the appellant he was moved out. DD

withdrew the allegation immediately and did not raise it again, or demonstrate an understanding of the word rape, but it was decided due to sibling disagreements and animosity it was better for them to have separate foster placements. DD was moved from that foster placement in July 2018 as she did not comply with the rules of the placement, and her next placement was terminated in March 2019 as she was engaging in unsafe behaviour and the relationship broke down. DD then moved to her current placement where she appears more settled and to have a positive bond with her carers.

14. Mr KA records that in July 2018 DD's mother appeared at her foster placement. Prior to this it had been thought that she was in Italy but it then appeared that she was in the UK illegally. She then had some contact with DD, and agreed to have a parenting assessment, up until October 2018 when she ended contact.
15. Mr KA says that DD and the appellant are very private and do not share much with the adults responsible for their care, but DD's foster carers do confirm that they are in contact with each other. DD has also said that they are in contact on social media although sometimes the appellant blocks DD, but he regards this as typical teenage behaviour. DD has told him that she calls and texts two or three times a week and see him here and there to eat or go to the cinema. She has told him that they are "siblings being up and down, although she wants him by my side as always". Mr KA did see the appellant interacting with DD extremely well and providing emotional support whilst she was in hospital having an appendicectomy in September 2019. The appellant gave DD his chain with an Albanian emblem on it which was clearly a source of comfort when she was feeling anxious and vulnerable. He also saw them on Teams at a video Teams meeting with the appellant's barrister in July 2021 and observed that they were very much in contact and wanting to maintain their contact as siblings for the future. DD told Mr KA that she wanted to support his appeal as the appellant "was the only one that keeps me going and without him I will break down" and also that the appellant "is the only family I have and as my mental health is bad, he is the only person I like to talk about my family with". Mr KA confirms that DD has had a significant amount of trauma in her past and has engaged (although not very consistently) with therapeutic services. He confirms that DD takes Melatonin and Propranolol to support her sleep, manage anxiety and panic attacks. It is his opinion that: "DD's mental health is already significantly impacted by the trauma experienced in Albania, her journey and separation and loss from her mother." He concludes that he would have: "concerns in relation to the impact of DD's future mental and emotional health, which is already fragile, should her brother be removed from the UK."
16. Mr Tufan submits, in summary, that it is accepted that the appellant and DD are biological siblings, and that DD is a minor. He accepts that their mother is not in the picture, and the two siblings have a family life relationship as DD is a minor. He accepts that the evidence is that they meet a few times a week, but argues that it would be proportionate to remove the appellant as the family relationship is not

of such a degree as to require that the appellant should remain. The appeal should therefore be dismissed.

17. Ms Reid submits, in summary, that the key issue in the proportionality assessment is the appellant's relationship with DD his minor sister who has leave to remain in the UK. She submits that they have a strong relationship, which, despite its ups and downs as described by the social worker Mr KA in his candid report, is now one which is very protective of DD by the appellant and somewhat parental when he is trying to ensure her future by trying to encourage her to attend school and helping with her CV for her apprenticeship. His removal would have a negative impact on DD's mental health, a concern not just of the appellant and DD but one shared by DD's foster carer Ms JK and her social worker Mr KA. The social worker has provided a very objective report which ultimately concludes that the appellant has a positive influence on his vulnerable minor sister DD.
18. In addition it is argued that it should also weigh in his favour that the appellant has lived in the UK since 2015, he was 13 years, and thus for almost seven years, and that he left Albanian at a very young age and would not be returning there with any family support or meaningful relationships in that country, as although his asylum claim was dismissed by the First-tier Tribunal it was believed, as set out at paragraph 25 of the decision, that he had been the victim of domestic violence at the hands of his father. It is also a neutral matter that he speaks English.
19. Ultimately, for all of these reasons, it is argued that the appellant's removal would be a disproportionate interference with his right to respect for his family and private life ties with the UK, and the family life ties of his vulnerable sister DD.

Conclusions Remaking

20. It was not argued by Ms Reid that the appellant could meet the private or family life provisions of the Immigration Rules, so this appeal is advanced solely on the basis that a free ranging Article 8 ECHR claim outside of those Rules succeeds.
21. There was no contention from Mr Tufan that the evidence of any of the witnesses who submitted statements was not credible or should not be given weight. I find the evidence before me is consistent in all material respects. Judge of the First-tier Tribunal Russell in his consideration of the protection claim advanced by the appellant concluded, whilst dismissing it found that: "The appellant's claim, set out in his witness statements and interviews is coherent and plausible and consistent with the background evidence. I am prepared to accept the appellant's evidence is probably true". I find both the appellant and DD's evidence credible. I find that I can place significant weight on the statement of truth from Mr KA as he is suitably qualified, has had long-term and on-going contact with DD and in the past contact with the appellant, and puts forward a picture which clearly includes the negatives as well as the positives. I also give weight to the witness statement

of Ms JK as although she did not attend to give oral evidence her evidence is consistent with that of Mr KA, the appellant and DD.

22. In this appeal I must give weight against the appellant and in favour of his removal because he cannot meet the Immigration Rules as the maintenance of immigration control is in the public interest, applying s.117B(1) of the Nationality, Immigration and Asylum Act 2002. I must also give weight, applying s.117B(3) of the Nationality, Immigration and Asylum Act 2002 against the appellant remaining as he is not (as yet) financially independent and I find that he will, for a year or so at least, be a burden on taxpayers. In relation to the appellant's integration however I find that the facts of this case show he is in fact at college and thus in reality is as integrated in society as any young person of his age might be expected to be. I have regard to the fact that little weight is to be given to his private life as formed in the UK, applying s.117B(4) and (5) of the Nationality, Immigration and Asylum Act 2002 as all of these private life ties have been formed whilst he has been unlawfully and precariously, with discretionary leave, present in this country. I find however that little is not no weight, and that as Ms Reid has submitted, the appellant has spent six of his most formative years in the UK growing from a child to a young adult in circumstances which were not of his own choosing as it is accepted by the First-tier Tribunal that his history of fear of violence from his father was probably true. I find, as Ms Reid, has submitted that the appellant does speak English, and that this must be treated as a neutral matter, and not one weighing against him, applying s.117B(2) of the Nationality, Immigration and Asylum Act 2002.
23. I now move to consider the decisive issue of the appellant's family life relationship, as accepted by Mr Tufan, with his biological sister DD who is a minor who has continuing leave to remain in the UK until 2023, having arrived in the UK with the appellant in 2013. The appellant and DD initially lived together for the first four years they were in the UK. They do not live together now, and have not done so since 2017/8 when they fell out over a very serious allegation made by DD against her brother. It is the evidence of the appellant, DD and the conclusion of her social worker, Mr KA, (who was at the time also the appellant's social worker) that this was a false allegation. Nevertheless, social services decided that a break in the relationship was the correct course, and DD and the appellant did not see each other again for about two years, until 2019. I find, relying on evidence from the appellant, DD and the statements of the social worker and DD's foster carer, that the current state of the contact between DD and the appellant is that they live separately but see each other face to face several times a week outside of their respective homes in cafes, restaurants or the cinema, and also speak regularly on the phone/via social media.
24. It is accepted by Mr Tufan for the respondent that the appellant's mother has no contact with the appellant or DD, and so I find that the appellant is DD's only biological relation with whom she has contact.

25. I find that DD is a vulnerable 16 year old girl who suffers from depression, anxiety, insomnia and panic attacks since around the time of her separation from the appellant in 2017, based on her evidence, that of Mr KA and her foster carer Ms JK. She has also committed acts of self harm, engaged in unsafe behaviours and when she learned of the appellant's removal decision she wrote herself suicide notes. She has found it hard to settle and form any sort of relationship with a foster carer, and is on her fourth placement, although this one is going better and she has been there for two years. DD, whilst having the normal short-term teenage ups and downs with her brother, very much wants him to stay with her in the UK. Her evidence is that: "I would go rapidly downhill without his love and support. I would be back to square one and my mental health would again worsen." It is the view of her foster mother, Ms JK, that the appellant is: "incredibly supportive of his sister. I can see that this helps her enormously; she feels that she is not alone and has family here." She concludes that "were the appellant to be sent back, DD would lose everything." Mr KA, DD's social worker concludes that: "DD's mental health is already significantly impacted by the trauma experienced in Albania, her journey and loss of her mother", and that he has "concerns in relation to DD's future mental and emotional health, which already is fragile, should her brother be removed from the UK." It is clear from all of the evidence that when things are particularly difficult for DD, such as when she was in hospital, that the appellant is fully there for her and providing her with very significant emotional comfort. I also find that he provides helpful adult older brother type support with practical matters such as trying to sustain her attendance in education and with her CV for her apprenticeship.
26. I find, having considered all of the evidence relating to the appellant's family life relationship with DD, that it weighs very heavily in the appellant's favour that he has this significant relationship with his sister DD in the UK; that he provides very regular and vital face to face support to DD who is emotionally and psychologically vulnerable; and that he is the only adult to whom DD can really open up as he is the only person who has gone through those traumatic past experiences with her and her only biological family member left with whom she is in contact. I combined this with the small amount of weight in the appellant's favour that I have concluded I can give to his private life ties formed over the past six years in the context of his having come to the UK as an unaccompanied asylum seeking child and grown up here, and in the context of his clearly having engaged very positively with opportunities in the UK and being on the path to employment, and thus integration and financial self-sufficiency, as a plumber. I weigh this against the public interest in maintaining immigration control, and thus removing those who cannot meet the requirements of the Immigration Rules and the fact that the appellant would probably be able to reintegrate himself in Albania due to his qualifications and language skills, and the appellant's lack of current financial independence. I conclude however that on all the evidence before me that the removal of the appellant is not a proportionate interference with his right to respect for his family life ties with his sister DD and his right to respect for his private life as the impact of his removal on DD would be

devastating and damaging to a vulnerable minor with mental health problems who has just started to experience some stability in her life against a background of trauma.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.
2. The decision of the First-tier Tribunal with respect to the Article 8 ECHR appeal was set aside by Upper Tribunal Judge Kekic.
3. Judge Kekic preserved the findings and decision of the First-tier Tribunal dismissing the protection appeal.
4. I re-make the Article 8 ECHR appeal by allowing it.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. We do so in order to avoid a likelihood of serious harm as a result of the mental health conditions of the appellant's sister.

Signed: *Fiona Lindsley*
Upper Tribunal Judge Lindsley

Date: 18th August 2021

Annex A: Error of Law Decision of Upper Tribunal Judge Kekic:

DECISION AND REASONS

Representation (by way of written submissions)

For the appellant: Sentinel Solicitors

For the respondent: Ms R Pettersen, Senior Home Office Presenting Officer

Background

1. This appeal comes before me following the grant of permission to appeal to the appellant by Upper Tribunal Judge Blum on 14 July 2020 against the determination of First-tier Tribunal Judge S Russell, promulgated on 20 February 2020 following a hearing at Taylor House on 14 January 2020.
2. The appellant is an Albanian national born on 13 September 2001. He entered the UK with his sister in 2015 and claimed asylum. Although their applications were refused, both were granted discretionary leave as unaccompanied minors. The appellant is now over 18 and his application for asylum/further leave was refused; his sister has leave until 2023 and is in foster care.
3. The appellant's appeal against the respondent's decision of 18 December 2018 was dismissed by First-tier Tribunal Judge Russell on asylum and article 8 grounds. The appellant obtained permission to appeal against the decision on article 8 grounds only. His claim that he would be at risk on return to Albania from a violent father and as a possible victim of trafficking was rejected.

Covid-19 crisis: preliminary matters

4. The matter would ordinarily have been listed for but due to the Covid-19 pandemic, and need to take precautions against its spread, this could not happen. The grant of permission, therefore, contained directions by which the parties were required to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.
5. The Tribunal has received replies from both parties with respect to the issue of whether the matter should be determined on the papers. Both are content that this should be done and I am satisfied that would be an appropriate way to deal with this appeal.
6. However, despite Judge Blum's directions in the grant of permission, neither party has put forward any submissions as to the error of law issue. Having satisfied myself that the parties have plainly received the grant of permission containing the directions, and that they have had the opportunity to respond

but have chosen not to assist the Tribunal with any written submissions, I now proceed to consider the matter.

Discussion and conclusions

7. I have considered all the evidence, the determination and the grounds for permission.
8. The appellant has not been granted permission to challenge the findings and conclusions of the judge as to his asylum and article 3 claim. In the absence of any submissions addressing the basis of the grant of permission, I conclude that the judge's decision to dismiss the asylum and article 3 claims stands.
9. I am left with the article 8 claim to consider. Judge Blum considered that there was an arguable error of law in the judge's failure to properly consider the appellant's relationship with his sister and the impact of his removal upon her.
10. The judge's assessment of the relationship between the siblings is contained at paragraphs 56 and 57. It is brief and I reproduce it below:

"...the appellant claims that he has a relationship with his sister who has leave to remain in the UK as a child. It is said that it will harm her best interests if the appellant is removed to Albania".

"Notably, none of the evidence in the form of witness statements or medical reports addresses the substance of the relationship between the appellant and his sister. I note that the appellant and his sister were accommodated together at one point but were then separated owing to differences between them. The appellant and his sister now appear to be on different trajectories and neither her witness statement nor that of her social worker speak to where her best interests lie. In those circumstances, I find that there is no evidence that her best interests will be harmed by the removal of the appellant".

11. The difficulty with this assessment is that it disregards entirely what the appellant's sister expresses in her witness statement. She maintains that they were accommodated together until March 2016 when they were separated due to bickering. Nevertheless, she maintains that it would be bad for her mental health were her brother to be removed. She fears she would lose support, that she would self harm as she had done in the past and that she would lose the one stable thing in her life. She speaks of him being constant in her life and being willing to drop everything to help her. She feels that he understands what she has been through as they shared the experience (witness statement: paragraph 7). She states that they see each other at weekends, go to the cinema and eat together. They also talk and if she has a problem he makes time to see her during the week too (at 9). She says that she has lost contact with all family except for her brother and that when she was in hospital with appendicitis, he was there with her all the time and provided her with emotional support (at 11).

12. A statement from the appellant's sister's foster carer was also adduced. This confirms that the girl has a supportive relationship with the appellant, that he helps her "*enormously*" and is "*incredibly supportive*" of her, that they talk to each other and see each other and that were he to be removed, she would "*lose everything*". She speaks of the girl writing suicide notes when she heard of the appellant's refusal and she confirms that the appellant was beside her in hospital nearly all the time (at paragraphs 5 and 6 of the witness statement).
13. There is also the evidence from the appellant himself. In his witness statement he confirms that they lived together for some three years before they were separated by social services due to arguments but that they love each other and see each other regularly. The statements are referred to in the skeleton argument which was before the judge at the time of the hearing.
14. It may be seen from the judge's brief assessment of the relationship between the siblings that these matters were not taken into account. Whilst the judge refers to a lack of evidence, he does not consider in full the evidence that was adduced and nor does he take account of the fact that he refused the request for an adjournment to enable the appellant's sister and her social worker to attend. No doubt that would have provided him with the further evidence he sought. Even without that evidence, however, I consider that the judge failed to have proper regard to the evidence that was before and that pointed to a close relationship between the appellant and his sister. That is an error of law. The article 8 claim will need to be re-decided by a judge of the Upper Tribunal at a date to be arranged.

Decision

15. The decision of the First-tier Tribunal on asylum and article 3 grounds is upheld.
16. The decision on article 8 contains errors of law and it is set aside. The matter is retained in the Upper Tribunal and a fresh decision shall be made in due course.

Anonymity

17. I continue the anonymity order made by the First-tier Tribunal.

Directions

18. The appeal shall be listed for a face to face hearing at a date to be arranged.
19. The following directions are issued:
 - (i) No later than 14 days from the date this decision is sent out the appellant's representatives are to inform the Upper Tribunal of the number of witnesses to be called with their names and addresses and of any requirement for an interpreter.

(ii) No later than 7 days prior to the resumed hearing the appellant shall file and serve statements of evidence for all witnesses to be called including a statement from his sister's social worker as to the nature of the impact of the appellant's removal upon her.

(iii) any other documentary evidence from the parties shall be filed and served no later than 7 days prior to the resumed hearing.

Signed

R. Kekić
Upper Tribunal Judge

Date: 24 September 2020