Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-003383
EA/50318/2020; IA/00243/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On Friday 2 December 2022	**On Thursday 16 February 2023**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

MR ALDOR ABDULLAI

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J Collins, Counsel instructed by Arlington Crown solicitors
For the Respondent: Mr C Avery, Senior Home Office Presenting Officer

DECISION

1. By a decision promulgated on 7 November 2022, and following a concession made by the Respondent, Upper Tribunal Judge Gleeson, found there to be an error of law in the decision of First-tier Tribunal Judge Bart-Stewart dated 22 June 2022 dismissing the Appellant's appeal against the Respondent's decision dated 22 September 2020 revoking the Appellant's residence card which had been issued to him as the spouse of an EEA national. Judge Gleeson's decision is appended hereto.

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Pursuant to rule 40 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Judge Gleeson did not provide reasons for her decision. Neither party sought such reasons following the promulgation of that decision. I do not therefore need to say more about Judge Gleeson's decision or that of Judge Bart-Stewart whose decision was set aside by Judge Gleeson's decision. Judge Gleeson did not preserve any findings made by Judge Bart-Stewart.

2. Judge Gleeson also directed that the re-making of the appeal take place in this Tribunal. Neither party objected to that course. The error of law was based on a failure to give reasons or failure to take account of some of the evidence. The grant of permission to appeal was on the basis that the Judge had made irrational or inadequate findings on the evidence. The Respondent accepted that was the position. As I note below, the issues in this appeal are very narrow. In fact, the only issue is one of credibility of the Appellant's claim to have been the victim of domestic violence.

3. The Appellant's appeal therefore came back before me for re-making of the decision. I had before me the Appellant's bundle before the First-tier Tribunal ([AB/xx]) and the Respondent's bundle before that Tribunal. I also received separately the witness statement of Mr Flogert Toli, the Appellant's friend and witness. That statement was produced for the hearing before Judge Bart-Stewart. Immediately prior to the hearing before me, the Appellant provided a two-page discharge summary from Barnet Federated GPs Limited ("the Medical Discharge Summary") dated 12 October 2018. I heard evidence from the Appellant and Mr Toli. Having heard their evidence and submissions, I indicated that I would reserve my decision and issue that in writing which I now turn to do.

FACTUAL BACKGROUND, EVIDENCE AND FINDINGS

4. The Appellant gave evidence via an Albanian interpreter. The interpreter was available only remotely. Although there were some minor technical issues at the outset for that reason, I was satisfied that the Appellant and interpreter understood one another, and that the Appellant was able to understand the questions put to him and to give his answers as fully as he wished.

5. The Appellant provided a witness statement dated 30 March 2021 ([AB/11-13]). He did not provide any further statement for the hearing before me.

6. The Appellant's written statement is very vague. He explains the background to his case. He is from Albania. He entered the UK illegally on 14 July 2013. He began a relationship with a Romanian national, Ms Tatiana-Diana Fixon Giura, in 2014. They started living together on 14 November 2014 and married on 11 September 2015. It is not disputed that, having applied for a residence card on 23 October 2015, one was issued on that day. Nor is it disputed that the couple divorced on 19

January 2018. The Appellant says that the relationship broke down in around November/December 2017.

7. In terms of the factual background, thereafter, the Appellant made an application, it appears for a retained right of residence which was refused by decision dated 25 June 2019. On 25 February 2020, a further application was made for permanent residence based on retained rights of residence which application was refused on 7 July 2020 for failure to pay the fee. On 22 September 2020, the Respondent made the decision now under appeal revoking the Appellant's residence card on the basis that he was no longer a family member.

8. As both representatives confirmed, the appeal turns on whether the Appellant has retained rights of residence following the breakdown of his marriage. In turn, that depends on the Appellant's claim to have been the victim of domestic violence. Mr Avery confirmed that if the Appellant's claim is believed, the Respondent accepts that the Appellant is able to succeed as a matter of law.

9. Turning then to the credibility of the claim to have been subjected to domestic violence by Ms Giura, the Appellant says the following in his written statement:

> "..6. At first things between my wife and I were good but as the marriage went on Tatiana and I were unfortunately arguing more and more this was brought about by the fact that Tatiana was very jealous and would want to check on me and control me. Things subsequently deteriorated and she became increasingly abusive and violent to me. The threats and violence were bad but worse in some ways was the manner in which she constantly belittled and humiliated me. As a result of all that I became sad and depressed not to say anxious.
>
> 7. Things became so bad that we separated initially in or around October 2017. Tatiana instigated divorce proceedings at that stage as a way of putting pressure on me and controlling me but we later reconciled and I moved back in about 2 weeks after I moved out. However it did not last and the abuse and violence I suffered continued leading to us splitting up for good.
>
> 8. In terms of the Home Office decision of 22 September 2020, I lived with Tatiana from November 2014 until November 2017; we were in a genuine relationship for all that time and Tatiana worked as an administrator at Duncan Lewis Solicitors. She was working there when we were last in contact. As at now, I do not know what the position although she must by now have been granted permanent residence as she has lengthy residence and work record in the United Kingdom."

10. Although the Appellant provided no further statement, I permitted Mr Collins to examine the Appellant in chief. He was asked what was the worst incident of domestic violence which occurred. He said that this was when he had to go to have a photograph taken for the embassy. After he had finished, he had arranged to meet his wife in a café. Before he had

the photograph taken, he went for a shave. Although he said he went for a shave, when cross-examined about this incident, he said that he had shaved himself at home. As a result of the shave, he had a red spot on the side of his face which was showing when he arrived at the café. His wife noticed it and asked where he had been. He told her that he had been to have a photograph taken for the embassy, but she repeated the question, and he repeated the answer. She then threw a hot coffee over his upper body and left the café. She told him that she would be leaving home as he had been dishonest. She thought he had been with another woman. However, when he returned home, she was still there. The Appellant said that the spot was by then less obvious but still there. He said to his wife that the spot would not still be there if it was caused by contact with another woman. She accepted that, started to laugh and apologised. The Appellant says that he told her that he did not find it funny and could not handle situations like this anymore. Although the Appellant finished his account by saying that he "had a lot to say if allowed to share", as I pointed out to Mr Collins, if the Appellant had a lot to say, that should have been contained in a written statement and not raised ad hoc in oral evidence.

11. When cross-examined about this incident, the Appellant said that his friend, Mr Toli, was with him in the cafe. Mr Toli had driven him there as he had a car, and the Appellant did not. The Appellant said that other incidents of violence happened at home. There was one further incident in public, but this was "not serious". It happened on a bus when the couple were sitting on the upper deck and the Appellant went downstairs to avoid further confrontation.

12. Although the Appellant's delivery of his evidence about this incident was given in a way which appeared rehearsed, I do not disbelieve it for that reason. He may have shut himself off from the emotion of the incident to cope with what he said had happened. However, there is a more serious problem with the evidence arising from the inconsistency between his account and that of Mr Toli.

13. Strangely, given that this is the Appellant's appeal and not that of Mr Toli, Mr Toli's written statement contains far more detail than that of the Appellant. He says that he was witness to the Appellant's wife being jealous and controlling and had been "present during and witness many incidents and altercations" between the couple when the Appellant's wife had been "physically, emotionally and psychologically abusive" to the Appellant. He says for example that he was present in the car with the Appellant when he would take a call from his wife, and she would insist that he make a video call to show that he was not with another woman. When they went to the gym, the Appellant would not take a shower as his wife might assume that he had been with another woman.

14. In terms of specific incidents, Mr Toli sets out the following:

> "..8. Another incident that I bore witness to, was while I was with Aldor, he received a phone call from Tatiana who proceeded to shout and scream and abuse Aldor, claiming that a pair of his underwear was missing. She claimed he must have been cheating on her and demanding to know where he left his underwear. It transpired the next day that she had in fact been doing laundry and while putting clothes out to dry on a radiator, the pair of underwear had slipped behind it.
>
> 9. The worst incident that I personally witnessed was at a coffee shop where my wife and I had met up with Aldor and Tatiana. Aldor received a text message, and Tatiana forcefully the [sic] took his phone off him before he had a chance to look at it. Aldor told her she did not have to grab the phone, as he had nothing to hide and he would have given it to her had she asked. Tatiana became infuriated at this, and she threw a full mug of hot coffee at him.
>
> 10. One one occasion, Aldor and I had been to the barbers, where we frequently go together to get our hair and beards trimmed and shaped. Aldor had a beard shape-up and it had left a slight redness and irritation to his neck where they had shaved him. When I got home, Aldor called me on speakerphone and Tatiana questioned me on where Aldor and I had been before he came home. Aldor told me the next day, when I saw him with scratches on his face, that Tatiana had attacked him as she thought the redness to his neck was from another woman. She had scratched him, pushed him and slapped him."

As is immediately apparent from the foregoing, there is an inconsistency between the two accounts.

15. Mr Toli also gave oral evidence before me. He did so in English, but the interpreter was retained in case he should need one. He did not. I was satisfied that he understood the questions he was asked and was able to answer in full.

16. Mr Toli accepted that he has been convicted of an offence involving deception (possession of identity documents with intent) for which he was sentenced to fifteen months, half in prison and half suspended. I would not for that reason alone have found him not to be a credible witness, but I accept that it is relevant to my consideration of his credibility.

17. The Appellant and Mr Toli were asked on multiple occasions about the inconsistency between their accounts. The Appellant was asked in cross-examination why Mr Toli would give a different account. The Appellant said that this was because he (the Appellant) had given a more detailed description as he had the opportunity to do so. He insisted that the argument in the café was caused by the shaving spot and not a text message on his phone. When asked whether Mr Toli was wrong to say that the shaving spot incident was on a different occasion, the Appellant asked in response what incident he was talking about. He then said that as far as he could remember, this was the incident he was talking about.

"In the coffee shop". There had been "issues and arguing". He suggested that this "might be a miscommunication with the papers".

18. When it was explained to the Appellant in re-examination that Mr Toli had separated the "coffee throwing incident" from the "beard/red spot" incident and asked whose account was accurate, the Appellant said only that the truth is what he said it was about the incident in the café and the mark on his neck.

19. Mr Toli was asked again about the incidents set out in his written statement in cross-examination. He said he was unable to remember exactly when these had taken place. They were many years ago and he had not expected to be asked about them.

20. Mr Toli could not remember the order in which the two incidents had taken place although later suggested in re-examination that one might have happened on the next day, offered perhaps as a reason why he might have confused the incidents. However, when asked in cross-examination about the incidents, he was clear that the trigger for the "coffee throwing" incident had been a text. Although he said that there were many incidents, he said that the two contained in his statement "stuck in [his] mind". When asked why the Appellant's account would be different, he flatly denied that he was wrong and said that these were the two incidents that he remembered. He confirmed that he had been asked by the Appellant to speak to his wife after the shaving incident because they had been to the barbers together. He did not believe that the coffee shop incident was after they had been to the barbers. The Appellant's wife had grabbed the phone when he had received a text. She then "got crazy" and threw coffee.

21. In re-examination, Mr Toli said that he did not know why the Appellant's wife went crazy whether because of the mark or the text. He had thought that she went crazy because of the text but he did not know whether they had argued about the mark when they went home. I found this last attempt to try to explain away the inconsistency once he had realised what it was to be unimpressive and unbelievable. Mr Toli had not once said previously that the two incidents happened at the same time or overlapped.

22. I have considered whether the inconsistency might arise as the result of a failure of recall on the part of either the Appellant or Mr Toli (or conceivably both) since the incidents happened before November/December 2017 and therefore some time ago. However, neither claimed that they could not remember the incident well. Mr Toli said it stuck in his mind. The Appellant was able to recall it in some detail even though he had failed to mention it in his witness statement. It is notable that both described the incident as the worst which had occurred.

23. Mr Collins described the conflict of evidence in his submissions as a "tension". I disagree. It was a clear inconsistency. The inconsistency was not only around the cause of the argument. It concerned the incident itself. The Appellant said that he had shaved himself when the mark appeared. Mr Toli said that they had been to the barbers together. The Appellant said that he had been to have a photograph taken for the embassy and that Mr Toli had driven him. Mr Toli mentioned no such background to the incident. Mr Toli said that he had been called by the Appellant to speak to his wife to confirm the source of the mark. The Appellant mentions no such conversation. Instead, he talks of an argument arising directly with his wife in front of Mr Toli. I am afraid that, as a result, I cannot accept the evidence of either the Appellant or Mr Toli about this incident or the other incident which Mr Toli reports concerning the text message. Whilst the inconsistencies taken separately might be relatively minor, taken together, they completely undermine the account of both men. I do not believe the incident or incidents occurred as claimed by either man or at all.

24. Mr Collins submitted that I should not be swayed in my findings by the lack of independent evidence of domestic violence, but he drew my attention to that evidence which was provided in support.

25. I accept at once that the fact that the Appellant did not report the incidents to the police is not undermining of his claim. I accept that many men and particularly those from the culture and background of the Appellant might not report a claim of domestic violence due to shame.

26. I cannot place weight on the Medical Discharge Summary. As Mr Avery pointed out, this has been produced very late in the day without any explanation as to why that is so nor from where it has suddenly appeared. That might cast some doubt on its genuineness. I accept however that it might have just been found by the Appellant. Whatever the reason for its late production, I do not consider that it provides any real support for the Appellant's case. The date of the document is well after the Appellant separated from his wife and indeed after the divorce. The writer records only what he or she has been told by the Appellant and in fact by Mr Toli who was the friend who accompanied the Appellant to the appointment. The Appellant's English is limited and there is no mention of an interpreter. The document mentions that the "friend" was translating. The writer of the document is at pains to point out that the Appellant was not his or her patient. Mr Toli said it was not his GP. It is therefore entirely unclear who the writer of the document is. In any event, the Appellant's problems are said to stem only from a "turbulent relationship". There is no mention of any physical violence or psychological control.

27. Although I was not taken to it, I have also had regard to the psychiatric report of Dr Razia Hussain dated 27 December 2019 ("the Medical Report") ([AB/115-124]). Dr Hussain is a registered medical practitioner employed as a locum consultant psychiatrist. She has practised as an

adult psychiatrist for over twenty years although there is no indication in her CV of experience in relation to domestic violence.

28. As set out in the Medical Report, the Appellant reports arguments and controlling behaviour, and "protracted torturing and humiliation" which he says "left him grimly traumatised". The Appellant reports that "he was referred to his GP, for the treatment of deterioration of his mental health due to facing domestic violence and the divorce". Dr Hussain does not appear to have called for or seen the Appellant's medical records which, with the exception of the Medical Discharge Summary, have not been produced. She does not therefore consider why the only medical evidence which has been produced thus far is from October 2018 when the Appellant saw a GP at a practice where he was not a patient. The Appellant has provided no evidence of consistent treatment for mental health problems either prior to the consultation with Dr Hussain nor since. He has provided no evidence in support of the assertion made to Dr Hussain that he had been referred to a GP and was treated for his mental health. He may have been prescribed medication in October 2018 but there is no evidence of a referral and consistent treatment for mental health before or after October 2018. I consider that lack of evidence to cast doubt on Dr Hussain's opinion and diagnosis.

29. It is of course not for Dr Hussain to provide an opinion on the credibility of the Appellant's account of why he is suffering mental health problems if indeed he was at that time. Even if Dr Hussain's diagnosis is accepted, therefore, it provides little if any support for the Appellant's claim. As Dr Hussain herself accepts at [2.4] of the Medical Report, the information provided in the Medical Report is "predominantly subjective" and is based only on a one-hour assessment of the Appellant. I am also a little puzzled about how Dr Hussain was able to assess the Appellant since there is no record of use of an interpreter and therefore no consideration whether and, if so how, the Appellant's limited command of English might have affected the assessment. For the foregoing reasons, I can give little weight to the Medical Report.

30. I do not accept the credibility of the Appellant's claim to have suffered domestic violence at the hands of Ms Giura. It may be the case, as the Appellant is said to have told a GP shortly after the relationship ended, that it was a turbulent relationship. Ms Giura might, as the Appellant says, have been a jealous woman. His mental health may even have been affected by the relationship and the breakdown of it (although I am less inclined to accept that given the lack of any contemporaneous evidence contrary to what the Appellant told Dr Hussain about his referral and treatment). I do not however accept that Ms Giura was violent towards the Appellant or even controlling of him. That is not due to lack of independent evidence but because I found the evidence there is, that is to say the evidence of the Appellant and Mr Toli, to be lacking in credibility.

CONCLUSION

31. As the only issue is one of credibility, my finding that the Appellant was not the victim of domestic violence at the hands of Ms Guira means that he is not entitled to a retained right of residence in EU law. His appeal therefore fails.

DECISION

The Appellant's appeal is dismissed.

Signed: L K Smith Dated: 5 December 2022
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-003383**
on appeal from EA/50318/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 28 October 2022	……7 November 2022……

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

ALDOR ABDULLAI

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

DECISION OF THE UPPER TRIBUNAL
PURSUANT TO RULE 40(3)(a) OF
THE TRIBUNAL PROCEDURE (UPPER TRIBUNAL) RULES 2008

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision to refuse him a residence card on the basis of retained rights, on domestic violence grounds, pursuant to Regulation 10 of the Immigration (European Economic Area) Regulations 2016. The appellant is a citizen of Albania.

2. Permission to appeal was granted on the basis that the First-tier Judge's decision is irrational and/or inadequately reasoned. In her Rule 24 Reply dated 9 September 2022, the respondent stated that she did not oppose

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the application for permission to appeal and invited the Upper Tribunal to remake the decision on retained right of residence.

3. It is common ground that the First-tier Tribunal did materially err in law in the manner in which she treated the evidence of the appellant and his witness, Mr Flogert Toli. Both parties agree that this is a case where the decision of the First-tier Tribunal must be set aside and remade.

4. I am satisfied that the decision of the First-tier Tribunal can properly be set aside without a reasoned decision notice.

5. Pursuant to rule 40(3) of the Tribunal Procedure (Upper Tribunal) Rules 2008, no reasons (or further reasons) will be provided unless, within 7 days of the sending out of this decision, either party indicates in writing that they do not consent to the appeal being disposed of in the manner set out at (5) above.

6. If in consequence an oral hearing is required, but the outcome is the same, the Upper Tribunal will consider making an order for wasted costs.

Decision

7. I set aside the decision of the First-tier Tribunal, with no findings of fact or credibility preserved. The appeal will now proceed to the stage in which the Upper Tribunal will remake the decision to allow or dismiss the appeal on the basis described in the grant of permission.

Signed: Judith AJC Gleeson
Upper Tribunal Judge Gleeson

Date: 28 October 2022