IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005440
First-tier Tribunal No:
PA/00092/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 14 May 2023

Before

UPPER TRIBUNAL JUDGE REEDS

Between

U H
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Jagadesham, Counsel instructed on behalf of the appellant.
For the Respondent : Mr McVeety, Senior Presenting Officer

Heard at (IAC) on 19 April 2023

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal (hereinafter referred to as the "FtTJ") who dismissed the appellant's human rights appeal in a decision promulgated on the 7 July 2021.

2. Anonymity had been granted by the FTT and was granted because the facts of the appeal involved a protection claim and also relates to personal medical evidence. Neither party urged the Tribunal to revisit that direction. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead

members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

3. Permission to appeal the decision of the FtTJ was sought and permission was initially refused but on renewal was granted by UTJ Keith on 10 January 2023.

4. The background to the appeal is set out in the decision of the FtTJ, the decision letter and the bundles provided. The appellant is a national of Albania who arrived in the United Kingdom on 24 May 2015. She made a claim for asylum on 9 June 2015 and a referral was made to the National Referral Mechanism ("NRM") to consider whether or not she was a victim of modern slavery. On 9 January 2018 it was decided that the appellant was not a victim of modern slavery, and her asylum claim was refused. It was dismissed by an Immigration Judge on 18 July 2018. The appellant's appeal rights were exhausted on 2 August 2018.

5. The appellant made further submissions on 25 August 2019 which were accepted by the respondent as a fresh human rights claim, based on Article3 and Article8, and based principally on her medical conditions. This was refused in a decision taken by the respondent on 26 July 2021 that her asylum claim had been determined earlier and she was not found to be credible witness as to events in Albania and that she had entered the UK with her husband and would not be returning as a lone female. The respondent also considered that the appellant's medical conditions did not engage Article3 given the high threshold necessary for a breach and that the appellant would be able to access medical treatment in the light of the expert report confirming medical treatment would be available.

6. The appeal came before the FtT. The central feature of the appeal related to the appellant's medical condition of lupus which had been diagnosed after her appeal had been dismissed in or about April 2019. It is a condition which is not curable and one that has an uncertain and unpredictable prognosis. In a decision promulgated on 11 August 2022, the FtTJ dismissed the appeal both on Article3 and Article8 grounds. The FtTJ considered the fresh evidence. As to Article3 based on her medical conditions, the judge concluded that the evidence did not show that the appellant would face a real risk of being exposed to a serious, rapid and irreversible decline in health resulting in intense suffering or a significant reduction in life expectancy due to the absence of treatment or lack of access to treatment. Whilst the evidence from the appellant's rheumatologist had not been challenged, nor the country expert, the judge found that there were medical facilities in Albania which offered treatment and that complex cases were commonly referred to treatment at the University Hospital however whilst he considered there would be significant difficulties in obtaining rituximab there were alternative available treatments which were less expensive. He found that there was not an absence of appropriate treatment and that the evidence of the treating clinician did not extend to showing the use of alternative treatments available and accessible would give rise to a serious, rapid or

irreversible decline in the appellant's health. Therefore he did not find Article3 was met (see paragraph 49). The FtTJ also rejected the submission that the appellant would face a delay in receiving treatment which would give rise to a flare in her condition and thus give rise to serious threat (see paragraphs 51 – 52). As to Article8, and the issue of very significant obstacles, the FtTJ concluded that whilst she would face a number of challenges on return including finding accommodation, gaining an income and managing her health conditions but she would have the support from her son and other family members and would be able to access relevant treatment and thus would not face "very significant obstacles "to her integration and dismissed the appeal on Article8 grounds.

7. The appellant sought permission to appeal which was granted by Upper Tribunal Judge Keith on 10 January 2023. As a result of the grant of permission, the appeal came before the Upper Tribunal. Mr Jagadesham appeared on behalf of the appellant and Mr McVeety appeared on behalf of the respondent, both of whom made their submissions to the Tribunal.

Decision on error of law:

8. I am grateful to both advocates for the assistance they have given during the course of the appeal. The central feature of the appellant's claim related to her medical condition which is of a serious nature and included the condition of lupus. The appellant has received medical treatment in the United Kingdom and autoimmune suppressants which, along with other medication, has been currently effective in managing her condition.

9. There are in essence four grounds of appeal but there is overlap between some of them. They concern firstly the assessment of the medical evidence concerning the availability of alternative treatment in Albania which was a finding reached by the FtTJ. Secondly, a failure to engage with evidence relating to the consequences of withdrawal of treatment, a relevant factor when applying the applicable test set out in AM (Zimbabwe [2020 UKSC 17) and taking into account evidence of previous difficulties and concerns in the past. Thirdly, the assessment of the accessibility of the treatment and the practical difficulties arising which was set out in the country materials which were not engaged with when reaching the conclusions based on Article3 (paragraph 53) and on Article8 (paragraph 65). Lastly there is a challenge to the assessment of the appellant's credibility principally based on paragraph 39 of the decision.

10. Mr McVeety on behalf of the respondent conceded in his submissions that the decision of the FtTJ should be set aside as he accepted that the grounds are made out and that there were material errors of law in the assessment of the medical evidence taken holistically and that the FtTJ conflated or misinterpreted the evidence given in Dr Ylli's report when reaching the overall conclusions and as a consequence the judge did not apply the correct legal test when considering Article3 and as such also affected the consequential assessment of Article8, which was based in part on the appellant's medical condition and the issue of "very significant

obstacles". Mr McVeety accepted that the Dr Ylli was not the treating clinician and that there was a material error in not assessing the country expert report in the context of the treating clinicians evidence. Mr McVeety also conceded that the FtTJ did not deal with the issue of access to treatment and accepted that there were country materials available which required analysis.

11. In his submissions, Mr McVeety stated that the issue of what treatment was available and issues of accessibility of such treatment was not as straightforward as the grounds appeared to suggest or as Mr Jagadesham had submitted. Whilst Mr McVeety conceded that the decision of the FtTJ involved the making of an error on a point of law he did not accept paragraph 14 of the grounds of permission to appeal to the Upper Tribunal (paragraph 12 of the grounds to the FtT) dated 23/8 /22 as to the disposal. He submitted that the issue of whether the appellant could access treatment was a more nuanced issue which related also to the credibility of the appellant whether the factual account of the availability of family on return which was relevant to both Article3 and Article8. He stated that the grounds did not challenge this. Thus he submitted the decision should be set aside but that the appeal should be reheard.

12. In his submissions Mr McVeety sought to preserve some findings but not others. Whilst he accepted the reports of the treating clinician and the country expert he submitted that it was not necessary to preserve any findings made and the evidence should be considered alongside the other factual evidence at a rehearing and in the light of issues of credibility. He further submitted that it would be necessary to make other factual findings which needed to factor into it arguments relating to availability and accessibility of treatment and there had been no consideration of those issues.

13. Mr Jagadesham in his submissions relied upon the grounds which have been summarised earlier. As to Paragraph 7 of the grounds this involved a challenge to paragraph 39 of the decision. He submitted that it formed part of the overall credibility findings of the FtTJ and if there was an error of law relating to paragraph 39, it affected the overall credibility assessment. He submitted that paragraph 39 formed part of that assessment including paragraphs 37 – 40 and impacted on the credibility of the issue of family support available which in turn had formed part of the reasoning of the FtTJ.

14. As to what other findings should be preserved, he submitted that the 1st line of paragraph 47 could be preserved. However he stated that he could see that preserving only part of a paragraph could be problematical. As to paragraph 60, he submitted that this was based on a flawed credibility assessment and further submitted that paragraph 65 should not be preserved as there were no clear findings made.

15. As set out above, the parties are in agreement that the FtTJ erred in law as set out above. They further agree that the decision should be set aside.

There is however no agreement as to what should be preserved findings and consequential orders, and this requires consideration.

16. Dealing with the error of law, in light of the concession made on behalf of the respondent that the decision should be set aside having accepted that there are errors of raw material to the outcome reached, it is only necessary to state briefly why that was made.

17. Dealing with the 1st ground the conclusion reached that the appellant could access alternative treatment did not take account of material evidence. Mr McVeety accepted the erroneous assessment made of the evidence which led to the FtTJ's findings between paragraphs 47 – 49 when applying the relevant test for a breach of Article3 of the ECHR, and also the effect that those findings had on the Article8 assessment. The finding made as to whether alternative medical treatment was available amounted to a misreading of the evidence of the treating clinician or a failure to consider that evidence alongside the evidence of Dr Ylli (country expert). The conclusions reached between paragraphs 47 – 49 concerning alternative treatment appears to have been based on the evidence of the country expert (see section 12 ;page 300AB) where reference is made to the cost of treatment not being high and that the treatment of Rituximab would not be part of the treatment regime and would be substituted by cheaper medication but if she would need it, she could obtain it from the University Hospital. However the assessment of Dr Ylli was not a medical assessment but was stating what was available in Albania. That evidence was relevant evidence following the decision in AM(Zimbabwe) both on the issue of costs and therefore accessibility but also as to alternative treatment, but this had to be considered in the context of the evidence of the treating clinician and thus the suitability of the treatment. If the FtTJ was going to depart from the evidence of the treating clinician as to the importance of this to her treatment regime, it was necessary to set out the reasoning for this.

18. As to the availability of medical treatment, Mr McVeety conceded that there was an error in addressing this. As UTJ Keith stated when granting permission there was evidence of the previous drug regime being unsuccessful and that medication was subsequently changed and therefore it was not simply an issue of alternative treatment, but the issue should be viewed in the light of the history of past treatment. This in turn led to an error in the conclusions on the issue of the likely effect of an absence of suitable treatment or an absence of the treatment currently prescribed. There was historical evidence of past flares up based on delay of therapy and there was an opinion from the treating clinician that whilst the appellant's condition was managed by a combination of hydroxychloroquine and methotrexate alongside Rituximab, there would be a flareup in the condition if Rituximab were withdrawn. This was not taken into account in the assessment and was relevant to that carried out between paragraphs 50 – 53.

19. Also as UTJ Keith remarked when granting permission there was evidence of life changing complications which arguably affected the assessment made under Article3.

20. Lastly, the parties agree that when considering the issues of accessibility of treatment, the conclusion reached at paragraphs 35 and 65 did not address the objective material advanced on behalf of the appellant. When looking at this issue, I do not consider that the FtTJ was in error by considering the evidence of Dr Ylli who was a country expert and therefore was able to set out the costs of treatment (see p.299-300) but is evidence had to be viewed alongside other associate costs identified such as “under the table tips”. It would have been open to the FtTJ to disregard this evidence, but reasoning would be required. As Mr McVeety submitted the evidence was not all one-way as to the issue of cost and thus accessibility but it was an issue which required determination on the evidence taken as a whole.

21. This leads to last issue of credibility and the challenge brought against paragraph 39 of the decision. The FtTJ found that the appellant had overstated her level of disability and how it affected her day-to-day life. However the evidence in the witness statement appeared to suggest that when she was previously treated her mobility deteriorated and she did require full-time care but that based on current treatment condition had improved. The evidence in essence presented a picture of a condition that fluctuated. The evidence of the treating clinician provided potential support for her evidence (see page 40). Thus there was other available evidence which perhaps gave a different view, and that the appellant was not stating that her condition was so severe that she needed full-time care. The materiality of that finding is that the appellant was not found to be a credible witness. When looking at the earlier paragraphs the FtTJ was entitled to take the decision of Judge Hillis as a starting point and as set out at paragraph 38 the evidence did not provide a satisfactory explanation for the adverse credibility points found previously. However as Mr Jagadesham submitted the finding at paragraph 39 was relevant to the overall assessment of credibility because the judge gave 2 reasons for not finding the appellant to be credible relying on both paragraphs 38 and paragraph 39. As such I would accept the submission made by Mr Jagadesham concerning paragraph 39 and that the assessment of credibility was flawed in this respect. This was material because the FtTJ relied upon that finding as to the level of care required when reaching his conclusion at paragraph 65, and as such is both relevant to the Article 3 and Article 8 assessment.

22. For those reasons, the errors of law conceded by the respondent and identified above are material to the outcome both on Article3 and Article8 grounds and both advocates are in agreement that decision should be set aside.

23. As to a further hearing I accept the submission made by Mr McVeety that as a result of the errors identified it will be necessary for a rehearing and for further factual findings to be made on the evidence taken as a whole.

Both advocates have given their submissions as to what findings, if any should be preserved. Having considered those submissions I do not preserve any of the findings made as such a course would unnecessarily bind any future tribunal from undertaking a holistic assessment of the evidence and that is particularly true where issues of credibility arise and applying the decision of AB(preserved FtT findings; Wisniewski principles) Iraq[2020] UKUT 00268). Mr McVeety sought to preserve the findings made in the Article8 assessment concerning the availability of family, however this has to be seen in the light of the challenge made to paragraph 39 and the overall assessment of the credibility of the appellant's evidence as to whether she would have family support. Furthermore, as Mr Jagadesham submitted by preserving the 1st line of paragraph 47 this would not be practical. The issue of whether the appellant could obtain Rituximab relies on a number of issues identified in the grounds and the 1st line made at paragraph 47 feeds into the rest of paragraph 47. It also appears to be an agreed fact that Belimumab is not available in Albania therefore it is not necessary to preserve that. The evidence of the treating clinician is not in dispute and again it is not necessary to identify particular paragraphs of the decision by reference to that evidence.

24. I have given careful consideration to the Joint Practice Statement of the First-tier Tribunal and Upper Tribunal concerning the disposal of appeals in this Tribunal.

> "[7.2] The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless 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."

25. When addressing that, I am satisfied that this appeal falls within subparagraph (b) and that further judicial fact finding will be required, and for the reasons given it is not appropriate to preserve any factual findings. In those circumstances it is consistent with the overriding objective to remit the appeal.

26. Therefore considering all of those issues, I accept the request made on behalf of the appellant at paragraph 13 of the grounds of appeal to the FTT (and paragraph 15 of the grounds to the UT) that the appeal should be remitted to the FtT but not preserving any findings of fact for the reasons set out above. This does not bind the parties from narrowing the issues when before the FTT.

27. For those reasons, the decision of the FtTJ involved the making of an error on a point of law and the decision of the FtTJ shall be set aside and remitted to the FtT for a hearing.

Notice of Decision

28. The decision of the FtTJ involved the making of a material error of law and is set aside and shall be remitted for a hearing before the FtT .

Upper Tribunal Judge Reeds
Upper Tribunal Judge Reeds

11 May 2023