IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000183

First-tier Tribunal No: PA/50380/2023
LP/01413/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 29 August 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

ERLAND BERA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Wood of the Immigration Advice Service.
For the Respondent: Mr Thompson, a Senior Home Office Presenting Officer.

Heard at Phoenix House (Bradford) on 5 July 2024

DECISION AND REASONS

1. The Appellant appeals with permission a decision of First-tier Tribunal Judge Sarwar ('the Judge'), promulgated following a hearing at Manchester on 30 October 2023, in which the Judge dismissed his appeal against refusal of his application for international protection and/or leave to remain in the United Kingdom on any other basis.
2. The Appellant is a citizen of Albania born on 5 September 2005 who claimed to have a well-founded fear of persecution in Albania. That application was refused by the Respondent on 16 December 2022.
3. At [20] the Judge set out the agreed issues to be determined.
4. The Appellant's claim is summarised by the Judge at [25] as follows:

    a. The Appellant is a national of Albania.
    b. Both the Appellants parents suffered from health conditions and to pay for the medical expenses, the Appellant borrowed 15 million Lek.
    c. The lenders then sought repayment in 2018/2019 and threats were made about the Appellants safety.

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d. The Appellant borrowed money from his cousin and left Albania in July 2021. He travelled through Kosovo, Macedonia, Serbia, Germany, Belgium and Holland. He entered the UK on 18 July 2021 and claimed asylum.
e. He fears if he is returned to Albania he will be killed or forced to work for the money lenders.

5. The Judge's findings are set out from [29] of the decision under challenge. The core finding of the Judge is that the Appellant had not proved his case to the lower standard and therefore dismissed his asylum claim, and on the other heads of claim, in line.
6. The Appellant sought permission to appeal asserting, Ground 1, the Judge had materially erred in law by failing to consider the evidence before him holistically. The Judge had admitting at the hearing a report from Sonia Landesmann and it is asserted in the Grounds that the Judge rejects the report on the basis she had already rejected the Appellant's account as not being credible at [21]. Ground 2 asserts the Judge has misdirected himself in law in relation to the standard of proof applicable to the Appellant's appeal. Reference is made to [28] of the determination in which the Judge writes "*I remind myself that the Appellant bears the burden of establishing their case. Looking at the evidence produced I am not satisfied that the Appellant has met the evidential burden, on the balance of probabilities and to the lower standard of proof".* The Grounds assert as the Appellant made his protection claim on 18 July 2022 and the Respondent's own guidance states that in assessing credibility and refugee status in asylum claim lodged before 28 June 2022 the required standard is that the Appellant must discharge the lower standard of a reasonable degree of likelihood. It is only claims made after 28 June 2022 which are subject to the provisions of section 32 of the Nationality and Borders Act 2022, with past events being assessed on the balance of probabilities.
7. Permission to appeal was granted by another judge of the First-tier Tribunal, the operative part of the grant being in the following terms:

> 4. I find that the grounds do identify an arguable error of law, for the reasons stated. While the Judge does make reference to the lower standard of proof, the express mention of the civil standard in paragraph 28 makes it arguable that he has applied too high a standard. While I consider the first ground to have less merit, the Judge having stated at paragraph 29 that all the evidence was considered in the round before any conclusions were reached, I do not limit the grant of permission and both grounds may be argued.
> 5. Permission to appeal is granted.

8. The Secretary Stated opposes the appeal in a Rule 24 response dated 25 January 2024, the operative part of which is in the following terms:

> 3. The complaint about the judge's treatment of the expert report seems to be a complaint of form over substance. Whilst a view may be taken that the judge's treatment of the report lacks detailed reasoning, the report itself makes unjustified assumptions about the appellant's circumstances.
> 4. In support of the above point, I include the following quote from the report.
>
> Mr Bera would be in danger of being re-found by the gang or another gang as he would appear vulnerable by virtue of being alone and from having been previously trafficked with the commensurate lack of confidence and fearfulness he may project. It is my opinion that there is no protection available for Mr Bera. Albania is a dangerous and corrupt place and although attempts have been made as outlined in various recent CPIN to improve matters unfortunately there is still a long way to go which is admitted as such in the CPIN.
>
> There is no suggestion in the evidence that Mr Bera has been trafficked.

5. At paragraph 15 of the determination the Judge found that the appellant stated under cross examination that he had not discussed with his family whether there had been any further threats since he left Albania.
6. The FtT referred to both the balance of probabilities and the lower standard of proof at paragraph 28 of the determination.

The respondent requests an oral hearing.

Discussion and analysis

9. I record for the benefit of anybody seeking to refer back to the First-tier Tribunal an error of numbering. The determination starts with paragraph [1] as expected and continues to [31]. For some reason instead of [32] there is then another [12], with the paragraphs thereafter continuing until the final paragraph at [36]. The paragraphs of the determination which are said to contain material legal errors are therefore those to be found in the second group of numbered paragraphs rather than the first.
10. I shall deal with Ground 2 first, for if it is found the Judge has made an error of law by applying an incorrect standard of proof, that would amount to a procedural unfairness possibly warranting the determination being set aside as a whole, and being remitted to be reconsidered *de novo*. In that case Ground 1 need not be considered.
11. It is accepted that if an asylum claim was made before 28 June 2022 the single standard of proof is "reasonable degree of likelihood" – see R v Secretary of State for the Home Department (ex parte Sivakumaran [1988] A.C. 958.
12. For claims made after 28 June 2022 the Nationality and Border's Act 2022 now requires the application of a two-stage test.
13. The first part of the test is the need to decide a number of matters on the balance of probabilities, namely:

    i. Whether the appellant has a characteristic which could cause them to feel persecution for reasons of race, religion, nationality, membership of a particular social group or political opinion (or has such a characteristic attributed to them by an act of persecution); and
    ii. Whether the appellant does in fact fear such persecution in their country of nationality as a result of that characteristic.

14. The second stage of the test, if the decision maker finds on balance the appellant has such a characteristic, and in fact fears persecution a result of that characteristic, is to decide whether there is a reasonable likelihood that:

    i. They would be persecuted as a result of that characteristic;
    ii. There would not be sufficient protection available; and
    iii. They could not internally relocate.

15. At [8] of the determination (the first paragraph 8) the Judge writes:

    8. Burden and standard of proof – in order to assess the basis of the asylum application (i.e. 'fear' etc) the burden of proof is on the Appellant and the standard of proof is to the lower standard. That means that the Appellant has to show that there is "a reasonable degree of likelihood" or "a real risk" when asserting his claims. This applies for past, present and future events or risk; and the risk has to be objective and not speculative. The lower standard is applied to all findings of fact except where expressly stated.

16. The Judge clearly set out the correct legal self-direction at [8]. At the second [28], which is stated in the grounds to contain the error. Although the Judge refers to both the balance of probabilities and the lower standard of proof, I am not satisfied that indicates an incorrect standard has been applied to the protection claim. Had the Judge not set out the correct burden and standard of proof at [8] it may have been possible to read the determination as Mr Wood's submitted in that the Judge had assessed the first question on the balance of probabilities and then gone on to answer the second question on the lower standard in accordance with the procedure for decisions made after 28 June 2022. But the Judge set out the correct burden and standard of proof and clearly applied that standard when determining whether there is any merit in the Appellant's claim for international protection. The exact wording of [28] is that the Appellant had not met the evidential burden on the balance of probabilities <u>and</u> to the lower standard. That is clearly an indication by the Judge that to neither standard had the Appellant demonstrated an entitlement to succeed.
17. I also note the submission from Mr Thompson that the Judges assessment was in fact correct as it appears towards the end of the determination whereas earlier on in the determination the Judge mentions Article 8 ECHR, although no evidence on this was led before the Judge. The balance of probabilities is the correct standard when assessing a claim pursuant to Article 8. It can be inferred from the determination that the Judge was referring to those matters to which the balance of probabilities test applies not having been proved to that required standard and to those to which the lower standard applies, i.e. the protection claim, not having been proved to that standard.
18. I find no legal error made out in relation to Ground 2.
19. Ground 1 asserts the Judge has erred materially by failing to consider the evidence holistically. Reference is made in the grounds to the decision in <u>AM (Afghanistan) v Secretary of State for the Home Department</u> [2017] EWCA Civ 1123 which referred to the established principle initially expounded in the case of <u>Mibanga</u> [2005] EWAC Civ 367 that a judge should not reject a claim on adverse credibility grounds before considering the objective country evidence, contrary to the well-established principle that credibility should be made on the basis of a holistic assessment.
20. The Grounds challenge the Judge's approach at [21]. In this paragraph, the second paragraph numbered [21], the Judge writes:

> "I have considered Sonia Landersmann's report in detail in which she explains the system of Kanun of Lek law in Albania and how it is embedded into the culture particularly in Northern Albania, where the Appellant is originally from and whilst Sonia Landersmann's findings on the Secretary of State's refusal letter noted however, the findings are based on the account provided by the Appellant and I am not satisfied that this account is credible."

21. The Judge sets out a number of reasons why it was found the account was not credible which are not addressed in the report. It was not disputed that there is a system of Kanun law in Albania, particularly in the North, although contemporary country information speaks of it having less importance in modern Albania than it did in the past.
22. The reason there was not the type of separation envisaged in <u>AM (Afghanistan)</u> is because the problems that arose in the evidence originate from the Appellant. For example, the Appellant claimed that threats were made as a result of his father's inability to pay the money back but could not provide an account of what threats were made. The Judge noted that they were not made to him directly in any event but to his parents. The Judge at [14] also notes a reply to a question put in cross-examination about what threats had been made, to which the

Appellant claimed that although he was in regular contact with his parents they did not discuss these matters. The Judge found these answers were contradicted by a letter from the Appellant's father dated 10 November 2021 claiming the Appellant could be taken hostage or even killed, and the Appellant's own statement where he claimed the threats were continuing.

23. The Judge also notes the Appellant in his evidence was not able to confirm from whom his father borrowed the money, whether they are an organisation or individuals, or whether there was any plan to pay to people back, and whether the Appellant's father borrowed the money from legal or illegal money lenders. The Judge found this lack of clarity material as the Appellant had managed to obtain medical evidence, including invoices from Albania to support his case from his parents, and it was therefore not thought unreasonable that he could have obtained evidence to support his case if it was genuinely available.

24. The Judge makes it clear at [20] that it was the cumulative effect of these evidential issues that cast doubt on the credibility of the account provided by the Appellant.

25. The case of Mibanga was an extreme example where the medical evidence would have made a material difference, as recognised by the Court of Appeal subsequently. It is not made out in this case that the evidence of Sonia Lansermann would have assisted the Judge in light of the problems identified arising from the Appellant himself if considered first, or in any other order.

26. The second problem with this Ground is that in [22] the Judge considers the issue in the alternative as if he was wrong, and accepting that his father had borrowed the money from a criminal gang, and the conclusions of the report that it would be dishonourable for the gang to seek retribution from the Appellant's father because of his physical health, noting in the same paragraph that there are still two other siblings residing in the family home, in relation to whom there was no evidence of any threats or harm. The Judge at [24] finds not being provided with any explanation why the Appellant would be specifically targeted over other family members. The Appellant's brother is approaching the age of 15 and his sister is over 15, the age at which Sonia Landmann indicated a male may be deemed to be an adult in Albania, but did not find this established any risk in light of the evidence that no action had been taken against any of the individuals concerned.

27. The Judge also notes at [26] a further inconsistency. The Appellant accepted he had previously provided an inconsistent account, claiming in his initial statement his father borrowed more money to secure his passage to the UK but later claiming he himself had borrowed the money and his father was unaware of his plans to travel to the UK. The Judge notes the Appellant confirming in oral evidence that his mother was still in Albania receiving treatment financed by the government and his father, who is working.

28. Standing back, it is clear the Judge was faced with a situation where the evidence did not satisfactorily support the claims being made by the Appellant. I do not find it made out that the Judge has committed a procedural unfairness as a result of an artificial separation in the manner in which the evidence was considered.

29. The core finding the Appellant lacks credibility, such that his claim was dismissed, is a finding within the range of those reasonably open to the Judge on the evidence and has not been shown to be rationally objectionable.

Notice of Decision

30. No material error of law has been made out in the decision of the First-the Tribunal. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 August 2024