Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00874/2011

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 November 2013	**On 24 January 2013**

Before

LORD BOYD OF DUNCANSBY
UPPER TRIBUNAL JUDGE KOPIECZEK

Between

IH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms E. King of Counsel, instructed by J.D. Spicer & Co Solicitors
For the Respondent: Mr I. Jarvis, Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant appeals against the decision of the First-tier Tribunal (Judge Easterman and Mr A E Armitage) heard at Hatton Cross on 8 January 2013 and promulgated on 29 July 2013.

2. A determination in the name of Judge Easterman alone was promulgated on 11 March 2013. By a decision promulgated on 6 June 2013 Mr C M G Ockelton, Vice President allowed an appeal on the sole basis of procedural irregularity arising out of the issue of a determination by one person following on an appeal heard by a panel of two. Judge Ockelton remitted the appeal back to the First-tier Tribunal and directed Judge Easterman and Mr Armitage to issue a determination of the panel that heard the appeal. That direction resulted in the determination which is the subject of this appeal.

3. The appellant says that he is an Albanian national born on 22 August 1977. He came to the UK in November 1999 and claimed asylum on 13 December 1999. At that time, and until comparatively recently, he claimed to be a Kosovan named AP, born on 22 August 1978. The further immigration history is set out in the supplementary letter of refusal dated 26 January 2012. In 2005 the appellant was successful before an Immigration Judge on Article 8 grounds after which he was granted discretionary leave to remain and then indefinite leave to remain in 2006. All of this was in the name of AP.

4. In March 2009 the appellant, in the name of AP, was convicted at Lewes Crown Court of sexual activity with a female child. He was sentenced to two years' imprisonment and disqualified from working with children for ten years. He was also made the subject of the notification requirements under the Sexual Offences Act 2003 for an indefinite period.

5. Section 32 of the UK Borders Act 2007 ("the 2007 Act") makes a presumption for the purposes of section 3(5)(a) of the Immigration Act 1971 that the deportation of a foreign criminal is conducive to the public good (s. 32(4)). It provides that the Secretary of State must make a deportation order in respect of a foreign criminal (s.32(5)). However these provisions do not apply if one of the exceptions in section 33 applies. Exception 1, so far as relevant to the appellant, is that removal of the foreign criminal would breach his Convention rights. The appellant fulfils the definition of foreign criminal in section 32(1) of the 2007 Act as someone who is not a British citizen and who has been convicted in this country of an offence and sentenced to a period of imprisonment of at least 12 months.

6. In due course the Secretary of State notified the appellant that he was liable to deportation. On 9 November 2011 (erroneously said to be November 2009 in the First-tier Tribunal's determination at paragraph 4) he was served with a notice that section 32(5) of the 2007 Act applies (automatic deportation) which he appealed to the First-tier Tribunal. In the course of that hearing the appellant claimed to be IH, an Albanian national. As a result the hearing was adjourned while checks were made. The First-tier Tribunal found that it is more likely than not that the appellant is Albanian and nothing now turns on the issue of identity.

7. The issue for the appeal before the First-tier Tribunal was whether or not deportation would constitute a breach under Article 8 of the European Convention on Human Rights and thus an exception under s.33 of the 2007 Act. Having heard the evidence and considered the papers and submissions the First-tier Tribunal concluded that deportation would not breach the appellant's Article 8 rights.

The Appellant's Case before the First-tier Tribunal

8. The appellant's case is set out in paragraphs 18 to 59 of the determination and in the appellant's statement contained in the bundle. We do not intend to repeat it but to summarise the main points.

9. The appellant maintained that he was in fact Albanian. He had entered the UK in 1999 and was advised by fellow Albanians to claim that he was from Kosovo. He took this advice and maintained that identity up until the time that the appeal was first listed. He married a woman, TH, and a son L was born to that relationship. Difficulties arose in the marriage. It ended in January 2007 when he was thrown out of the house. His conviction related to the sexual abuse of one of his wife's daughters, his stepdaughter. He did not accept his guilt and unsuccessfully appealed his conviction. He is presently pursuing an application to review the conviction through the Criminal Cases Review Commission.

10. The appellant has lived in the UK for 13 years and has a new partner, EM. He had been friends with her before he went into prison and subsequently entered a relationship with her. He is now a devout Christian and attends a Christian Fellowship. He had a good work record up until the time he slipped a disc. Back problems now meant that he could not work as a landscape gardener. Although he is presently unable to see his son L he hopes that might change in the future. He has not seen him since 2007. He has a brother and family in the UK whom he sees regularly as well as a cousin.

11. He does not wish to return to Albania. He would find the adjustment difficult and is concerned as to how he would be received as a Christian. He does not know how he would find work with his back injury. His girlfriend would not be able to join him. She is a Radiographer. She has her family there and does not speak Albanian.

Grounds of Appeal and Submissions for Appellant

12. There are two separate grounds of appeal. The first is that in two respects the First-tier Tribunal made substantial errors of fact. The second is that the First-tier Tribunal erred in its consideration of EB (Kosovo) [2009] 1 AC 1159. We shall deal with each of these in turn.

13. The appellant alleges that the First-tier Tribunal made a significant error of fact in paragraph 93 where the First-tier Tribunal stated:

> Further, in this case whilst it may be that the appellant has spent a period of lawful stay in the United Kingdom, it is also right that his current partner entered the relationship with him knowing of his criminal conviction and quite soon if not at the outset of her relationship, knowing of the Secretary of State's likely intention to deport, which means again when considering the weight to be given to that relationship it has to be taken into account, but it must always have been foreseen that it may not have been able to develop to fruition.

14. Ms King, for the appellant submitted that the decision to deport was a finely balanced decision. It was therefore incumbent upon the Tribunal to appreciate all the facts and in particular to correctly establish the facts. So far as the Tribunal's reasoning at paragraph 93 is concerned she submitted that it was factually wrong. The appellant and EM met in June 2007. In October 2008 he began to lodge with her. In January 2009 they commenced a romantic relationship. The appellant was not convicted until 27 March 2009 and he then attempted to appeal his conviction. His appeal rights were exhausted in June 2010. It was not until March 2011 that the Secretary of State informed the appellant that she was considering deportation and then a further 8 months before the decision was taken to deport him. Accordingly it was wrong to say that she entered the relationship knowing of his criminal conviction. The relationship was established before then.

15. The significance of this error of fact, she submitted, was that, under reference to Uner v Netherlands (2007) 45 EHRR 14 one of the specific criteria was "whether the spouse knew about the offence at the time when he or she entered into the family relationship". She submitted that there was a difference between a precarious relationship and an established relationship. She referred us to R (on the application of Onkarsingh Nagre [2013] EWHC 720 (Admin) where Sales J quotes with approval Rodrigues da Silva and Hoogkamer v Netherlands (2007) 44 EHRR 34, where at paragraph 39 the ECHR stated:

> "Another important consideration will also be whether family life was created at a time when the persons involved were aware that the immigration status of one of them was such that the persistence of that family life within the host state would from the outset be precarious. The Court has previously held that where this is the case it is likely only to be in the most exceptional circumstances that the removal of the non-national family member will constitute a violation of Article 8."

16. In this case she maintained that there was no precariousness as the relationship had started before the conviction. While EM was aware that the appellant was facing serious criminal charges he was denying his guilt and she believed in his innocence. He had been acquitted of charges in

respect of two other girls. In answer to suggestions that the relationship was precarious in any event since the appellant had befriended EM in the name of AP, Ms King said that this was not material to the decision of the respondent. She conceded that the appellant had obtained indefinite leave to remain using a false identity and that EM had initially been unaware of this. She also accepted that EM had later helped to maintain the deception. However Ms King maintained that the appellant's name and origin were irrelevant in considering the facts of his family life at the time. The second refusal letter which was issued after the respondent was informed of the appellant's true identity did not say that indefinite leave to remain was to be revoked because of deception by the appellant.

17. The second material error of law was said to be in relation to the decision of the Crown Court Judge to amend his sentence under the slip rule to withdraw the recommendation for deportation. At paragraph 95 the First-tier Tribunal said that they understood that it was likely to be because since the implementation of the Borders Act (sic) it is common knowledge that anyone receiving a sentence of more than a year is required to be deported and there was no need for a judge to make such an order. In fact, Ms King submitted, the reason was that the sentencing judge became aware that the appellant was in the country lawfully and not as he had assumed without permission.

18. The second ground of appeal is to the effect that the First-tier Tribunal misinterpreted EB (Kosovo) [2009] 1AC 1159 by saying that it had less weight in this case. The reason the Tribunal gave was that unlike EB (Kosovo) this was not a case of removing someone who had no right to be here in order to reinforce immigration control but someone who the Secretary of State, acting under primary legislation, had an obligation to deport because of his own behaviour. In EB (Kosovo) the House of Lords had held that an Asylum and Immigration Tribunal should consider whether and to what an extent a delay in resolving an asylum appeal was relevant to the question of proportionality in ordering his removal. It was an error of law for the Tribunal to place less weight on the delay in this case simply because it was concerned with deportation rather than asylum. Accordingly the Tribunal should have placed greater weight on the issue of delay. In this case there was delay. The First-tier Tribunal was wrong to find that it was not substantial. Ms King submitted that the delay was some 18 months from the notification that he was liable to deportation and service of notice of deportation in November 2011.

Submissions for Respondent

19. In reply Mr Jarvis submitted that there was no error on the part of the First-tier Tribunal regarding the nature of the relationship between the appellant and EM and its impact on the assessment of the appellant's Article 8 rights. There was a more nuanced approach by the First-tier Tribunal than was suggested by the appellant. The Tribunal were aware that the effect of the deportation order was likely to be the end of the

relationship. The family life became precarious as a result of the appellant committing serious offences. It prejudiced his family life in the UK. The automatic consequence was that he was liable to deportation. In answer to the criticism that the second refusal letter did not raise the issue of his indefinite leave to remain he said that it did not need to do this as a deportation order revokes ILR.

20. So far as the second error of fact was concerned he accepted that there was an error at paragraph 95. That could be seen from the judge's variation of sentence at BB1 in the respondent's bundle. However he submitted that this was of no significance in the decision making process.

21. Turning to the second alleged error of law Mr Jarvis contended that any delay had to be substantial or culpable. The appellant knew from 2009 that he faced deportation. He had been under no illusion that the respondent was pursuing deportation. The appellant had not identified any prejudice arising from the delay, or any ambiguity on the part of the respondent. There was nothing in the policy to say that there has to be swift action. He referred us to the cases of ZA (Bangladesh) v SSHD [2009] EWCA Civ 158 at paragraph 23 and Onur v United Kingdom [2009] ECHR 289 at paragraphs 11, 15, 51 and 52. He submitted that these cases showed that even substantial periods of delay can be acceptable. There is no legitimate expectation that a decision will be taken in any particular length of time.

Conclusions

22. We do not consider that the First-tier Tribunal made any significant error of fact in its assessment of the relationship between the appellant and EM. It is of course true that one of the factors identified in Uner v Netherlands is whether or not the partner knew of the offence at the time that she entered into the family relationship. However this is only one of the criteria which may be taken into account in determining whether deportation would lead to a violation of his Article 8 rights. Nor do we think it correct to look at the date on which the relationship started and compare it with the date of conviction as if nothing else matters; it is important to look at the realities of the relationship. EM was introduced to the appellant through a friend. She allowed him to stay with her in order that he could get bail in the criminal proceedings. He moved in to the house in October 2008 and the relationship started in January with the conviction in March 2009. Accordingly while the First-tier Tribunal is not correct to say that she entered into the relationship knowing of the conviction she certainly knew that he faced a serious charge which, if proved, could well result in a significant custodial sentence with the consequent threat of deportation. In reality the relationship was precarious from the beginning as EM must have known. The fact that she soon knew that he had misrepresented his identity to the respondent and through this deception obtained indefinite leave to remain merely reinforces the precariousness of the relationship. Nor is it an answer to say that she believed in his innocence. That may

well be so but the fact is that he was convicted and EM would have known that that was a possible outcome. Furthermore, at para 93 of the determination the First-tier Tribunal noted that it was quite soon, if not at the outset, that she knew of the intention to deport the appellant. The first notification of liability to deportation was issued in June 2009. Accordingly the conclusion of the First-tier Tribunal that it must always have been foreseen that the relationship may not have been able to develop to fruition is correct. There is no error of law.

23. We agree with Ms King and Mr Jarvis that the First-tier Tribunal was in error with their understanding of why the judge withdrew his recommendation for deportation. The reason given by the judge is that he appreciated that the appellant had been in the UK for a long time and was given indefinite leave to remain. He said that he gave insufficient weight to the fact that he had a child with the mother of the complainant and although he suspected that their relationship is at an end he may well have an argument he would wish to try and make in a different place for being able to see his own child. It was for that reason he deleted the recommendation for deportation. However while we agree that the First-tier Tribunal were incorrect in their understanding we do not consider that anything turns on it. The judge clearly felt that the issue was one to be resolved in a different place. The appellant has not seen L since 2007 and there is no immediate prospect of him doing so. Moreover while the First-tier Tribunal were wrong in their supposition as to why the recommendation in this case was withdrawn they are correct in saying that section 32 of the 2007 Act makes such recommendations otiose.

24. We now turn to the second ground of appeal which relates to the alleged delay in making the deportation order and the weight which should be accorded to the dicta in EB (Kosovo). We listened carefully to Ms King's submissions but we are unable to agree with her that there has been any substantial delay in this case. The appellant was convicted in March 2009. The respondent notified him that he was liable to deportation in June 2009. He then appealed and his appeal rights were exhausted in June 2010. Ms King then complained that it was not until March 2011 that a fresh notice of liability to deportation was served on the appellant and not until November 2011 that the deportation order was made. However it is clear from the chronology of events found in the appellant's bundle at pages 272 to 279 that the respondent was actively pursuing the appellant's agents for information on what had happened with the appeal. Repeated attempts were made to find out what had happened with the appeal. On 5 May 2010 a representative from the appellant's solicitors told the case worker that they were awaiting a decision and that the solicitors would fax the details to the case worker as soon as they were aware of the outcome. Efforts were made on 5 July, 11 August, 17 August, 10 November and 29 November to find out from the solicitors what had happened. It was not until 11 January that the case worker received a copy of the court order from the solicitors with confirmation that the appeal had been dismissed. Ms King complained that the case worker should have gone direct to the

Court of Appeal. It is true that that might have provided an answer more quickly but the respondent was entitled to rely on the undertakings given by the appellant's own solicitors that they would advise her of the outcome "as soon as they were aware of the outcome".

25. In any event we do not consider that the delay is substantial far less showing evidence of a dysfunctional system. While it is also true that the relationship with EM may have subsisted for a little longer we do not consider that any delay will have added substantially to the considerations of the appellant's Article 8 rights. As we have already pointed out the First-tier Tribunal was correct in finding that it must always have been foreseen that the relationship with EM might not be one that would develop to fruition.

26. Since we are satisfied that there has been no substantial delay in this case it is not necessary for us to consider whether the weight that should be given to issues of delay in a case such as this should be any lesser than would be given in an asylum case. We find that there is no error of law.

27. Finally we should comment on a submission made by Ms King in reply to Mr Jarvis. She submitted that the offence of which the appellant was convicted was not a serious sexual offence. She started to address us on the circumstances of the offence in support of that submission. She said that the nature of the offence must be a relevant factor in determining whether or not deportation was proportionate.

28. We do not consider it appropriate to hear submissions on the circumstances that surround an offence. That would inevitably lead to us hearing evidence if the circumstances were disputed. The fact of the conviction and the sentence together with the sentencing remarks of the trial or sentencing judge should be all that is required. We note that in his sentencing remarks the judge stated, "This was an appalling breach of trust. You ended up in an important role within a family as not only a husband to a wife, father to three stepdaughters and father to your own son L. You chose, over a significant period of time, to sexually abuse a child who was your stepdaughter. Not only was that a position of trust that you abused, but she was also learning disabled and you knew it."

29. Of course there are cases of sexual abuse which will incur heavier sentences than two years imprisonment and might therefore be said to be more serious. But we cannot agree that the conviction is not a serious sexual offence. More importantly the sentence was one which exceeded the threshold which Parliament decided should determine whether a foreign criminal should be deported. Parliament placed an obligation on the Secretary of State to make a deportation order unless one of the exceptions applied. We are satisfied that there is no error of law in the First-tier Tribunal's decision that the appellant had failed to establish that his removal from the United Kingdom would breach his Convention rights.

Decision:

The decision of the First-tier Tribunal did not involve the making of an error on a point of law. Accordingly, its decision to dismiss the appeal on all grounds stands.

Anonymity

Given that these proceedings involve a child, we make an order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008. Consequently, this determination identifies the child, and the adults associated with him, including the appellant, by initials only in order to preserve the anonymity of that child.

Lord Boyd of Duncansby 7/01/14