



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/25350/2016

THE IMMIGRATION ACTS

Heard at Field House
On 8 May 2018

Decision & Reasons Promulgated
On 4 July 2018

Before

UPPER TRIBUNAL JUDGE KING TD

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KLODIAN [B]

Claimant/Respondent

Representation:

For the Appellant: Mr L Tarlow, Home Office Presenting Officer

For the Respondent: Ms F Shaw, Counsel instructed by Bankfield Heath Solicitors

DECISION AND REASONS

1. The claimant is a citizen of Albania. He arrived in the United Kingdom in August 1999, clandestinely, claiming to be Kosovan. His immigration history has been a complicated one. He has committed a number of criminal offences particularly in February 2010 when he was convicted of perverting the course of justice and sentenced to one year and six months' imprisonment. He also had offences dating from 2005 when he continued to offend after his conviction in Bristol Crown Court. It was not surprising therefore that a deportation order was made against him on 3 November 2016, he being classed as a foreign criminal.

2. The claimant sought to appeal against the deportation order. That came before the First-tier Tribunal. Those proceedings were set aside by reason of error of law and the matter came for rehearing before First-tier Tribunal Judge Murray on 21 September 2017. The appeal was allowed on the basis of Article 8 of the ECHR.
3. Challenge was made to that decision by the Secretary of State for the Home Department, on the basis that insufficient weight had been attached to the public interest considerations in the matter. Challenge was also made to the finding by the First-tier Tribunal that his separation from his children and partner would be unduly harsh.
4. Leave to appeal to the Upper Tribunal on such grounds was granted and thus the matter comes before me to determine the issues.
5. The primary challenge made by Mr Tarlow to the determination is that insufficient regard was had by the First-tier Tribunal Judge to the public interest in removing the claimant. I find there to be little merit in that argument.
6. At paragraph 13 the Judge notes the lengthy history and notes the various offences committed by the claimant. At paragraph 36, in particular, the Judge considers the seriousness of the claimant's offending and risk of reoffending, particularly the offences committed in 2009 and 2010. Although the offences have not escalated in seriousness he has continued to offend, the last conviction being some five months prior to the hearing. The Judge indeed comments: "It follows that the public interest in his deportation has increased since the last appeal". The Judge considered that the claimant was indeed a foreign criminal convicted of an offence which entailed a sentence of imprisonment of at least twelve months. In the circumstances the proportionality of deportation falls to be assessed, applying paragraphs 398 and 399 of the Immigration Rules and Section 117C of the 2002 Act. It has not been suggested in any grounds of appeal that that approach was not the appropriate one to take.
7. In those circumstances the focus of consideration as set out in paragraphs 398 and 399 of the Rules was whether the claimant was a person having a genuine and subsisting parental relationship with a child under 18 years old, who is in the United Kingdom and that the child is a British citizen and that it would be unduly harsh for the child to live in the country to which the person is to be deported and it would be unduly harsh for the child to remain in the United Kingdom without the person who is to be deported.
8. In this case the claimant does have two children who are British citizens, aged 5 and 7 at the time of the determination. It was not in dispute that the claimant was in a genuine and subsisting parental relationship with such children. The issue was therefore whether it would be unduly harsh for them to live in Albania and whether it would be unduly harsh for them to remain in the United Kingdom without the claimant.

9. The position of the Secretary of State in the decision under challenge was that there was no reason why the children could not relocate to Albania or indeed why they could not remain in the United Kingdom, the claimant's wife being able to provide the appropriate emotional support for the children and receive wider support from family members, teachers and the medical professionals.
10. The Judge in a detailed determination did not agree with those conclusions, noting in particular the decision of the Upper Tribunal in **KMO (Section 117 - unduly harsh) Nigeria [2015] UKUT 00543 (IAC)**. The judge noted correctly in paragraph 40 that the test in such matters was whether the impact on the child, children or partner of a foreign criminal was inordinately or excessively harsh. There was nothing to indicate that the Judge, in considering the facts of the case, did not apply the correct test. What is contended by the Secretary of State is that the Judge was wrong to conclude that on the facts of the particular case, that such was unduly harsh.
11. A document of particular importance to the Judge in coming to the conclusion was the independent social worker report by Rukhsana Farooqi dated 5 January 2017. The author of the report sets out her qualifications, having been a qualified social worker since 1992, a guardian in proceedings for NYAS since 1996. She has experience working for CAFCASS and is now an expert witness and a part-time senior practitioner at Simmons House Adolescent Psychiatric Unit, St. Luke's Hospital. She also lists the number of documents that were considered and has met the claimant and his wife and the children and has made an assessment of those meetings in the report.
12. The claimant met his wife in 2006. [L] was born on 16 May 2010. The claimant and Mrs [B] married on 17 September 2011. The relationship was not an easy one partly because of the offending behaviour of the claimant and his imprisonment and partly because he exercised violence towards her. It involved the police and also some degree of separation. He received counselling for his behaviour including anger management and communication skills. Their child Robbie was born on 25 December 2011. Notwithstanding various difficulties highlighted in the report it was the view of the author of the report that it was a very close family.
13. The author of the report met the family on 2 January 2017 and has also met with the two children on their own and together and have met the maternal grandparents. Mrs [B] was the main breadwinner for the family, indicating that she was under stress and anxiety herself, It was important for the claimant to take on more of a role of primary carer and looking after the children while she was working. Mrs [B] has been diagnosed with diabetes. As to the children both are settled in their current education and routine. The children were said to possess very good social skills and are settled in their environment and secure in their relationship with the claimant as primary carer. The view of the author of the report is that the claimant and his wife are very close and dependent on each other emotionally and have maintained their

relationship despite significant difficulties. The couple have a strong relationship with Mrs [B]'s parents.

14. In terms of potential separation from the claimant to the children it was noted from [L]'s school report of 29 June 2015 that when her father left home because of the domestic violence incident she regressed at school and found it very difficult to cope. It is the view of the expert that separation would be very significant for the children. In her view a move to Albania would be both unsettling and uncertain for the children and that they would find it difficult to cope, particularly given the separation that they would have from other wider family members. It was the view of the author that separation would have a grave impact on the children's emotional and psychological needs and that they would be at real risk of developing mental health difficulties.
15. As the starting point the Judge recognised that both children were British and that leaving the United Kingdom would be a loss of inherent benefits and opportunities that they currently enjoyed. In terms of the impact upon the children were they to move to Albania, that is considered in the light of the social enquiry report. In paragraph 28 the disadvantages are highlighted but balanced also, to some extent, in paragraph 29 with consideration as to free education and other matters.
16. At paragraph 39 the judge looked at the difficulties which both the claimant's wife and family would have in moving to Albania and concluded that it would be unduly harsh for them to do so. He also found in paragraph 41 of the determination, in the light particularly of the social work report and the oral evidence of the claimant's wife in particular, that there would be a devastating effect upon the family to be deprived of their father. Such a finding led to a conclusion that it would be unduly harsh for the children to remain in the United Kingdom without the claimant.
17. The grounds of challenge contend that the judge failed to give adequate and clear reasons why a return to Albania and/or the separation of the claimant would be unduly harsh. As Mr Tarlow submitted, it is a natural consequence of deportation that family units may well be separated and that children will be upset by such separation. He submits that it may be difficult to adjust to life in Albania but no clear reason has been given why that should be particularly difficult in the circumstances of this case.
18. In terms of reasons it is abundantly clear that the First-tier Tribunal Judge has set out the reasons for the conclusions that matters would be unduly harsh, having properly outlined the test that is to be applied. The views of the claimant's wife and those of the social worker clearly were given considerable weight in the factual analysis and that is the task of the judge to apply a proper balancing exercise to the evidence and to give such evidence appropriate weight.
19. It is not the task of the Upper Tribunal to weigh the merits of a particular decision. It may well be that the view of the judge in this particular case was one that may have

been particularly generous; one which another judge may not have followed. What is or is not unduly harsh is a matter for proper assessment. In this case reasons have been given. I do not find that the reasons were so flawed in common sense or application or outside a reasonable scale of assessment so as to be considered irrational or perverse. The decision-making process, as articulated in the determination in some detail, was one which I find was properly within the reasonable range of responses properly open to the judge. In the circumstances I do not find the reasons to be either inadequate or perverse.

20. In those circumstances I find that it was properly open to the judge to come to the conclusion as to paragraphs 398, 399 and Section 117D that such matters should be applied in the situation of the claimant such as to render his removal from the jurisdiction to be disproportionate in his offending.
21. In those circumstances the Secretary of State's appeal before the Upper Tribunal is dismissed. The decision of the First-tier Tribunal Judge shall stand, namely that the appeal is allowed on the basis of human rights and Article 8 ECHR.

No anonymity direction is made.



Signed

Date 14 May 2018

Upper Tribunal Judge King TD