



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: PA/07344/2016

THE IMMIGRATION ACTS

Heard at Field House
On 5 April 2018

Decision and Reasons Promulgated
On 16 April 2018

Before:

UPPER TRIBUNAL JUDGE GILL

Between

The Secretary of State for the Home Department

Appellant

And

A S

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T Melvin, Senior Presenting Officer.

For the Respondent: Ms C Bexson, of Counsel, instructed by Freedom Solicitors.

Anonymity

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. I take the view that this is necessary in order to protect the identity of the original appellant's child. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. The parties at liberty to apply to discharge this order, with reasons

DECISION AND REASONS

Introduction and background facts:

1. The issue in this case is whether Judge of the First-tier Tribunal Andonian (hereafter the “judge” unless otherwise indicated) materially erred in law in concluding that the deportation of A S (hereafter the “claimant”) would be in breach of his rights under Article 8. The Secretary of State had made a deportation order against the claimant on 4 July 2016 (served on 8 July 2016) in accordance with s.32(5) of the UK Borders Act 2007 (the “2007 Act”). The judge's decision means that he effectively concluded that Exception 1 as provided for in s.33(2) of the 2007 Act applied.
2. Although not raised in the Secretary of State's grounds of appeal and not in issue before me, I should record that there appeared to be no clear finding by the judge whether the claimant had rebutted the presumptions in s.72 of the Nationality, Immigration and Asylum Act 2002 (the “2002 Act”), although there were several paragraphs in his decision concerning s.72 and he referred, at para 100, to the claimant posing a low risk of re-offending in his consideration of Article 8. The parties were unable to point to any clear finding.
3. However, the lack of any finding in relation to s.72 is not material, given the judge's adverse credibility assessment in relation to the claimant's asylum claim and the fact that he dismissed the claimant's appeal on asylum grounds.
4. The claimant is a national of Afghanistan, born on 16 August 1990. He has a daughter, Y, born on 18 February 2012, by his former partner, Ms S P. In his concluding paragraph, the judge said that he considered that the claimant's claim outweighed the public interest in his deportation. He said that the claimant's deportation may well bring to an end to the bond he has established with his daughter and that his daughter “*may well suffer psychologically, emotionally and mentally as a result of the report of the independent social worker*”. The judge noted that the claimant is of low risk of offending and considered that “*the claimant deserved this one last chance in the best interests of his daughter to prove that he will remain out of trouble for all times. This was his first and only offence for which he has served time and I hope he has learnt from it.*”
5. The deportation order was made following the claimant's conviction at Birmingham Crown Court on 19 June 2012 of a money laundering offence, i.e. entering into an arrangement to facilitate the acquisition, retention, use or control of criminal property by or on behalf of another person. On 19 December 2012, he was sentenced to 5 years' imprisonment.
6. I set out at para 10 below, the relevant part of the sentencing remarks of the sentencing judge. It is sufficient to say at this point that the sentencing judge concluded that the particular money-laundering arrangement that the claimant (with others) participated in was “*intricate, highly sophisticated and involved numerous layers of personnel*”, that it operated for a significant period in excess of 2 years and that the sums involved were “*massive*”. The sentencing judge said that in total in excess of £120 million was successfully sent abroad, of which in excess of £60 million was banked through Barclays and NatWest in Birmingham. The sentencing

judge said he had no doubt that “*all but a very small percentage of that money was criminal property*”. In addition, he had no doubt that a substantial proportion of the money involved derived from the trafficking of both class A and class B drugs.

7. In relation to the claimant, the sentencing judge said the claimant had worked at the UK money exchange from the time it opened in June 2010 until it effectively closed in March 2011 and that that money service business was set up for the sole purpose of creating false documents to disguise criminal money. The sentencing judge said that the claimant had worked on a full-time basis at the UK money exchange and was involved in creating “*literally thousands of false documents*”. He concluded that the claimant was involved in this arrangement for a 10 month period and played a significant role.

Immigration history and factual background

8. The claimant arrived in the United Kingdom on 7 October 2008 and was served with illegal entry papers on 22 October 2008 after being encountered following which he claimed asylum. He did not attend an interview. On 24 February 2009, he was sent a letter which informed him that his asylum claim would be treated as withdrawn if he did not explain why he had not attended the interview. He did not respond to the letter. On 10 March 2009, his asylum claim was treated as withdrawn. At the same time, he was served with a notice (IS151A) which gave him a right of appeal. He did not appeal.
9. The claimant was then convicted of the offence mentioned above on 19 June 2012. He was given prior notice of the Secretary of State’s intention to deport him and an opportunity to make representations before the deportation order was signed on 4 July 2016.

The sentencing judge’s sentencing remarks

10. The relevant part of the sentencing judge's sentencing remarks read:

"The particular money-laundering arrangement in which each of you participated, involved a number of grave, aggravating features. It was intricate, highly sophisticated and involved numerous layers of personnel. Money was transported from criminal groups to cash couriers employed on behalf of the money- laundering group. It was then taken to a safe house for counting. The money was then moved to a different premise where it was put into fast deposit bank bags in readiness for banking. False records were created by bogus money service businesses to disguise the origin of the funds. There were four such bureaux, of which at least two were set up with the sole intention of facilitating the money-laundering arrangement.

The money was banked in cash, principally in Birmingham and Manchester. It was then put into the account of the Manchester-based money service business and rapidly transferred abroad. These activities were controlled from abroad principally Dubai and Pakistan. Within the United Kingdom there were coordinators in day-to-day charge of the numerous transactions and layers of personnel to which I have referred. This highly organised arrangement operated for a significant period in excess of two years. The sums involved were massive. In total in excess of £120 million was successfully sent abroad.

Of that sum in excess of £60 million was banked through Barclays and NatWest in Birmingham. I have no doubt that all but a very small percentage of that money was criminal property.

In a general sense, the criminality of money laundering is the assistance, support and encouragement that it provides to the underlying criminal conduct. In this case I have no doubt that a substantial proportion of the money involved derived from the trafficking of both class A and class B drugs. The supply of drugs represents a social evil in which these courts are under a duty to deter.

A S, you worked at the UK money exchange from the time it opened in June 2010 until it effectively closed in March 2011. That money service business was set up for the sole purpose of creating false documents to disguise criminal money. In that context you worked on a full-time basis at the UK money exchange and were involved in creating literally thousands of false documents. In the 10 months that it purported to these, it created false records in the sum of approximately £17 million. Those records were utilised within the money-laundering arrangements to disguise a corresponding amount of criminal money.

In addition, on two occasions in February and March 2011 you were involved in collecting cash and taking it to the home of M K. It follows that you were involved in this arrangement for a 10 month role and played a significant role.”

Relevant legal provisions

11. Section 117A-D of the 2002 Act provide (insofar as relevant) as follows:

“117A Application of this Part

- (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
 - (a) breaches a person’s right to respect for private and family life under Article 8, and
 - (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
- (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
 - (a) in all cases, to the considerations listed in section 117B, and
 - (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
- (3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

- (1) The maintenance of effective immigration controls is in the public interest.
- (2) ...
- (3) ...
- (4) ...
- (5) ...
- (6) ...

117C Article 8 additional considerations in cases involving foreign criminals.

- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
- (4) Exception 1 applies where ...
- (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh.
- (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
- (7) ...

117D Interpretation of this Part

(1) In this Part—

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who—

- (a) is a British citizen, or
- (b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means ...

(2) In this Part, “foreign criminal” means a person—

- (a) who is not a British citizen,
- (b) who has been convicted in the United Kingdom of an offence, and
- (c) who –
 - (i) has been sentenced to a period of imprisonment of at least 12 months,
 - (ii) has been convicted of an offence that has caused serious harm, or
 - (iii) is a persistent offender.

(3) ...

(4) ...

(5) ...”

12. Paras 362, 397-399A of the Statement of Changes in the Immigration Rules HC 395 (as amended) (hereafter the “Rules”) provide (insofar as relevant) as follows:

“A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at 28 July 2014 are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.’

...

397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to

these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.

A.398. These rules apply where:

- (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under *Article 8* of the Human Rights Convention;
- (b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

- (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least four years;
- (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
- (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398(b) or (c) applies if –

- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and
 - (i) the child is a British citizen; or
 - (ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision;
 and in either case
 - (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
 - (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported;

or

- (b) ...

399A. ...”

The judge's decision

13. It is unnecessary to summarise the judge's reasons for his adverse credibility assessment of the claimant's evidence concerning his asylum claim, given that this is not an issue before me.
14. In relation to the Article 8 claim, the evidence before the judge may be summarised as follows:
15. Following his release on licence, the claimant was given permission in January 2016 by the probation service to move to London. Since then, he has lived with Ms P's mother who lives near Ms P. He and Ms P tried to become a couple but eventually decided it was best for their daughter if their relationship was terminated and they became close friends and parents to their daughter. He picks his daughter up from school each day and takes her to her grandmother's house. He spends three nights per week with Y who stays at her grandmother's home three days per week (para 26 of the judge's decision).
16. The claimant said that he was sure that he and Ms P would encourage their daughter to explore her Afghan culture and heritage but that Ms P could not teach Y about the Afghan background in the way that he said he could (para 28).
17. In evidence, Ms P said, inter alia, that although she would support Y to learn about Islam if the claimant is not in the UK, she would struggle to teach her about Islam because she does not believe in it herself. She is worried that without her father their daughter will lose all contact with her Afghan Islamic heritage (para 35).
18. In a report, an independent social worker outlined the strong bond the claimant had with his daughter and the psychological damage that there would be if her father is deported. His deportation would affect her emotionally and educationally and it would also affect her social development. There may be implications for Y's identity needs. The separation at this stage in their relationship is likely to be perceived as a significant loss by Y (para 39).
19. The judge considered Article 8 at paras 95-100 of his decision. They read:
 - “95. Article 8 (1) of the ECHR sets out that everybody has the right to respect for his private and family life. However, every state has the right to control the entry of nonnationals [*sic*] into its territory and article 8 does not give a person an automatic right to choose to pursue their private or family life in the UK. An interference with an individual's private or family life will only be unlawful if it is first established that private and family life exists and then only if the interferences is for one or more of the public interest reasons that are set out in article 8 (2) or if the interference is disproportionate to the public interest reasons.
 96. The immigration rules at paragraph A 362 and paragraph A 398 D set out the practice to be followed by officials acting on behalf of the Secretary of State when considering an article 8 claim from the person liable to deportation on the basis of criminal convictions. These rules reflect Parliament's view of what the public interest requires for the purpose of article 8 (2). Parliament's view is also set out in sections 117 A- to 117D in

part five A of the National Immigration and Asylum Act 2002 inserted by the Immigration Act 2014.

97. The nature of the [claimant's] article 8 claim is as follows: - his established a family life and private life in the UK with his daughter [Y] date of birth 8th February 2012, a British citizen. In support of the [claimant's] article 8 claim he has submitted his daughters [sic] full UK birth certificate. He is the father on the certificate. The [claimant's] former partner gave evidence as well as did the former partner's mother.
98. The [claimant's] deportation the SSHD said is conducive to the public good and in the public interest because he has been convicted of an offence for which he has been sentenced to a period of imprisonment for at least four years. Therefore, in accordance with paragraph 398 of the immigration rules the public interest requires deportation unless there are very compelling circumstances over and above those described in the exceptions to deportation set out at paragraph 399 and 399 A of the immigration rules.
99. Insofar as very compelling circumstances are concerned, as the exceptions to deportation do not apply to him, considerations been given as to whether there are such very compelling circumstances such that the [claimant] should not be deported. There is significant interest in deporting the [claimant]. This is because he was convicted for a very serious offence. As I told him at the conclusion of the hearing when reserving my decision, just because he has a daughter who is a British citizen, that is not a trump card. In order to outweigh the very significant public interest in deporting the [claimant], he will need to provide evidence of a very strong article 8 claim over and above the circumstances described in the exceptions to deportation. [Y] is the [claimant's] daughter. She was born on 18 February 2012 to [Ms P]. She is now at the date of the hearing before me over 5 years of age. I have seen her a copy of her birth certificate. I accept that the [claimant] is the father of the child. I accept that he sees his daughter on a regular basis practically daily. I accept he takes her to and from school, sees her practically daily, cooks and cleans for her, takes her to the park, bathes her and puts her to bed, and helps her in her lessons. I accept that there is a strong bond between her and her father. I accept the conclusions of the social worker. I accept the importance of the support that the girl's mother and grandmother said that the [claimant] gives to her as her father. I considered both the [claimant's] former partner and the child's grandmother as entirely credible witnesses in regard to the bond that has developed between the [claimant] and his child.
100. The Home Office's duty to safeguard the welfare of children is set out in section 55 of the Borders Citizenship and Immigration Act 2009 and this has been taken into account by me in the best interests of the child as being a primary consideration. However, the best interests of the child are not the only or paramount consideration and must be balanced against other relevant factors including the public interest in deporting foreign criminals and to determine whether the [claimant's] deportation is proportionate. I take note of the social workers opinion. Taking all matters

in the round, I also note the [claimant] is remorseful and that he knows what he had done was wrong and that is why he pleaded guilty at the first day of the trial. I believe for the reasons already stated as regards this article 8 claim that in this case it is considered sufficient enough to outweigh the public interest in his deportation. I understand and believe if the [claimant] was deported this may well bring an end to the relationship and the bond he has now established with his daughter and she may well suffer psychologically, emotionally and mentally as a result of the report of the independent social worker. I also note that the [claimant] is of low risk of offending from all the independent reports I have considered and deserves this one last chance in the best interests of his daughter to prove that he will remain out of trouble for all times. This was his first and only offence for which he has served time and I hope he has learnt from it."

(My emphasis)

The grounds and issues before me

20. The grounds may be summarised as follows: In allowing the appeal on the basis that the claimant deserves "*this one last chance in the best interests of his daughter to prove that he will remain out of trouble for all times*", the judge had erred by importing his own test and failing to apply the mandatory requirements of s.117A-D which required the claimant to show very compelling circumstances over and above those described in paras 399 of the Rules, as affirmed by the Supreme Court in Ali v SSHD [2016] UKSC 60. The claimant's daughter had no medical or special needs. The claimant's involvement in her daily routine, such as taking her to and from school, cooking and cleaning for her, and taking her to the park was no different from that undertaken by many parents. The consequence of contact being lost cannot be described as inordinately or excessively severe or bleak for the claimant's daughter, let alone constitute very compelling circumstances. In CT (Vietnam) [2016] EWCA Civ 488, the Court of Appeal held that only the strongest Article 8 claim will outweigh the public interest in deporting someone who had been sentenced to at least four years' imprisonment.
21. At the commencement of the hearing, I asked the parties to address me on the following issues:
- (i) whether, in light of the guidance in relevant judgments of the Court of Appeal and Supreme Court, the judge was reasonably entitled to allow the appeal on the facts as found by him.
 - (ii) whether he had effectively treated Y's best interests as a "*trump card*" notwithstanding that he said they were not so.

Submissions

22. Mr Melvin relied upon the grounds. He also relied upon SSHD v AJ (Zimbabwe) and other [2016] EWCA Civ 1012 and NA (Pakistan) v SSHD [2016] EWCA Civ 662.
23. In relation to the grounds, Mr Melvin submitted that the judge had failed to apply Ali. Y had no medical or other special needs. The claimant's involvement in Y's life was no different to the circumstances of many other parents. There were no compelling

circumstances, let alone very compelling circumstances over and above those described in paras 399 of the Rules.

24. Mr Melvin submitted that, in light of para 33 of AJ (Zimbabwe), the judge was not reasonably entitled to allow the appeal on the facts of the case. Furthermore, he effectively treated the Y's best interests as the paramount consideration. The separation of a child and a parent cannot, without more, constitute very compelling circumstances, as the Court of Appeal said in AJ (Zimbabwe) at para 31. At para 46, the Court of Appeal said that emotional damage experienced by a child due to being separated from a parent is not unusual. Any other conclusion would drain para 398 of the Rules of any practical significance.
25. Mr Melvin submitted that the judge had reached an unreasonable or irrational conclusion. He asked me to set aside the judge's decision to allow the appeal under Article 8 and to proceed to dismiss the appeal, on the basis that no reasonable judge could allow the appeal on the facts of the case. In this regard, he relied upon paras 31, 33 and 46 of AJ (Zimbabwe).
26. Ms Bexson submitted that the judge was reasonably entitled to allow the appeal and that he did not treat Y's best interests as the primary consideration.
27. Ms Bexson submitted that the Secretary of State's grounds were an attempt to re-argue the case. It is clear from paras 95-100 of his decision that the judge did not ignore the mandatory provisions of s.117A-D. It is plain that he considered the statutory framework. At para 98, he said that the public interest requires a person's deportation unless there were very compelling circumstances over and above those described in paras 399 and 399A. He considered this against the factual matrix of the case. He gave clear reasons why the daughter's circumstances went beyond the norm. He had a report from an independent social worker who said that the child would suffer emotional and psychological damage. He weighed these circumstances against the state's interests. He noted that the claimant posed a risk of re-offending and that he had shown remorse. He had pleaded guilty on the first day of his trial. The claimant's daughter is of mixed ethnicity. The response of Ms P in evidence, as to whether she would support her day learning about Islam was very qualified (para 35 of the judge's decision). Ms Bexson submitted that the judge did not substitute his own test, as contended in the grounds. He decided that the impact on Y of the claimant's deportation amounted to very compelling circumstances over and above those described in paras 399 and 399A.
28. I asked Ms Bexson to address me on Mr Melvin's submission that, if the judge's decision is set aside, I should proceed to re-make the decision on the appeal and dismiss it without hearing any further evidence.
29. Ms Bexson submitted that the appeal should be remitted to the First-tier Tribunal ("FtT") because the claimant may obtain a further report from a social worker. This would be necessary in order to update the Tribunal on Y's emotional state.
30. I asked Ms Bexson to explain what circumstances existed to justify further evidence being given. She submitted that the claimant would prefer to give further evidence and therefore she requested that the appeal be remitted to the FtT or, in the alternative, that the appeal be re-made in the Upper Tribunal.
31. I reserved my decision.

Assessment

32. The relevant legal provisions, which I have set out above, have been considered by the higher courts on a number of occasions, examples being the Supreme Court's judgment in Ali and the Court of Appeal's judgments in AJ (Zimbabwe) and NA (Pakistan), upon which Mr Melvin relied, as well as the more recent judgment of the Court of Appeal in SSHD v OP (Jamaica) [2018] EWCA Civ 316.
33. The principles to be drawn from the jurisprudence are not in dispute. At para 14 of NA (Pakistan), the Court of Appeal said that the legal provisions divide foreign criminals into two categories: those with sentences of between one and four years' imprisonment and those sentenced to four years or more. For convenience, I shall follow the terminology used in NA (Pakistan) (para 14) to describe the first category as 'medium offenders' and the second category as 'serious offenders'.
34. Medium offenders can escape deportation if they come within paragraph 399 ('parent/partner provisions') or paragraph 399A ('long residence provisions') (the "safety nets". If a medium offender does not come within either of the safety nets, he can only escape deportation on Article 8 grounds "*in exceptional circumstances*" (para 15 of NA (Pakistan), now amended so that it is necessary to show very compelling circumstances over and above those described in paras 399 and 399A.
35. Serious offenders can not escape deportation by bringing themselves within either, or indeed both, of the safety nets. The last part of rule 398 provided that a serious offender could only escape deportation on Article 8 grounds "*in exceptional circumstances*", now amended so that it is necessary to show very compelling circumstances over and above those described in paras 399 and 399A.
36. At paras 29, 30, 33 and 34 of NA (Pakistan), the Court of Appeal said:
- "29. In our view, the reasoning of the Court of Appeal in JZ (Zambia) applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially

compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute “very compelling circumstances, over and above those described in Exceptions 1 and 2”, whether taken by themselves or in conjunction with other factors relevant to application of Article 8.

33. Although there is no ‘exceptionality’ requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

“Neither the British nationality of the respondent’s children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation.”

37. It is therefore clear that an especially strong case is required before an Article 8 claim can succeed on the basis that there are very compelling circumstances over and above those described in paras 399 and 399A.
38. Turning now to instant case, the claimant was sentenced to 5 years’ imprisonment. This means that he is a serious offender who could only succeed in his Article 8 claim on the basis of his relationship with his daughter if there were very compelling circumstances.
39. It is clear that the judge referred *in terms* to the mandatory provisions of s.117A-D and that he also referred *in terms* to the requirement for the claimant to show that there were very compelling circumstances over and above those described in paras 399. Further, it is also clear that he said *in terms* that the best interests of a child are not a trump card and that the claimant will need to “*provide evidence of a very strong claim over and above the circumstances described in the exceptions to deportation*”.
40. The question in this case is whether the judge did in fact apply the principles he correctly set out.
41. I have concluded that he did not. The circumstances of the claimant's case cannot, any reasonable view, be described as sufficient to constitute even a bare case falling within para 399, let alone one that constitutes very compelling circumstances over

and above those described in paras 399. Y has no medical needs or other special needs. Whilst it is correct that the social worker's report explains the emotional and psychological damage that Y would suffer if she is separated from her father, this is not exceptional or unusual. It is to be expected that deportation will separate children from their parents and that the children will suffer distress. The claimant's involvement in her daily life is not unusual.

42. Insofar as reliance was placed on the fact that Y is a mixed child who would lose the opportunity to learn about Islam and her Afghan heritage from the claimant if he is deported, I cannot see that this can be described as an unusual circumstance. There are very many children who are of mixed heritage. Even if it is the case that she loses the opportunity to learn about Islam and her Afghan heritage, this cannot reasonably constitute a very compelling circumstance.
43. I have therefore concluded that the judge could only have reached the decision he reached by impermissibly placing little or no weight on the state's interests and by treating Y's best interests as the paramount consideration contrary to his express self-direction on more than one occasion that they were not a trump card. He could only have reached the conclusion he reached by paying lip service to the principles he had to apply notwithstanding that he set them out.
44. The mere fact that a judge says he has applied a principle does not mean that he did in fact do so if the facts are such that the judge's conclusion is unreasonable when tested against the principle in question. I am in no doubt that that is the case here.
45. It is not the case, as the judge appeared to think, that the only applicable facet of the public interest was the risk of re-offending. There are other, important, facets including the public interest that those who are serious offenders should be deported in all but rare cases. Money laundering offences are very serious offences. In the instant case, the sentencing judge had no doubt that a substantial proportion of the money that was laundered was derived from the trafficking of class A and class B offences. Those who involve themselves in trafficking drugs depend upon people to launder their money. The sentence of 5 years' imprisonment is a proper measure of the seriousness of the claimant's offence. The necessity for the claimant to show very compelling circumstances over and above those described in paras 399 sets the threshold at the appropriate level to take proper account of all the facets of the public interest that must be taken into account.
46. I agree with Mr Melvin that a decision which sets the threshold for the requirement to show very compelling circumstances so low that the best interests of a child who has no medical and no special needs and where the only notable features were that she will lose the opportunity to learn about Islam and her Afghan culture in addition to suffering psychological damage outweighed the public interest would effectively drain para 398 of the Rules of any practical significance.
47. I have therefore concluded that the judge materially erred in law in allowing the appeal as follows: Although he referred in terms to the need for the claimant to show that there were very compelling circumstances over and above those described in paras 399, he did not in fact apply the test. Although he said that the best interests of a child are not a trump card, he proceeded to treat Y's best interests as of paramount consideration.

48. In addition, and for the same reasons, I am in no doubt that the judge's conclusion, that there were very compelling circumstances over and above those described in paras 399, was unreasonable. This is a further material error of law.
49. I therefore set aside the judge's decision to allow the claimant's appeal under Article 8.
50. In re-making the decision, I have to consider first whether the claimant should be allowed to give further evidence.
51. I asked Ms Bexson to explain why the Tribunal should receive further evidence if I reach the conclusion that the judge's decision was unreasonable. She said that the claimant may obtain a further report from a social worker in order to update the Tribunal on Y's emotional state and that the claimant would like to give further evidence. She did not say that there had been any change in circumstances such as to lead me to think that there might potentially now be in existence evidence of circumstances capable of constituting very compelling circumstances.
52. Given that the judge's findings of fact and assessment of the impact on Y of the claimant being deported have not been disputed, I see no reason to hear further evidence.
53. Importantly, in my view, the fact is that the circumstances of the instant case cannot reasonably constitute very compelling circumstances. For the reasons given above, on any legitimate view, no reasonable judge could conclude that the circumstances in the instant case taken as a whole amount to very compelling circumstances over and above those described in paras 399.
54. Accordingly, I have decided that there is no need for the Upper Tribunal to hear further evidence. I proceed to re-make the decision on the claimant's appeal and dismiss his appeal on human rights grounds against the Secretary of State's decision. My reasons are given above.

Decision

The decision of Judge of the First-tier Tribunal Andonian involved the making of a material error of law.

I set aside the decision to allow the appeal under Article 8. His decision to dismiss the appeal on asylum grounds, humanitarian protection grounds and in relation to Article 3 stands.

I re-make the decision on the Article 8 claim by dismissing it.



Signed
Upper Tribunal Judge Gill

Date: 11 April 2018