

2. The respondent is a citizen of Lithuania who entered the United Kingdom, on his account, in 2010. He has a lengthy criminal history which, after a conviction resulting in his imprisonment, resulted in a deportation order being made against him for reasons he says of an inability to get legal aid. He did not challenge that order and he was removed. He requested voluntary return to Lithuania. It appears that he did in fact then travel from Northern Ireland to Dublin and flew to Lithuania on his own account. A deportation order was signed and enforced on 8 June 2015. At some point he then returned to the United Kingdom and was arrested in 2017 for drug possession, was given a five-month concurrent sentence and was again in May 2017 served notice of removal as an illegal entrant. He applied to revoke the deportation order but that was rejected by the Secretary of State on the basis that this was a case to which Regulation 34(4) of the European Economic Area Regulations applied, in that the application could be made only after he had been removed from the United Kingdom.
3. The applicant, and this does not now appear to be in dispute, is in a relationship with a joint British/Irish national, Ms O who lives in Armagh city. They have a child and his partner also has a child from an earlier relationship. The applicant's case was that his removal would be disproportionate in terms of Article 8, particularly with regard to the effect this would have on his relationship with his partner and with the two children. The judge heard extensive evidence from a number of witnesses including the appellant, the appellant's partner's father and also unusually in this case, extensive evidence from the expert witness Professor Iwaniec who was cross-examined. Professor Iwaniec is an emeritus professor at Queens University, Belfast, who describes herself as having extensive experience in childcare and child protection work for over forty years. She gave extensive evidence and her conclusions as to the worst possible scenario is set out in the judgment at paragraph 45.
4. It is clear that the expert witness, who did have concerns about the appellant's criminal behaviour and the likelihood of his being able to reform without help, and she also concluded that it was clearly in the best interests of both children for the relationship with the father to be maintained. The judge's findings are relatively brief, set out at paragraphs [49] to [51].
5. In summary, he found that there is no evidence that the appellant had worked for a sustained period in Northern Ireland, that little weight must be attached in the claimed difficulties in challenging the making of the deportation order and that he took into account the convictions. At [49] of his decision the judge said:

“Against this background, both the appellant and Mr [O](sic) restate what they have been advised about the pronouncements of the Courts; that their daughter is not to be blamed for their behaviour, frankly a statement best not coming from themselves. It is an unprepossessing picture. However, to dwell on these issues, it seems is to allow the

appellant's criminal history to intrude on the interests of the two children."

6. The judge then went on to say that he did not attach much weight to the expert's evidence as to the optimism, as to the respondent's ability to reform, but was satisfied that she is an expert in child attachment and had clearly carried out a thorough and thoughtful investigation into the family's background and circumstances, as evidenced by her lengthy report, stating

"I find myself having to give weight to the considerations she believes are relevant to [the children's] best interests and the fostering of the same. Accordingly I conclude that if the appellant is removed to Lithuania this will have a significant detrimental effect upon the interests of the children to which the authorities are bound to take into account as a primary consideration and to both safeguard and promote.

51. The issues in this case are finely balance and I respect the caseworker's firmness of purpose but weighing all of the issues in accordance with **Razgar** I conclude the appellant's removal would be disproportionate against Article 8 rights of all the family members and therefore find myself having to allow this appeal."

7. The Secretary of State appealed against that decision on a number of grounds, one of which was not pursued before me. In essence the first point is that the judge carried out a freestanding Article 8 assessment without having had regard to the Immigration Rules of Section 117 of the 2002 Act, that being a duty incumbent on him by operation of Section 117A.
8. It is also submitted, that whilst it is generally accepted the best interests of the children is to remain in contact with biological parents, it is also well-established that the deportation context far more has to be shown in essence that the effects of deportation would have unduly harsh consequences for the child or children and that any Article 8 assessment must take into account the public interest. In this case the public interest, where a foreign national has committed crime repeatedly, it is averred that the judge failed to take into account the criminality properly but there was no indication in in the body of the determination that the judge has given due consideration that all the family returning to Lithuania as an EEA state, or what the unduly harsh consequence of separation would be. Finally, that there is no consideration of the public interest where the scales are heavily weighted in favour of deportation, instead relying on the freestanding Article 8 assessment.
9. For whatever reason the judge did not make reference to Section 117 of the 2002 Act. It is incumbent on the judge to have done so, given the terms of Section 117A of that act. That of course is not necessarily fatal to the decision if it can be shown that he properly applied the relevant principles.

10. I note that in this case, as Ms Connolly submitted, it was clearly accepted that this was a case to which the Immigration Rules do not apply, but that does not absolve the judge from not referring to Section 117C. There is also, I accept, a degree of unfortunate, to put it at its best, ambiguity in the Secretary of State's decision. It is not entirely clear whether the Secretary of State is stating that the applicant was a persistent offender and that thus Section 117C would be engaged. There are indications that that was considered in the refusal letter given the references to paragraph 398(a), but while Section 117A requires the judge to take into certain matters, that does not absolve him from looking at the public interest in the wider sense.
11. In this case, I have no doubt that the judge was right to accept that it was in the children's best interests to remain in the United Kingdom but there is no indication of any proper balancing exercise in this case of the best interests of the children with the public interest in removing somebody who had, and there is no dispute about this, entered the United Kingdom in flagrant breach of a deportation order. There is simply no proper mention of the public interest in the decision at all and I do not accept that it can be inferred that the judge took that into account, still less can it be inferred what weight he attached to that. The judge's view of the appellant's offending is also unclear. That is something which he should have taken into account
12. I have been taken very helpfully through much of Professor Iwaniec's report. It concentrates on the importance of children's attachment behaviour, particularly in the early years, to both parents and the consequences that may flow from that. But it does not specify anything particular which may or may not happen as a result of that attachment being broken, either by part of the family going to live in Lithuania, although I accept that that could be difficult because the older boy has a relationship with his father. But again, that is not something which is addressed at all. I bear in mind that this is after all a deportation appeal, in that there is a deportation decision in the background.
13. I conclude within this case the judge has simply failed properly to address the weight to be attached to the public interest and has failed properly to explain why the best interests of the children outweigh the public interest in deportation. The reasoning is defective because there is simply no statement made of what the judge considered on each side of the balancing and why he considered one outweighed the other. To state that it is in the best interests of the children for the family to stay together is simply not adequate, even taking into account the extensive evidence and report of Professor Iwaniec.
14. Accordingly, for these reasons, I am satisfied that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside
15. Given that there will need to be an extensive new fact-finding exercise with respect to the , I conclude that it is appropriate to remit the appeal to

the First-tier Tribunal to be heard by another judge. The Secretary of State needs to formulate his case properly and that there needs to be clarity as to whether it said that the appellant is a persistent offender or not.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.
2. The appeal is remitted to the First-tier Tribunal for a fresh hearing on all issues

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. The purpose of this decision is to protect the children involved. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date 24 June 2019

A handwritten signature in black ink, appearing to read 'Jeremy Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul