Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/22895/2018 (V)

THE IMMIGRATION ACTS

Heard by Skype for Business via Field House On 13th April 2021	**Decision & Reasons Promulgated On 6th July 2021**

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

BA
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Daykin, of Counsel, instructed by Rashid & Rashid Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in 1987. He arrived in the UK illegally in 2012. On 8th September 2014 he was given a conditional discharge of 12 months for possession of a class A drug. He married DA, a

British citizen, on 30th September 2014. He was convicted of a number of criminal offences, the most serious being possession with intent to supply of a class A drugs which resulted in his being sentenced to a term of imprisonment for a period of two years and six months on 14th September 2015. A deportation order was made against him on 9th December 2015. He was deported to Albania on 19th April 2016.

2. The appellant re-entered the UK illegally in January 2017, and in July 2017 submitted an application to revoke his deportation order on human rights grounds. He then left the UK again in August 2018. On 4th October 2018 the application to revoke the deportation order was refused with an out of country appeal, and that appeal was lodged on 1st November 2018.

3. On 4th December 2018 the appellant was arrested in the UK again, having re-entered illegally due to his wife's ill health. He claimed asylum on 6th December 2018. On 8th January 2019 the appellant was served with a s.72 letter, and in February 2019 he responded to this letter.

4. This appeal is the one lodged by the appellant on 1st November 2018 against the decision of 4th October 2018 refusing to revoke the appellant's deportation order. The appeal was dismissed on all grounds in a decision of the First-tier Tribunal Judge Ian Howard promulgated on 31st January 2020. In a decision promulgated on 8th October 2020 I found that the First-tier Tribunal had erred in law and set aside the decision and all of the findings. I append my decision, with my full reasoning as Annex A to this decision.

5. The matter comes before me again to remake the appeal. The hearing is held once again via Skype for Business in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. There were no significant issues of connectivity or audibility with the hearing.

6. It is accepted by both parties that this appeal firstly concerns whether the appellant can show that he meets the family life Exception 2 to deportation as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002; or if he cannot whether he can show that there are very compelling circumstances over and above this exception as set out at s.117C (6) of the Nationality, Immigration and Asylum Act 2002, Binaku (s.11 TCEA; S.117C NIAA; para.399D) 2021 UKUT 34 (IAC) applied.

7. In light of the updating medical evidence, which related both to the treatment of the appellant's wife, DA, in the UK and also to the availability of treatment for her medical condition in Albania, served in an electronic updating bundle by Rashid & Rashid Solicitors on the day of the hearing, and which supported the contention that she would not be able to obtain one of the medications on which she is periodically reliant in Albania and

that other treatment for her condition would be very expensive and well beyond those earning normal wages in Albania Mr Tufan fairly conceded that it would be unduly harsh for the appellant's wife, DA, and child, LA, to live with him in Albania. As a result it was agreed that the first focus of the hearing was whether it would be unduly harsh for the appellant's wife and child to remain in the UK without him whilst having occasional visits to him in Albania; and the second issue was whether there were any very compelling circumstances over and above the exceptions to deportation which would make his removal a breach of Article 8 ECHR.

Evidence & Submissions – Remaking

8. The salient evidence of the appellant, as set out in his witness statement and oral evidence is, in summary, as follows. He came to the UK from Albania in May 2013 in search of a better life for himself and to support his parents. He says he was tricked into believing that he did not have to pay for his being brought here as the agents appeared like friends, and was shocked when he understood from them he had to pay them £10,000. They beat him up when he said he did not have the money, and as a result he agreed to pay them a weekly amount, and by October 2014 he had paid off £6000, but if he missed a weekly instalment they would assault him. He says he was too afraid to seek medical help or go to the police about them. He met his wife, then DB and now DA, first in December 2013 through friends, they lost touch but met up again in April 2014. The relationship developed quickly, and they moved in together, and in Summer 2014 he proposed in McDonalds restaurant when they were out with friends. They were married at Dumfries Registry Office on 30th September 2014 in the presence of close friends. His wife knew he had immigration problems but was unaware about the money he owed to the agents as he kept this matter to himself as culturally this was not a matter a man would share with his partner.

9. In 2013 the appellant's wife was diagnosed as having immune thrombocytopenic purpura (ITP). This is a bleeding disorder where the immune system destroys blood platelets which are necessary to cause clotting. It can be brought on by depression and tiredness. Her condition worsened in 2014 and 2015. She was working very hard to support both of them, and also developed severe backache.

10. In November 2014 the agents who had brought him to the UK came to his house when his wife was not home, and demanded the remaining £4000 immediately, when he said he could not pay them a man hit him with a gun on the head. They then offered him another way to pay them back. He should keep a black bin bag in his house and not look at the contents. If he did not do this the agents threatened that they would harm his wife, her family in the UK and his family in Albania. He agreed to look after the bag. He explained his bruises etc to his wife by saying that he had had a misunderstanding with someone in the street. The appellant and his wife

had to leave their home and move in with friends on a temporary basis, but he took the bag with him. On 16th November 2014 the police raided this address and took the drugs which were in the bag and arrested both him and his wife. The appellant says he pleaded guilty to the offence so as to get his wife out of the mess, as she had nothing to do with it. She was released after three days. He told the judge about the threats and the other people who were involved, and was given a lower, 30 month, sentence although the judge viewed him as having been stupid.

11. The appellant left the UK voluntarily in April 2016 and returned to Albania as a legal aid solicitor advised him he could apply to return after one year. His wife visited him in Albania on three occasions, although the doctors advised her not to travel when she insisted on travelling she was given extra medication for the visits. His wife had two miscarriages: one whilst in custody in November 2014 and another in October 2019.

12. In November 2018 the appellant's wife was told she needed an operation to remove her spleen, which would have meant she had no immune system, and he decided that he should re-enter the UK illegally so he could be there with her, and this is why he returned to the UK on this occasion, although in the end that operation did not take place. In December 2018 he was detained by the Immigration Service but in March 2019 they released him on bail to live with his wife. He has lived continuously with his wife since that time.

13. When the appellant's wife was pregnant initially her ITP was alright but in the last three months things became complicated, and at one point she was taken to hospital in Canterbury and then to London. He spent 7 days sleeping in a chair next to her in Canterbury, and she then spent 5 days in London. During the pregnancy he had to cook, shop and keep house. Their daughter LA was born in August 2020. After the caesarean birth his wife's condition deteriorated and her blood became dangerously thick, with the platelets going from 250 to 950, and there was a risk of clotting and as a result she had to spend a week in hospital. For the first three months after LA was born he did not let his wife do anything bar rest and have fresh air, he did everything to care for the baby, with lots of skin to skin contact, and also of course brought LA to his wife so they could have time together. His wife's ITP is currently in remission and she is well.

14. They have had to keep away from others due to Covid-19 since his daughter was born, and initially his wife was shielding. Now she is not shielding but her doctors have not yet decided if she should be vaccinated due to the risk of blood clots which she is vulnerable to anyway due to her ITP. So far LA has not had any health problems. The appellant is central to LA's routines, and particularly bedtime as he almost always deals with this and is able to get her to go to sleep more easily than his wife. He and his wife take turns to go to her during the night if she wakes depending who hears her first and is awake.

15. The appellant says that he is a reformed character and will not commit any criminal offences in the future. He has done courses and has qualifications, and so has the skills to find a good job. His wife has a good job as a deputy residential care manager in the UK, and needs to remain in this country for her medical treatment. He will not be reliant on benefits if allowed to remain. His wife cannot afford to pay for tickets to visit him frequently in Albania and does not have sufficient holiday to do this. They have both been reliant on antidepressants in the past, and receiving counselling as a result of the stress that separation placed upon them.

16. The appellant says that it would be terrible if he were not allowed to remain in the UK, particularly now that he and his wife are parents. He cannot imagine his daughter growing up without both parents, and has bonded with her completely from the time she was born. He feels his deportation would be unfair and traumatic for LA, and also would not be good for his relationship with his wife. He is also concerned that if his wife had a relapse of her ITP that she would not be able to cope. In these times his wife has body and bone aches, and is barely able to lift her phone let alone feed, change, bath and play for baby LA. His wife does not have family she can turn to, her mother died when she was 12 years old, and she is only close to her Dad and he is 60 years old and runs his own business and could not cope with looking after LA. She has a half-sister from her mother but does not get on with her; she has some more distant relatives but they do not live close by and have work so would not have time to help out.

17. The key evidence of DA, the appellant's wife, as set out in her two witness statements and oral evidence is, in summary, as follows. She is a British citizen. She confirms that she has read the appellant's statement and agrees with the contents. She knows that the appellant is very sorry for his actions which led to him being imprisoned and having to leave the UK and her. She believes that he is truly transformed since that time: he is willing to discuss problems; he is more considerate; is a great listener and cares and supports her emotionally.

18. Prior to her daughter, LA being born, she worked very hard, up to 80 hours a week, so that she could support the appellant as he was, and remains, unable to work. She is a deputy manager working with adults with learning difficulties. Tiredness can trigger her ITP. She is emotionally very reliant on the appellant, and his uncertain immigration status has made her anxious and depressed, and she has had treatment for these conditions including counselling. She needed treatment to conceive their daughter due to her ITP. Before LA was born she worked from April 2020 to August 2020 from home in the context of the Covid-19 pandemic. She plans to return to work part-time in June of this year. During an ITP relapse, even if she is not hospitalised, this does affect her ability to do certain more challenging aspects of her work.

19. DA feels it would be very harsh to make the appellant leave the UK as she believes that the bond between the appellant and LA is even stronger than the one she has with LA. He puts her to bed as a rule every evening and on the couple of times she has tried to put her to bed it has taken must longer for her to settle; and LA eyes always light up when she sees him. LA is a real daddy's girl. She would not want LA to be brought up by a single parent as she was after her mother died.

20. DA explained that her ITP is in remission but she gets fatigue and body aches from the medication she has previously had to take and so she can struggle with LA who is always on the go, and sometimes needs the appellant to care for her for a day. She does not have other family to turn to as she is just close to her dad, but he has his own scaffolding business which is currently very busy after a lull during lockdown and he is working 6 days a week. Her wider family consists only of relatives on her father's side: her grandmother is too old to help out, and her aunts work in hospitals and so are too busy working full time, and it's too risky to ask them anyway. In addition, and despite shielding, she got Covid-19 and was unwell for a week and sadly now has some long Covid symptoms including chest pains and shortness of breath, and so is due to have a chest x-ray soon. Her consultant is still considering whether it would be safe for her to have the vaccine given the blood clot risk and fears it could trigger a relapse in her ITP.

21. DA feels she would not be able to manage with LA when she has an ITP relapse if the appellant was not in the UK. Most commonly the relapse is sudden and dramatic, and she has to spend time in hospital, and other relatives could not step in and care for LA full time. The appellant is fully informed about her ITP, and has always accompanied her to medical appointments and is able to do things like inject her with medication if she is unable to do this and is always willing to care for her when this is needed.

22. Rashid & Rashid Solicitors lodged on the day of the hearing a supplementary bundle which contained 136 pages of medical letters for DA, much relating to her pregnancy, and not in chronological order but spanning the period 2018 to 2021. I was not taken to any of this evidence by Ms Daykin. DA's medical condition is not in dispute so I simply note that what is said in these letters is in keeping with the evidence given by the appellant and DA about DA's medical conditions, and high-light the following.

23. Dr Gillian Evans, Consultant Haematologist in her a letter dated 14th May 2020 clarifies that ITP is a condition which can cause bruising, nosebleeds, mouth bleeding, but also more serious internal bleeding and can be occasionally fatal. It needs to be managed by specialist haematologists. DA has "severe refractory relapsing ITP" She has had many different types of treatments since her diagnosis in 2013. She came off treatment in May 2019

so as to be able to become pregnant by taking a powerful immune suppressant, but after becoming pregnant needed treatment again to stabilise her platelet count. DA needed her pregnancy to be managed by a centre with full ITP expertise as there were risks both to her and her unborn baby. After the birth of LA she needed to have chemotherapy type treatment due to her condition, and there is a schedule of her treatments dated 13th October 2020 for October and November. An updating letter from Dr Evans dated 15th March 2021 confirms that DA is currently in remission and not needing treatment but that she is likely to relapse in the future, but the timing and severity of the relapses are unpredictable. It is her opinion that she is best treated by the team of doctors who understand her complex condition which has been resistant to many treatments.

24. There are two letters from Think Action dated October and July 2019 for the appellant and DA respectively. In relation to the appellant the cognitive behavioural therapist concluded that he had symptoms of PTSD and depression, including flashbacks and depression caused by living in limbo. A report of psychiatrist Dr M Kashmiri dated 15th December 2018 found whilst in detention he was suffering from mixed anxiety and depressive disorder. The Think Action letter in relation to DA concluded that she had severe generalised anxious and depression, and outlines that she had taken part in seven sessions provided by the service. No reference was made to this evidence by Ms Daykin.

25. Mr Tufan argued for the Secretary of State that the appeal should be dismissed as it would not be unduly harsh for DA to remain in the UK and care for LA without the appellant, with occasional holiday visits to him in Albania as DA had done in the past. He argued that the appellant was just helping out with the care of his daughter in the normal way, and there was nothing out of the ordinary on the facts of this case. He argued that this was still the proper test as set out in KO (Nigeria)v SSHD [2018] UKSC 53, and that this was reflected in the Court of Appeal decision at paragraph 42 of HA (Iraq) v SSHD [2020] EWCA Civ117 As Mr Justice Sedley found in Lee v SSHD [2011] EWCA Civ 248 separating families is what deportation does, and this is lawful. If DA has to go into hospital due to a relapse in her ITP then Social Services would be there to assist her, and it was proper to take note of this, as per BL(Jamaica) [2016] EWCA Civ 357. Mr Tufan argued that there were also no very compelling circumstances over and above the exceptions. The offences for which the appellant was convicted were serious, and he got a two and a half year prison sentence. The appellant could not claim to be rehabilitated as he had broken the law in re-entering the UK illegally after his criminal convictions and in any case Lord Justice Underhill had found in HA (Iraq) that rehabilitation alone was rarely a matter to which great weight could be given.

26. Ms Daykin argued in her skeleton argument and oral submissions that the appeal should be allowed. She argued that it would be unduly harsh to DA

and LA for the appellant to be deported, and so the appellant qualifies under Exception 2 as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002. DA and LA are qualifying partner and child because they are both British citizens.

27. Ms Daykin argues that the test for unduly harsh is now to be found properly articulated by the Court of Appeal in HA (Iraq), particularly at paragraphs 44 and 56 of the judgement, with clear reference to KO (Nigeria) as the starting point for the decision. There is no requirement of exceptionality just a fact specific analysis to see if the necessary degree of harshness to meet the test was present. It is argued that it would be unduly harsh on the facts of this case because LA is a young baby of eight months and could not have a relationship with the appellant other than if he remains in the UK as her relationship can only be a physical face to face one; she lives with the appellant and has a particularly close physical bond with him and he is intimately involved with her daily routine and LA would be bereft if he were to have to leave the UK as she has a clear emotional bond with him and there would be no way to explain his absence to her or for her to understand it other than as an abandonment, as was found in AA (Nigeria)v SSHD [2020] EWCA 1296; further due to DA's physical ill health DA would not be able to cope reliably with providing all the physical care for LA on her own, as her medical condition is one which has historically had a number of relapses and further these are sudden and unpredictable, and DA does not have other family members on whom she can rely as they are all working and for LA to have to go into the care of Social Services in such circumstances would be traumatic and unduly harsh for DA and LA.

28. It is argued that there are very compelling circumstances as although the conviction for possession with intent to supply of class A drugs is a serious one the sentencing remarks of Recorder Dunn-Shaw refer to the fact that the appellant was coerced and exploited into becoming involved with the criminal behaviour and he was also given a sentence at the lower end; and further the criminal behaviour which led to these convictions took place in 2014, and since that time the appellant has no further convictions. It ought to be seen that he is now rehabilitated, and that the re-entry to the UK was only motivated by concern for the appellant's serious unwell wife, and again would not be indicative of any future unlawful behaviour. It is argued that the particular circumstances relating to the appellant's conviction mean that in an Article 8 ECHR balancing exercise his family life, with all of its individual characteristics as outlined above, outweighs the public interest in his deportation.

Conclusions – Remaking

29. The index offence in this case is possession of a class A control drug, cocaine, with intent to supply together with two counts of possession of an identity document with intent for which the appellant was sentenced to 30

months imprisonment. In his sentencing remarks Recorder Dunn-Shaw accepted that the appellant possessed with intent to supply a large amount of class A drugs "under coercion" and that his "naivety was exploited". He was given a 30% discount for his guilty plea. Recorder Dunn-Shaw also acknowledged that the appellant's wife relied upon him to assist in the event of emergencies or difficulties.

30. As set out at s.117C(1) of the Nationality, Immigration and Asylum Act 2002 the deportation of the appellant as a foreign criminal is in the public interest, and as set out at s.117C(2) the more serious the offence the greater the public interest in his deportation. Drugs offences are acknowledged to be particularly serious offences, and thus there is a weighty public interest in the appellant's deportation.

31. In Binaku the Upper Tribunal found as follows: "*A foreign criminal who has re-entered the United Kingdom in breach of an extant deportation order is subject to the same deportation regime as those who have yet to be removed or who have been removed and are seeking a revocation of a deportation order from abroad. The phrases "cases concerning the deportation of foreign criminals" in section 117A(2) and "a decision to deport a foreign criminal" in section 117C(7) are to be interpreted accordingly*"

32. It follows that the first question that arises in this appeal is whether the appellant can meet the Exception 2, as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002. It is accepted by the respondent that he has genuine and subsisting relationships with his qualifying partner, his wife DA, and with a qualifying child, his daughter, LA. Both are "qualifying" as they are British citizens. To meet Exception 2 the appellant needs to show it would unduly harsh both for them to accompany him to live in Albania and to remain in the UK without him. However it is rightly conceded by Mr Tufan for the respondent that the medical evidence and evidence regarding treatment for ITP in Albania, particularly from the Spitali Amerikan in Tirana at pages 9 to 22 of the supplementary bundle, means that it would be unduly harsh for DA and LA to have to live in Albania due to the high cost of her necessary medical treatment, low wages in that country and the lack of availability of a medication on which DA is periodically reliant. As a result I need only making findings as to whether it would be unduly harsh for DA and LA to remain in the UK without the appellant, although with periodic holidays to see him in Albania, to establish whether Exception 2 is met or not. If the appellant is unable to meet this test then it will be necessary to consider whether there are very compelling circumstances over and above this Exception in accordance with s.117C (6) of the Nationality, Immigration and Asylum Act 2002.

33. I find both witnesses to be credible. There was no submission from Mr Tufan to the contrary, and their oral evidence was consistent with each other, with their written statements, with the other documentary evidence

and was heart felt and detailed. The question is therefore whether the appellant can meet the requirements of either Exception 2 or the very compelling circumstances test on the facts of his case.

34. From HA (Iraq), which builds on the decision of the Supreme Court in KO (Nigeria), particularly at paragraph 44 and 56 of the judgement, the test of what is "unduly harsh" with respect to a child remaining in the UK whilst a parent is deported is one which may be summarised as follows. It is a matter of determining whether the level of harshness goes beyond what is acceptable: this in turn does not require something exceptional or rare, indeed it might be that undue harshness is quite common. It would not be lawful to find that some level of undue harshness was ordinary and therefore acceptable. Of course deportation separates families and the fact of such a separation alone does not suffice, and of course the potential role of Social Service can be considered where relevant. What is required is a fact sensitive analysis with a number of factors being particularly relevant: the age of the child; whether the child lives with the parent being deported; the degree of emotional dependence on the parent being deported by the child; the financial consequences of deportation; the available emotional support from the remaining parent and other family members; the practicality of maintaining a relationship with the deported parent; and the individual characteristics of the child.

35. In this case LA, the appellant's daughter, is just 8 months old. She is a healthy normally developing baby to date. I find that LA has a very close physical relationship and strong emotional bond with the appellant. They live together and have always done so as part of a nuclear family with, his wife and her mother, DA. He is particularly heavily involved with her day to day care because DA has a serious physical medical condition which periodically leaves her tired and in pain, and in the context of DA having undergone a chemotherapy treatment for her ITP and having contracted Covid-19 in the 8 months since LA's birth. The appellant puts LA to bed each night, and for the first three months of her life did all of the physical work (changing nappies, washing, putting to bed, playing) connected with his new born daughter to allow his wife to recover from the caesarean birth in the context of her ill-health and previous drug treatment to enable DA to have a healthy pregnancy. If the appellant were deported there would be no way to replicate this relationship via social media, letter or phone, as it is one based on face to face and skin to skin (as the appellant put it) contact between the two of them for a large part of each day. Occasional holidays could also not sustain this relationship. LA is also too young to comprehend any explanation as to what had happened to the appellant if he were deported, half of her world would simply have inexplicably disappeared. I find that this would be very distressing for her.

36. I find that if the appellant were deported DA would be left to care for her daughter LA alone on a day to day basis. Her own mother died when she

was 12 years old and she has no contact with the maternal side of her family. She has a good relationship with her father who is a 60 year old man running a scaffolding business, and currently working 6 days a week after lean times during the Covid-19 lockdowns, but he is not in a position to provide help with childcare; other more distant relatives such as her two aunts also work full time, and in their case in the Health Services which would pose an infection risk at the current time, and are likewise unable to provide practical help. I find that DA, clearly an intelligent woman, would generally cope whilst she is in remission with her ITP with caring for LA if she had to do so alone, although it would be tiring and difficult as it is for most single parents, and I do note that she has had a history of anxiety and depression which might return. However, I find that DA would be unable to cope with the care of LA when she had a recurrence of her ITP disease, and the medical evidence is that this is likely and the timing and severity of such a relapse unpredictable. Whether DA was hospitalised or not I find that that it is probable that she would be unable at such a time to care for a lively 8 month baby, shortly to become a toddler, alone given the tiredness and pain it engenders. I accept that Social Services would have a legal responsibility to help, but find that this would be extremely traumatic for LA if without warning she suddenly lost the care and continuity of her one remaining parent having, from her perspective, inexplicably lost the appellant. It would also be very traumatic for DA to have her child taken into care as well as having to deal simultaneously with a recurrence of her serious ITP condition.

37. In these circumstances I find that it is overwhelmingly in LA's best interests that the appellant remain in the UK, and also that the impact of the appellant's departure would be unacceptably, and thus unduly, harsh for LA and DA for the reasons I set out above. In addition, and whilst this is the not the necessary test, the facts of this case are not, I find, ordinary: the appellant's relationship with his daughter is particularly physically and emotionally close and irreplaceable at a distance; the appellant's partner has a serious and unpredictable physical health condition, ITP, which her consultant says will reoccur and I find will mean she cannot care for her daughter alone; and the appellant and his wife, DA, are bringing up her their baby daughter, LA, together without possible help from wider family.

38. It follows that Exception 2, as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002 is met by the appellant as his deportation would be unduly harsh to his daughter LA and his wife DA. I therefore do not need to consider whether there are very compelling circumstances over and above this Exceptions in accordance with s.117C (6) of the Nationality, Immigration and Asylum Act 2002. As I find that the appellant can show he can meet the terms of Exception 2 then the public interest does not ultimately require his deportation and he is entitled to remain in the UK on Article 8 ECHR human rights grounds.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal and all of the findings.

3. I re-make the appeal by allowing it on Article 8 ECHR human rights grounds.

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. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so to protect the privacy of his wife in relation to her medical condition.

Signed: *Fiona Lindsley* Date: 14th April 2021
Upper Tribunal Judge Lindsley

Annex A: Error of Law Decision:

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Albania born in 1987. He arrived in the UK illegally in 2012. On 8th September 2014 he was given a conditional discharge of 12 months for possession of a class A drug. He married DB, a British citizen, on 30th September 2014. He was convicted of a number of criminal offences including possession with intent to supply of a class A drugs which resulted in his being sentenced to a term of imprisonment for a period of two years and six months on 14th September 2015. A deportation order was made against him on 9th December 2015. He was deported to Albania on 19th April 2016.

2. The appellant re-entered the UK illegally in January 2017, and in July 2017 submitted an application to revoke his deportation order on human rights grounds. He then left the UK again in August 2018. On 4th October 2018 the application to revoke the deportation order was refused with an out of country appeal, and an appeal was lodged on 1st November 2018.

3. On 4th December 2018 the appellant was arrested in the UK again, and said that he had re-entered illegally due to his wife's ill health. He claimed asylum on 6th December 2018. On 8th January 2019 the appellant was served with a s.72 letter, and in February 2019 he responded to this letter.

4. This appeal is the one lodged by the appellant on 1st November 2018 against the decision of 4th October 2018 refusing to revoke the appellant's deportation order. The appeal was dismissed on all grounds in a decision of the First-tier Tribunal Judge Ian Howard promulgated on 31st January 2020.

5. Permission to appeal was granted by Judge of the First-tier Tribunal JM Holmes on the 3rd March 2020 on all grounds but principally on the basis that it was arguable that the First-tier Tribunal had erred in law in finding, contrary to the evidence, that the appellant's British citizen wife could live in Albania in the context of her health condition.

6. The matter came before me to determine whether the First-tier Tribunal had erred in law. The hearing was held at a remote Skype for Business hearing in light of the need to reduce the transmission of the Covid-19 virus, and in light of this being found to be acceptable by both parties, and being a means by which the appeal could be fairly and justly determined. There were no issues of connectivity or audibility with the hearing, which was joined by the appellant and his spouse from their solicitors' offices.

Submissions – Error of Law

7. In grounds of appeal and in further submissions provided to the Upper Tribunal, both drafted by Ms E Daykin for the appellant, and in oral submissions from Ms Daykin it is argued for the appellant, in summary, as follows.

8. Firstly, it is argued that the First-tier Tribunal failed to look at all matters collectively when deciding there were no very compelling circumstances which meant it was not lawful to deport the appellant. There are separate conclusions on mitigating factors relating to the offence, the appellant's mental health, the appellant's partner's mental health etc. but there was failure to stand back and assessing the totality of these matters to see if they amounted to very compelling circumstances.

9. Secondly, it is argued that the First-tier Tribunal irrationally or with insufficient reasons failed to place any weight on the mental health issues suffered by the appellant attributing them all to his being detained, and failed unlawfully to give any weight to the Think Action letter of 16th October 2019 despite the fact that the appellant had not been detained for 10 months and was, according to this letter, still suffering from PTSD and depression.

10. Thirdly, it is argued that there was a failure to fully take into account the medical evidence relating to the appellant's wife from her consultant haematologist which was that she needs to be regularly monitored and in regular access to her UK healthcare because otherwise she could bleed to death, and that her life expectancy without treatment would be very short. Although sometimes her condition is in remission the evidence showed that she had had two relapses since 2013. It was irrational on the basis of this evidence for the First-tier Tribunal to have concluded that the appellant's wife could live safely in Albania and travel back to the UK for treatment when this were needed.

11. Fourthly it is argued that the First-tier Tribunal has erred by conducting a separate Article 8 ECHR balancing exercise after having considered whether there are very compelling circumstances under the deportation Immigration Rules which is contrary to the higher courts guidance that the Immigration Rules represent a complete code in deportation matters, and as some matters arise only in one of these considerations, such as finding the appellant's offending is at the lower end of the spectrum in the separate Article 8 ECHR exercise only, there is evidence that this amounted to a material error of law by the First-tier Tribunal.

12. In the further submissions from Ms Daykin submitted by her instructing solicitors to the Upper Tribunal on 20th May 2020 she also makes an application to admit further evidence under Rule 15(2A) of the Upper Tribunal Procedure Rules with respect to the appellant's spouse's ill health

on the basis that this is an on-going issue which needs to be updated in light of her pregnancy and further treatment she has received. The medical letter is from Dr Gillian Evans, the appellant's wife treating consultant haematologist and is dated 12th May 2020. Rashid & Rashid Solicitors have also provided a copy of the appellant's child's birth certificate showing his daughter L was born in August 2020. It was accepted by Ms Daykin that these documents only had relevance to a remaking hearing so there was no application to admit them in relation to the issue of whether the First-tier Tribunal erred in law.

13. Mr Clarke defended the decision of the First-tier Tribunal. He accepted that there had been an error of law in conducting a separate Article 8 ECHR exercise after that relating to whether there were very compelling and compassionate circumstances but argued that this was not in any way a material error of law. Mr Clarke also pointed out that the relevant test was that at paragraph 399D of the Immigration Rules, as this was a revocation appeal, and there would have to be very exceptional circumstances to outweigh the public interest in deportation, although he also accepted that this test probably did not materially differ from that of very compelling, compassionate circumstances over and above the exceptions to deportation. Mr Clarke submitted that the errors raised in this appeal could not enable the appellant to meet this very high test so were ultimately immaterial.

14. Mr Clarke also argued that there was no unlawful segregating of the issues when looking at whether there were compelling compassionate circumstances over and above the exceptions to deportation as at paragraph 38 of the decision it is concluded that "all in all" there were no such circumstances, and this implies a cumulative assessment. He argued that the Think Action letter was such slight evidence, giving no details of the qualifications of the author or the techniques used to come to the PTSD and depression diagnosis, that it was properly concluded that it took the medical evidence no further than the psychiatrist's report from the time when the appellant was in detention. With respect to the medical evidence relating to the appellant's wife it is argued that the three medical letters from Dr Evans of 2015, 2017 and 2019 were all considered properly by the First-tier Tribunal and the fact was at the time of hearing the appellant's wife's condition was in remission and she was drug free. The medical evidence indicated, contrary to the appellant's wife's oral evidence, that it would be possible for the appellant's wife to go to Albania, and indeed it was clear that she had visited on three occasions, and so it was right that the First-tier Tribunal took this into account. There was a lack of medical evidence as to what would happen in the future, and so it was lawfully open to the First-tier Tribunal relying on the most recent medical letter to conclude that the appellant's wife could live with him in Albania.

Conclusions – Error of Law

15. The decision of the First-tier Tribunal finds at paragraphs 22 to 25 that the appellant is unable to meet the exceptions to deportation in the Immigration Rules as he cannot meet the private life exception as he has not been lawfully resident, and he cannot meet the family life exception because likewise he cannot show that his relationship was formed when he was in the UK lawfully. As such it is properly concluded that the only question under the deportation Immigration Rules remaining was whether there are very compelling circumstances over and above those exceptions to deportation that mean the appellant should not be deported.

16. As Ms Daykin has identified the First-tier Tribunal wrongly conducts a separate Article 8 ECHR exercise outside of the Immigration Rules after concluding that there were no compelling compassionate circumstances. I do not find that this alone was a material error. The only potential for this being a material error is if the correct exercise, the proportionality exercise looking for very compelling circumstances was wrongly conducted in any way, so I now turn to this exercise.

17. I find that the approach adopted by the First-tier Tribunal to the very compelling circumstances test does however err in law for the following reasons. As argued by Ms Daykin each element of the case is examined and then in the final sentence of the paragraph concluding consideration of that element (namely paragraphs 26, 27, 35 and 36) it is concluded that it does not amount to a compelling circumstances. I do not find that the single sentence at paragraph 38 suffices to show that there was a cumulative assessment of these facts as it could simply be saying that each of the individual assessments failed to reach the necessary standard of compellingness and so the appeal failed. There was therefore a failure to consider the elements cumulatively, and further I find that there was also a failure to include elements found in the appellant's favour in the separate Article 8 ECHR exercise, namely the fact that his sentence is at the lower end of the continuum, that there were no aggravating features to his criminal behaviour and the fact that the appellant accepted his guilt.

18. I find that the rejection of the letter from Think Action, which states that the appellant has PTSD and depression, at paragraph 27 of the decision is insufficiently reasoned. Mr Clarke has raised legitimate issues with the letter which could have been reasons not to give it weight, but these are not set out in the decision. Alone, however, it would not suffice to show a material error of law in the context of the high legal test which this appellant has to meet.

19. The appellant's wife's medical letters from her treating haematologist Dr Evans are evidence that she has a chronic blood disorder, namely immune thrombocytopenia purpura, which means in simple terms that her white blood cells attack her blood platelets. She has had relapses in the past, but at the current time she is drug free due to having endured cycles of drug

treatment including a form of chemotherapy which she undertook to enable herself to try to have a baby. The First-tier Tribunal concludes at paragraph 34 of the decision that the it is accepted that she has this conditions, and that the drugs she might need in case of a relapse would not be available in Albania, but finds that in this circumstance (which is confusing described as both unforeseen and one which might reasonably arise in the context of her condition) she could obtain a return flight to the UK for treatment as a British citizen. As the medical evidence includes details that in the past, when the condition reoccurred, of the appellant's wife needing urgent admission to hospital and the possibility of her bleeding to death without treatment, and it is not entirely straightforward that a British citizen who has made her permanent home in another country can return for free NHS treatment, I find that this conclusion was irrational and insufficiently reasoned.

20. Whilst appreciating the force of Mr Clarke's submissions with respect to the high test to be applied to this appellant I find that it cannot be said that the errors of law above when considered cumulatively are immaterial. There is a possibility, even if it is not a very strong one, that the medical condition of the appellant's spouse when considered in the round with the offending being at the lower end and other factors in the appellant's favour might lead another Tribunal to allow the appellant's appeal, although a new Tribunal would have to consider not only whether it would be over and above unduly harsh for the appellant and his spouse to live in Albania but also whether it would be unduly harsh for her to remain in the UK without him which this First-tier Tribunal failed to consider. I therefore conclude that the errors of law are material and so set aside the decision and all of the findings of the First-tier Tribunal.

21. As I find that this appeal will not involve very extensive fact finding I retain the remaking in the Upper Tribunal. It was agreed by the appellant and his wife that the remaking would best take place via a remote Skype for Business hearing, particularly as his wife has recently given birth to a baby and now has to undergo further medical treatment which will affect her immune system and so will need to isolate completely, and so it would be best for them to join a remote hearing using their own laptop computer from home for the remaking hearing. It was agreed that the remaking should be listed for the first available date after 10 weeks allowing for the appellant's wife to have her treatment and recover somewhat from it. The appellant confirmed that he did not need an interpreter for the remaking hearing.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal dismissing the appeal and all of the findings.

3. I adjourn the re-making of the appeal.

Directions

(i) The remaking hearing will consist of evidence from the appellant, his wife and submissions in a remote Skype for Business hearing.

(ii) Any further documentary evidence relied upon should be filed and served ten days prior to the remaking hearing.

(iii) The time estimate is 3 hours.

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. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so to protect the privacy of his wife in relation to her medical condition.

Signed: *Fiona Lindsley* Date: 30th September 2020
Upper Tribunal Judge Lindsley