



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/15053/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 24 January 2022**

**Decision & Reasons Promulgated
On 18 March 2022**

Before

**UPPER TRIBUNAL JUDGE BLUNDELL
DEPUTY UPPER TRIBUNAL JUDGE MALIK QC**

Between

**JETMIR DUKA
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

**SECRETARY OF STATE
FOR THE HOME DEPARTMENT**

Respondent

Representation

For the Appellant: Mr David Sellwood, Counsel, instructed by ITN Solicitors

For the Respondent: Mr Tony Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal, brought with permission of the Vice President, from the decision of First Tier Tribunal Judge Rai (“the Judge”) promulgated on 23 December 2019. By that decision, the Judge dismissed the Appellant’s appeal from the Secretary of State’s decision to refuse his human claim and to deport him from the United Kingdom.

Background

2. The Appellant is a citizen of Albania who was born on 1 April 1975.
3. The Appellant and his wife arrived in the United Kingdom on 5 July 1999 and claimed asylum. The asylum claim was refused on 6 October 2000 and the appeal rights in respect of that decision were exhausted on 3 February 2001. They were, however, granted indefinite leave to remain on 10 February 2006. They have three children born on 22 June 2000, 8 November 2005 and 21 November 2013 respectively. The children are British citizens.
4. The Appellant was convicted at Kingston Crown Court on 26 February 2012 of possession of a Class A drug with intent to supply. He was sentenced to 6 years and 9 months imprisonment, which was reduced on appeal to 5 years and 6 months imprisonment. The Secretary of State served a decision to deport him from the United Kingdom on 5 December 2016. On the same date, she refused the Appellant's human rights claim and certified that claim under section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Following the decision of the Supreme Court in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 [2017] 1 WLR 2380, however, the Secretary of State reconsidered the matter and made a fresh decision to deport him on 4 July 2018. The Secretary of State, at the same time, refused his human rights claim based on Article 8 of the ECHR.
5. The Appellant's appeal from the Secretary of State's decision was heard by the Judge on 13 September 2019. The Appellant and his wife gave oral evidence and were cross-examined. The Judge found them to be credible witnesses. The Judge, however, concluded that the effect of the Appellant's deportation on his wife and children would not be unduly harsh. The Judge concluded that there were no "very compelling circumstances over and above these described in Exceptions 1 and 2" for the purpose of section 117C(6) of the 2002 Act. The Judge, accordingly, dismissed the Appellant's appeal and held that the Secretary of State's decision was not incompatible with Article 8.
6. The Appellant's application for permission to appeal from the Judge's decision was refused firstly by the First Tier Tribunal and then by the Upper Tribunal. However, following a successful Judicial Review of the Upper Tribunal's refusal of permission to appeal, the Vice President granted permission on 21 September 2021.

Grounds of appeal

7. The Appellant has pleaded two grounds of appeal. First, the Judge failed to take into account material evidence. Second, the Judge misdirected herself as to the law.

Submissions

8. We are grateful to Mr Sellwood, who appeared for the Appellant, and Mr Melvin, who appeared for the Secretary of State, for their assistance and able submissions.
9. Mr Sellwood developed the two grounds of appeal in his oral submissions. He submitted that the Judge failed to take into account, or properly engage with, the expert evidence of Dr Jagmohan Singh and Ms Nomjikelo Okanji. He submitted that the Judge's analysis and reasoning as to that evidence was inadequate. He further submitted that the approach adopted by the Judge to the issue of whether the deportation would result in unduly harsh consequences was inconsistent with *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 [2021] 2 All ER 898.
10. Mr Melvin submitted that the Judge's decision and reasons, read as a whole, were adequate. He submitted that there was limited medical evidence before the Judge who looked at everything before dismissing the Appellant's appeal. He further submitted that there was no material misdirection in the Judge's decision and it disclosed no error of law.

Discussion

Ground (1)

11. The evidence before the Judge included a report prepared by a Consultant Forensic Psychiatrist, Dr Jagmohan Singh, on 15 August 2019. At paragraph 1.1 of the report, Dr Singh diagnosed the Appellant's wife with moderate depressive illness, panic disorder and generalised anxiety disorder. At paragraph 1.2, Dr Singh added that her "mental state is likely to deteriorate significantly" in the event of the Appellant's deportation and that it "will then be closely associated with an increase in her risk of self harm or suicide". Dr Singh further stated, at paragraph 13.6, that "in the event of her mental state deteriorating she will be incapable of looking after her children and would be unable to function in her day to day life".
12. The Appellant also relied on a report and an addendum prepared by an Independent Social Worker, Ms Nomjikelo Okanji, prepared on 15 May 2019 and 11 September 2019. At paragraph 1.12 of the addendum, Ms Okanji stated that the Appellant's children "are likely to suffer psychological harm as a result of their father's departure from their life at this stage of their development". At paragraph 1.13, Ms Okanji added that "the separation is likely to lead to ambivalence in their lives and will adversely affect their ability to develop positive relationship with their peers and in their adult life". Ms Okanji further stated, at paragraph 2.6 that in the event of the Appellant's deportation "the mother's mental health would have deteriorated to the extent of requiring input from the mental health services" and "children services would have become involved due to the mother's inability to effectively parent the children".

13. The Judge, at paragraph 59, held that “overall there is no persuasive evidence that any of the children would suffer an adverse reaction or consequence or that it would be unduly harsh if their father were to be deported”. In our judgment, this formula is ambiguous. It could be a loose way of saying that there was no evidence, or it could mean that there was evidence, but that the Judge did not consider that it was sufficiently persuasive. If the formula has the first meaning, it is an inaccurate account of the evidence of Dr Singh and Ms Okanji. If it has the second meaning, it begs a question, which is why the Judge considered that the evidence was not sufficiently persuasive. The Judge was not required to accept what was said by the experts but, as was made clear in *SS (Sri Lanka) v Secretary of State for the Home Department* [2012] EWCA Civ 155, at [21], she was required to engage with it and to give proper reasons for reaching a contrary view. There is no proper engagement with the evidence in the Judge’s analysis, nor did she give proper reasons for rejecting that evidence.
14. The Judge, at paragraph 48, stated that she had “taken into account the psychiatric report” but the Appellant’s wife “has not been diagnosed with any mental health condition such as depression or PTSD”. This, with respect, is irreconcilable with the diagnoses of Dr Singh as referred above. We are satisfied that the Judge has not taken Dr Singh’s evidence into account or, if she has taken it into account, she has not given any reasons for departing from the diagnosis.
15. The Judge referred to Ms Okanji’s evidence at paragraph 52 and concluded that the Appellant’s “return from prison has brought some level of stability and that the progress the children have made is as a result of the attachment with him”. In our judgment, this is manifestly insufficient. The Judge should have engaged with Ms Okanji’s opinion as to the effect of the Appellant’s deportation on the children. There is no clear indication as to whether the Judge has accepted or rejected Ms Okanji’s evidence as to the consequences of the Appellant’s deportation. Even if one proceeds on the basis that the Judge has taken into account Ms Okanji’s evidence, her decision is vitiated by inadequacy of reasons.
16. The Judge, at paragraph 46, held that “there is no reason why” the Appellant’s wife “would not be able to work and provide financial support in helping him relocate”. At paragraph 47, the Judge repeated that the wife “would provide appropriate support and assistance to the children” following the Appellant’s deportation. In making these findings, the Judge has not explained how the Appellant’s wife, given the evidence of Dr Singh and Ms Okanji as to her mental health and potential deterioration, is expected to work and support the children without the Appellant. The findings are inadequately reasoned if not irreconcilable with the expert evidence.
17. The Judge, at paragraph 63, stated that if “the mother cannot cope in the UK without the appellant, then it is open to them to decide to take at least the two younger children back to Albania”. The Judge added that the

mother and the children “are not required to leave the UK but it is an option open to them if it is felt that the effect on them would be too onerous”. In our judgment, there are two difficulties with this approach.

18. First, the question for the Judge was not whether it is open to the Appellant’s wife and children to relocate to Albania. The question was whether it would be unduly harsh for them to do so for the purpose of Exception 2 in section 117C(5) of the 2002 Act. As Underhill LJ noted in *HA (Iraq)*, at [31], adopting Jackson LJ’s analysis in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 [2017] WLR 207, at [28]-[34], “if a serious offender 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”. There is no consideration by the Judge as to whether relocation would have an unduly harsh effect on the Appellant’s wife and children.
19. Secondly, the Judge’s finding at paragraph 63 does not sit comfortably alongside with the finding made at paragraph 53. At that paragraph, the Judge had stated that she was “satisfied that it is in the best interest of the children to remain in the UK”.
20. In the circumstances, we conclude that the Judge’s decision is wrong in law on the first ground of appeal.

Ground (2)

21. In *HA (Iraq)*, at [44], Underhill LJ held that Lord Carnwath’s reference in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 [2018] 1 WLR 5273 to a degree of harshness “going beyond what would necessarily be involved for any child faced with the deportation of a parent” should not be read literally because one cannot define the level of harshness “necessarily” suffered by “any” child. At [56], Underhill LJ took the view that “whilst it was not wrong to refer to an ordinary level of harshness, it was not possible to identify a baseline of ordinariness”. Peter Jackson LJ added, at [156], that *KO (Nigeria)*, contrary to the earlier understanding, did not set up “a notional comparator”.
22. The Judge made her decision without the benefit of *HA (Iraq)*. At paragraph 59, the Judge sought to compare the facts of this case with a notional case involving “the normal type of upset” to children. At paragraph 60, the Judge referred to “the type of due harshness which inevitably follows”. At paragraph 62, the Judge held that the Appellant’s wife would experience “normal reaction to a severed bond” following the Appellant’s deportation.
23. Although the Supreme Court has granted permission to appeal from *HA (Iraq)*, we are currently bound by it. In our judgment, contrary to *HA (Iraq)*,

the Judge made her assessment by reference to “a notional comparator”, and thereby erred in law.

24. The Judge’s conclusion that the separation from the Appellant will not have an unduly harsh effect on his wife and children is material to her conclusion that there were no very compelling circumstances for the purpose of section 117C(6) of the 2002 Act. We therefore conclude that the Judge’s decision is wrong in law on the second ground of appeal too.

Conclusion

25. For all these reasons, we find that the Judge erred on a point of law in dismissing the Appellant’s appeal. We therefore set aside the Judge’s decision in its entirety.
26. Having regard to paragraph 7.2 of the Senior President of the Tribunal’s Practice Statement for the Immigration and Asylum Chamber, and the extent of the fact-finding which is required, we remit the appeal to the First Tier Tribunal to be heard afresh by a different Judge on up-to-date evidence.

Notice of decision

27. The First Tier Tribunal’s decision is set aside and the appeal is remitted for a fresh hearing.

Anonymity order

28. The First Tier Tribunal made no anonymity order when making its decision. Likewise, having regard to the Presidential Guidance Note No 2 of 2022, *Anonymity Orders and Hearing in Private*, and the Overriding Objective, we do not consider that an anonymity order is justified in all circumstances. We therefore make no order under Rule 14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Zane Malik QC
**Deputy Judge of Upper Tribunal
(Immigration and Asylum Chamber)**
Date: 14 February 2022