Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00521/2014

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 16 March 2015	**On 27 April 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

G K
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr M Shilliday, Home Office Presenting Officer
For the Respondent: Mr S Kerr, Counsel instructed by Karis Law

DECISION AND REASONS

Introduction

1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge John Jones QC. For reasons given in his determination following a hearing on 23 September 2014, the judge allowed the appeal against the Secretary of State's decision that s.32 (5) of the UK Borders Act 2007 applied to the respondent (referred to as the claimant).

2. The claimant is a national of Kosovo. He has been in the United Kingdom since the age of 15 and after successive periods of leave to remain on a discretionary basis was granted indefinite leave to remain on 7 March 2012. His partner is a British national and they have a son just over 3 years old. In the light a child being affected by these proceedings, I make an order pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify him.

3. The trigger to the deportation order was the claimant's conviction on 2 October 2013 of attempted robbery for which he was sentenced on 23 October to eighteen months' imprisonment. The claimant had pleaded not guilty to the offence which had occurred on 13 November 2012; he was found guilty by a majority of the jury.

4. The Secretary of State relies on two letters giving reasons why she contended s.32 (5) applied. The first dated 12 March 2013 was accompanied by the deportation order dated 7 March. It records the claimant's immigration history (he had first claimed asylum but was then granted exceptional leave to remain in 2003). The letter also lists two previous convictions which I refer to in more detail below. The Secretary of State explained that as the claimant had not raised any Article 8 grounds there were therefore no barriers to his removal. The claimant did not have an in-country right of appeal as he had not responded to a One-Stop Warning to give reasons why s.32(5) did not apply. This was reviewed following representations from the claimant's current solicitors explaining that he had not received the correspondence. Accordingly the Secretary of State issued a supplementary letter dated 14 April 2014 which addresses representations made on 19 and 20 March 2014 based on his relationship with a British national and their child. Medical grounds were also raised based on a diagnosis of right nephrocalcinosis (kidney stones).

5. The Secretary of State did not accept that the claimant's removal would be in breach of Article 3 and Article 8. As to the family life, it was considered that removal would give rise to interference and may not be in the best interests of the child, the Secretary of State nevertheless considered that such interference was justified. In the absence of evidence of paternity it was not accepted that the claimant had a genuine and subsisting relationship with his son for the purposes of paragraph 399(a) of the Immigration Rules. As to the claimant's partner, the Secretary of State did not accept there was a genuine and subsisting relationship for the purposes of paragraph 399(b) taking account of events in 2010 when application had been made for a certificate of approval for marriage. Paragraph 399A was considered but did not avail the claimant as he had not lived in the UK for at least half his life preceding the date of the signed deportation order. Discounting the time he had spent in prison he had been resident in this country for around ten years and nine months. Furthermore it was not considered there were any exceptional circumstances which would outweigh the public interest.

6. The grounds of appeal are dated 25 March 2014 and so predating the supplementary letter. These address the assertion that the claimant had an in-country right of appeal and furthermore state that removal would be in breach of his human rights, although not without any particularity.

7. The appellant gave evidence in English before the judge as did his partner. He noted that the Secretary of State had not challenged that the claimant had a son and that they were in a genuine and subsisting relationship. The family had only lived together since May 2014 but the judge was satisfied that the claimant, his partner and his son comprised a family unit. Applying the Immigration Rules, he was satisfied that it would be unduly harsh for the son to live in Kosovo, that it is in the best interests of the child to live with his father as well as his mother and that it would be unduly harsh for the son to remain in the United Kingdom without the claimant. The judge was also satisfied that the claimant had had a genuine and subsisting relationship with his partner for ten years but it was unnecessary for him to consider whether it would be unduly harsh for her to move to Kosovo or remain in the United Kingdom in the light of his findings in respect of their son.

8. The judge also considered that in the light of these findings, it would be unduly harsh for the parents to have to endure their child suffering and furthermore he did not consider it reasonable to expect a UK citizen to relocate outside the United Kingdom. He also addressed the public interest with reference to Part 5A of the Nationality, Immigration and Asylum Act 2002 in considering the public interest and concluded that the offence was not an extremely serious offence in the eyes of the criminal law. The judge did not consider that the previous offences were capable of significantly tipping the balance against the claimant. He found that in applying the Immigration Rules, the public interest did, on the facts of the case, particularly in the light of the genuine and subsisting relationship with the child, favour deportation. On this basis he allowed the appeal under the Rules and as a consequence did not consider it was necessary for him "to consider any freestanding claim under Article 8 considered outside the Immigration Rules nor the human rights claim arising from the [claimant's] health problems".

9. Permission to appeal was granted on a renewed application by Upper Tribunal Judge Grubb. The grounds were twofold. The first was that the judge had made a material misdirection of law under the Rules. The conclusion that it would be unduly harsh for the claimant's son to live in the United Kingdom without him was fundamentally flawed. The relationship had only been since May 2014 and that relationship was fundamentally "normal" in all regards. The judge's assessment did not disclose any factors to establish undue harshness. There was no challenge to the conclusion that it would be unduly harsh for the son to live in Kosovo.

10. The second ground relates to the public interest. It is asserted that the correct approach is not whether the offence is extremely serious in the

eyes of criminal law but rather the correct approach is to consider the sentence imposed, the circumstances of the offence, the public interest and the will of Parliament as to where the balance lies within primary legislation. Due regard had not been given to the weight in favour of deportation. The scales weigh in favour of that and must be tipped in the claimant's favour, not against him.

11. In granting permission Upper Tribunal Judge Grubb considered it was at least arguable that merely assessing the impact on the child in the abstract was insufficient to determine undue harshness. He also granted permission on the second ground since the Article 8 assessment would arguably be irrational if the finding on undue harshness could not stand. It was difficult to see why the judge had gone on to consider Article 8 within the "complete code" at paragraph 398.

Part 5A of the 2002 Act and the Relevant Immigration Rules

12. Part 5A of the 2002 Act introduced by the Immigration Act 2014 is in these terms:

"PART 5A

Article 8 of the ECHR: public interest considerations

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) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who

seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English -

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons -

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to -

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where -

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

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 -

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

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 a partner who -*
  - *(a) is a British citizen, or*
  - *(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 - see section 33(2A) of that Act).*

(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) For the purposes of subsection (2)(b), a person subject to an order under -

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time -

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

13. The immigration decision was made before the changes to the Immigration Rules relating to deportation that came into force on 28 July 2014. The judge heard the appeal after that date and applying the principles in *YM (Uganda) v SSHD* [2014] EWCA Civ 1292, the judge was obliged to apply the 2014 Rules despite the decision having been undertaken under the previous rules. The judge did not set out the relevant rules in his decision. These are:

"Deportation and Article 8

A398. These rules apply where:

(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 4 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 7 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) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

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

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

Did the Judge Err in Law?

14. Both parties relied on skeleton arguments. The Secretary of State begins with reference to the judgment of Richards LJ in *JO (Uganda) v SSHD* [2010] EWCA Civ 10 at [27] as applied in instructions to her caseworkers

when considering whether the effect on a child of deportation of a foreign criminal is unduly harsh. It is argued that it is entirely obvious that the term "unduly harsh" imports a balancing exercise taking the effect of deportation on the child on the one hand and weighing this against the offending of the claimant. The presumption in favour of deportation is not rebuttable by the claimant. The judge had concluded that the impact on the claimant's son was that he would be "very upset" and that the relationship would cease day-to-day. This was in the context of the judge's observation at [42]:

> "Other things being equal, it is in the best interests of the child to live with a father as well as a mother."

15. In addition it is argued that other things were not equal in the light of the serious robbery committed by the claimant for which he had continued to deny responsibility. The offence had led to a sentence sufficient to pass the threshold set by Parliament in the 2007 Act. The judge's views on the seriousness of the offence being reduced was not a finding that was open to him. The public interest in deportation which included the seriousness of the offence and the fact that the antecedents showed persistent offending and a marked escalation must be weighed against the best interests of the child when coming to a conclusion under paragraph 399(a). The seriousness, frequency and escalation of the offending were plainly not outweighed by the relationship or by the fact that this would cause upset to the child. In the alternative it is pleaded that the determination was irrational in reaching its finding given the statutory context of deportation.

16. Mr Shilliday developed these points in his oral submissions emphasising that criminality can result in the fracture of the family unit as considered in *AD Lee v SSHD* [2011] EWCA Civ 348. He argued that the Immigration Directorate Instructions had been approved by the Court of Appeal in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 at [14] and [16] in the context of its conclusion that it was "… difficult to see what scope there is for any consideration outside the new Rules: i.e. they provide a complete code." Mr Shilliday argued that the Rules were underpinned by s.117C. He maintained his argument that the judge had failed to assess the effect of the index offence being further criminality which indicated clear escalation.

17. Mr Kerr's skeleton interprets the first ground as contending that because the relationship between the claimant and his son had been brief and normal there were no factors leading to the conclusion that it would be unduly harsh for the son to live in the UK without him. Because the parties could enjoy their relationship remotely deportation was not unduly harsh. Furthermore the judge had failed to engage with paragraph 399(b) of the Rules.

18. By way of response it is argued that the judge had provided cogent and ample reasoning for his conclusion that it would have unduly harsh

consequences for the son to remain without his father. The grounds provided a misleading summary as to the extent and length of the relationship between them. It was not the case that the relationship had only existed since May 2014. There was unchallenged evidence from the claimant, his partner and his mother as to the extent of the relationship which included evidence of prison visits and regular contact prior to conviction. The judge had made clear findings as to the consequences of substituting a remote and intermittent relationship with his son and the grounds were therefore merely a disagreement with the conclusions. As to whether the harshness was "undue", the judge had provided comprehensive and cogent reasons going further than simply considering the impact of deportation on the son. There had been consideration of the seriousness of the offence and the public interest. Specifically the judge had in mind the questions elucidated in the provisions of s.117B and C. A comprehensive analysis of the competing interests in the light of the statutory provisions had been provided and the judge had not minimised the seriousness of the offence but merely considered the wording of the sentencing judge. Thus it is argued that the judge did consider the seriousness of the offence when deliberating whether the harshness to the son of the claimant's deportation was "undue".

19. As to the second ground in the light of *Dube* (ss.117A-117D) [2015] UKUT 90 (IAC) the judge was duty-bound to consider the provisions of s.117. In the light of the sentencing judge's remarks the judge had considered the more serious the offence committed the greater the public interest. The complaint that the normal circumstances which swayed matters in the claimant's favour was not evidence of an error of law but merely disagreement with the conclusions. The reference by the judge to the other offences which had not resulted in custodial sentences was not a misdirection.

20. In the course of his submissions, Mr Kerr argued that he read the determination as the judge not confining himself to a limited analysis of the undue harshness but carrying out a proportionality exercise over a number of paragraphs and then a brief Article 8 analysis on a *Belton* basis. The balancing exercise undertaken pointed to an interplay between the Rules and the statute and he argues the judge firmly had this in mind. The provisions in Part 5A were therefore part of the balancing exercise under paragraph 399(a).

21. In the ensuing discussion Mr Shilliday argued it was irrational for the judge to say the offence was not serious in the context of its nature and the escalating element. Mr Kerr maintained that the attack was on conclusions and did not show error.

My Analysis

22. The first question is whether the judge made the correct approach in reaching his finding that it would be unduly harsh for the claimant's son to remain without his father. It is clear to me that any enquiry whether it

would be unduly harsh for the child to remain in the United Kingdom without the person who is to be deported (paragraph 399(a)(b) (preserving the somewhat bizarre layout of the Rule)) is an exercise that requires reference to the factor that renders something which may be harsh as unduly harsh. There can be no doubt that the separation of a child from his parents is harsh where, as in this case, the best interests lie in the family unit being preserved. The factor to be considered is the criminal offending which informs the public interest. The claimant is in the category of offending resulting in sentences between one and four years. That will include a range of offences some of which will be more serious than others. It is the seriousness of the offence and other associated factors such as the risk of reoffending and the impact of the offence on others which will lead to a correct analysis of whether a harsh result is unduly reached or not. In other words, this is the proportionality exercise required by the Rules. I accept Mr Kerr's argument that the provisions of Part 5A applies to that exercise within the Rules. S.117A(2) makes it clear that the court or Tribunal *must* have regard to the provisions. S.117C(1) and (2) make it clear that deportation of foreign criminals is in the public interest and that the more serious the offence committed the greater the public interest in deportation of the criminal. The greater the public interest therefore the greater the harshness that can result in the impact on others of a foreign national's removal.

23. In my view the application of primary legislation to the approach under the Rules does not significantly alter the comprehensive code principles confirmed by Sales LJ in *SSHD v AJ* (Angola) [2014] EWCA Civ 1636. The Act does not replace or provide an alternative basis for assessment of Article 8 outside the Rules. This was clearly in the mind of Aikens LJ in *YM (Uganda) v SSHD* [2014] EWCA Civ 1292 where at [56] he observed in respect of the disposal of the appeal:

> "But for the reasons that I have set out above, in my view the 2012 Rules will not apply to any further decision on YM's Article 8 rights. Both the new statutory provisions and the 2014 Rules must be applied. In those circumstances, I would allow the appeal on the Article 8 ground, set aside the UT's decision and remit this matter to a differently constituted UT to reconsider the facts and make the necessary findings and evaluations in the light of the new statutory provisions and the 2014 Rules."

24. As observed by the Tribunal in *Dube*

> "judges are required statutorily to take into account a number of enumerated considerations. Sections 117A-117D are not, therefore, an a la carte menu of considerations that it is at the discretion of the judge to apply or not apply. Judges are duty-bound to 'have regard' to the specified considerations."

25. Article 8 considerations of foreign national criminals have a special category under the Rules. The Court of Appeal in successive decisions has made it abundantly clear that those Rules provide a complete or comprehensive code. The principles of proportionality feature in

implementation of that code and Part 5A makes it clear how aspects of proportionality are to be approached.

26. Turning to the judge's decision, I am not persuaded that he reached his conclusion regarding the unduly harsh impact on the son remaining here without his father by carrying out the correct proportionality exercise. At [40] to [42] the judge explains why he considers it would be unduly harsh for the son to live in Kosovo or for him to remain in the United Kingdom without his father without any reference to the criminal offending that has brought these possibilities about. Instead his focus was on the negative aspects on the son's development. Whilst I accept the judge was correct to identify those factors which rendered either option harsh, there is no consideration of why it would be unduly harsh.

27. The question of the public interest in deporting the claimant is not considered until after these conclusions have been reached at [45]. This and the succeeding paragraphs make no reference to the Immigration Rules but instead appear to be an impermissible exercise outside the Rules solely with reference to general Article 8 principles and Part 5A.

28. In my view, therefore, the first ground of challenge by the Secretary of State is more than a disagreement. It identifies an error of approach by the judge in separating the considerations of unduly harsh from the factors relied on for the claimant's deportation. The second ground attacks aspects of the separate and impermissible Article 8 analysis of whether deportation of the claimant is justified. I do find some force in the criticism of the judge's dilution of the seriousness of the offence, principally because he failed to have regard to the rules. I also consider the judge erred in relation to issue of the risk of reoffending evidenced by the way in which the criminal offending has developed. The judge's observation at [49] that "the facts of those offences are not known nor relied on by the respondent" does not reflect the correct analytical approach. The offences were referred to in the supplementary letter and it was incumbent upon the judge to take them into account particularly in the light of the sentencing remarks which included the observation that the claimant was not of good character.

Remaking the Decision

29. Although both parties indicated that they were content for me to remake the decision based on the material before me I am not satisfied that the findings of the judge provide a sufficiently complete picture for me to do so. The evidence recorded at [21] indicates that the claimant moved in with his partner in May 2014 and that this was the first time they had been properly living together. Mr Kerr's skeleton argument takes issue with the grounds of application arguing that they had provided a misleading summary as to the extent and length of the relationship between the claimant and his son. I have to say this aspect is not entirely clear. Whether it would be unduly harsh for the claimant's son to remain without his father in the United Kingdom requires careful analysis of all the

competing factors and I consider therefore further evidence is necessary on this aspect.

30. In the circumstances as further fact-finding is necessary, the case will be remitted to the First-tier Tribunal for its further consideration. That reconsideration will not be required with reference to the claimant's health problems there being no challenge to the judge's decision not to deal with this aspect.

Decision

The appeal is allowed to the extent the decision is set aside and the case remitted for reconsideration by a differently constituted First-tier Tribunal.

Signed Date 24 April 2015

Upper Tribunal Judge Dawson