



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

Appeal Numbers: DA/00616/2015
IA/24690/2015

THE IMMIGRATION ACTS

**Heard at Field House
On 6 March 2018**

**Decision & Reasons Promulgated
On 17 April 2018**

Before

**THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE DAWSON**

Between

**ROLAND [L]
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mrs [L]

For the Respondent: Mr R Dunlop, counsel instructed by the Government Legal Service

DECISION AND REASONS

Introduction

1. This is the decision of the Tribunal. We conclude that the First-tier Tribunal (“the FtT”) made an error of law in its decision dismissing the appeals against the decisions refusing an EEA Residence Card and refusing a human rights claim. In summary, we consider that the appellant was not given an effective hearing of his appeals having regard to the principles that we now know from the decision of the Supreme Court

in *R (Kiarie and Byndloss) v Secretary of State for the Home Department* [2017] UKSC 42 and accordingly we remit the case to the FtT for its reconsideration. Our reasons are as follows.

2. The appellant is a national of Albania, where he was born on [] 1982. He first came to the United Kingdom on 14 April 2000 and claimed asylum which was rejected. He unsuccessfully appealed. On 6 July 2002 he married a British citizen. However, on 27 November 2003 he was removed to Kosovo. With entry clearance as a spouse the appellant re-entered the United Kingdom on 1 January 2004. In 2007 he began his current relationship with Ms [S], a Polish national who had arrived here in 2006.
3. On 28 March 2008 he was granted indefinite leave to remain based on his previous marriage to the British citizen. That marriage was dissolved on 28 April 2010. Some two and a half years later on 10 August 2012 he was convicted on a count of conspiracy to supply Class A drugs. He was sentenced to five years and four months' imprisonment. On 20 November 2012 the appellant was served with notice of liability to deportation. After he applied for the Facilitated Return Scheme in July 2013, the Secretary of State issued a deportation order on 13 September 2013. The appellant changed his mind. He no longer wished to return voluntarily and made various representations against deportation in which he relied on Article 8. He also applied for an EEA residence card on 1 February 2015 on the basis of his relationship with Ms [S]. That application was refused by the Secretary of State by letter dated 11 June 2015. Pursuant to regulation 26 of the Immigration (European Economic Area) Regulations 2006 ("the Regulations"), the appellant lodged an appeal against the decision to the FtT on grounds under the Regulations and human rights grounds.
4. Whilst this appeal was pending, on 13 November 2015 the Secretary of State made a deportation order against the appellant as a foreign criminal as defined by section 32 of the UK Borders Act 2007. On 24 November 2015 she also refused the appellant's human rights claim. In addition, the Secretary of State certified the claim under section 94B of the Nationality, Immigration and Asylum Act 2002 on the basis that removal prior to the hearing of the appeal would not breach his human rights. This resulted in the appellant being constrained from appealing the refusal of his Human Rights claim whilst in the UK.
5. On 15 December 2015 a judge of the Upper Tribunal exercising its judicial review jurisdiction refused an application for a stay on removal. The application for permission to bring judicial review proceedings was also refused and the claim was certified as totally without merit; as a result the appellant had only a right of appeal to the Court of Appeal. The appellant was removed to Albania on 15 December 2015.
6. An appeal against the decisions under the Regulations and on Human Rights grounds was brought on 21 December 2015 on the basis that the Secretary of State had failed to apply the Regulations correctly and under

Article 8 with reference to private and family life established in the United Kingdom.

7. The appellant and Ms [S] married on 30 March 2016 in Albania and later that year their son T was born in the United Kingdom.
8. Earlier on 19 May 2016, the Secretary of State provided a supplementary letter in addition to the reasons given for the deportation order in advance of these appeals being heard in May 2016. As matters turned out, they were not heard until 24 January 2017.
9. The appellant was represented at the hearing by Counsel and a Presenting Officer appeared on behalf of the Secretary of State. The judge heard evidence from Mrs [L] and a family friend. A signed statement was provided on behalf of the appellant.
10. The judge made the following findings as set out in [77] of his decision:
 - (i) Mrs [L] has had permanent rights of residence since October 2011.
 - (ii) The appellant is a family member and regulation 21(3) of the Regulations applies. As a consequence the respondent “may not deport” the appellant unless there are serious grounds of public policy or security.
 - (iii) It is in T’s best interests that he continue to live with his mother whilst developing a relationship with his father being the circumstances into which he was born. T has not lived with his father.
 - (iv) The appellant had sought to diminish his involvement in the “serious and well-organised drugs ring” that operated in Norwich. The judge observed:-

“This diminution of his role leads me to conclude that the appellant has not been truthful in his witness statement (or to others) and that he presents a genuine, present and serious threat to society by repeating his association with serious organised crime in the Albanian community. Whilst his marriage (and parenthood) could act as a benign influence upon him, I find that it is unlikely, given that his stable relationship with Mrs [L] over many years failed to prevent his criminal activities previously.”
 - (v) The judge observed that although the appellant had no previous convictions, the offences of which he had been convicted were not a one-off event as the activities had been continuing for several months under police surveillance.
 - (vi) There was no reason to conclude that the appellant’s prospects for rehabilitation were prejudiced by being deported to Albania where he resides with his parents and where “as a healthy, resourceful and educated English speaker, he is likely to have advantage as a job-seeker over his compatriots”.
 - (vii) It was proportionate to deport the appellant to Albania on the basis of serious grounds of public policy.

11. The judge turned to Article 8 and considered the case under Part 5A of the Nationality, Immigration and Asylum Act 2002. He found that very compelling circumstances over and above those in Exceptions 1 and 2 to paragraph 117C did not exist to outweigh the public interest in deportation. And thus the appeal was dismissed on all grounds.
12. In a rule 24 response dated 5 September 2017 the point is made that there was nothing in the papers or the decision of the FtT which would suggest that the appellant had made any request to give evidence electronically, that he wished to appear to give evidence or even argue that his non-attendance before the Tribunal was prejudicial. The appellant was professionally represented and chose not to pursue any remedy.
13. Permission to appeal was granted on a renewed application to the Upper Tribunal on grounds that may be summarised as follows:-
 - Ground 1: The proceedings were unfair by reference to the decision *R (on the application of Kiarie) v SSHD* [2017] UKSC 42. It is argued that the appellant was “entirely prejudiced by his absence from the hearing and inability to attend in terms of his credibility and inability to give live evidence, the difficulty his professional advisers had in taking instructions, both before and during the hearing, and his inability to gain expert reports”.
 - Ground 2: The First-tier Tribunal had failed to consider Article 24(3) of the EU Charter of Fundamental Rights. No findings had been made as to whether this right would be breached by the appellant’s deportation or whether the test of undue harshness is modified by the fundamental right.
 - Ground 3: The First-tier Tribunal erred in failing to consider whether the deportation of the appellant would impact on his wife’s free movement rights.
 - Grounds 4 and 5: The First-tier Tribunal erred in that there was no evidence the appellant had repeated his association with serious organised crime in the Albanian community and had failed to assess the risk of re-offending *ex nunc*. As to rehabilitation the First-tier Tribunal had failed to materially consider the matters in place in the United Kingdom that would assist his rehabilitation.
14. In granting permission to appeal Upper Tribunal Judge Smith explained that she did so principally on the first ground. She observed that the other grounds were weaker noting that the rights of a child under Article 24(3) were not absolute and if deportation is otherwise justified under EU law neither that nor the partner’s rights to free movement could outweigh the result. Permission was not however refused on any of the grounds.
15. There was no cross-appeal by the Secretary of State although it was submitted at the hearing that the FtT had applied the wrong test under regulation 21; the appellant was not entitled to recognition as having a permanent right of residence and so the base level threshold of assessment applied rather than “serious grounds”.

The Hearing

16. The appellant's solicitors withdrew prior to the hearing due to funding difficulties. Mrs [L] spoke on behalf of the appellant and responded in detail to Mr Dunlop's skeleton argument and his submissions. Although the focus in this case was on the first ground, we encouraged him to address us on all grounds so that Mrs [L] had the benefit of understanding the Secretary of State's position on each aspect of the challenge.
17. Mrs [L] explained that her husband's solicitors had advised that in order for him to be here for the hearing he should apply for temporary admission. They were unable to afford the fee for this having spent funds on the application for judicial review. The submissions by Mr Dunlop were the first time that she had heard such an option was available and even had she been aware of this possibility there would have been a problem meeting the cost.

Ground 1

18. Essentially Mr Dunlop maintained the position taken in the rule 24 response and argued that the matter at stake was one of fairness. Common law fairness did not apply in respect of something that had not been sought. Mr Dunlop considered that the appellant who was legally represented had waived the right to participate in the hearing via video link. His skeleton argument identifies two options open to the appellant; the first being that he could have applied to the FtT to give live evidence or he could have brought a Judicial Review. Understandably Mr Dunlop accepted in the light of the evidence produced by Mrs [L] that the latter option had been exercised.
19. Reliance was placed on two decisions. The first is *R (Thompson) v the Law Society* [2004] EWCA Civ 167. This concerned a solicitor who challenged the finding of a committee and adjudication panel on the basis that he had not been afforded an oral hearing in respect of complaints over his professional conduct. The court was satisfied that if the solicitor had thought at the time of the proceedings against him that an oral hearing was desirable or if he had wanted to give oral evidence or to cross-examine the complainant he would have been permitted to do so. He did not however and, as observed by Clarke LJ at [47],

"I cannot at the moment think of a circumstance in which a solicitor who did not ask for an oral hearing before the Adjudicator or appeal panel could complain that no oral hearing was held. In my judgement, the claimant's failure to ask for an oral hearing ... is fatal to his argument at common law."
20. Mr Dunlop argued that the same principles of common law fairness applied to Convention matters and he referred us to the decision of the European Court of Human Rights in the case of *Schuler-Zgraggen v Switzerland* (Application No. 14518/89). In this case the claimant challenged the decision of the Invalidity Insurance Board which had cancelled a pension the applicant had been previously awarded on the grounds of incapacity

for work. Her complaint was that there had been no hearing before the Federal Insurance Court.

21. The Strasbourg Court observed at [58]:-

“58. The court reiterates that the public character of court hearings constitutes a fundamental principle enshrined in paragraph 1 of Article 6. Admittedly, neither the letter or the spirit of this provision prevents a person from waiving of his own free will, either expressly or tacitly, the entitlement to have his case heard in public, but any such waiver must be made in an unequivocal manner and must not run counter to any important public interest ...

In the instant case the Federal Insurance Court’s Rules of Procedure provided in express terms for the possibility of a hearing “on an application by one of the parties or of [the presiding judge’s] own motion.” ... As the proceedings in that court generally take place without a public hearing, Mrs Schuler-Zraggen could be expected to apply for one if she attached importance to it. She did not do so, however. It may reasonably be considered therefore that she unequivocally waived her right to a public hearing in the Federal Insurance Court.”

22. Mr Dunlop accepted that the position might be different where an appellant was unrepresented which might require a tribunal to take a more proactive approach or where there was no possibility of obtaining a video link. But such a link as shown in a Country Guidance case, was available between Albania and the United Kingdom and there was no obligation on a tribunal to probe why an available option had not been taken. Answering the questions set out in *AJ*, the appellant had legal representation at all times and there was no evidence that there were reports required in addition to the OASys report that had been before the FtT. The fact of the appellant’s representation answered the third question and had it been considered the appellant’s evidence was necessary, his representatives should have asked for a video link. This meant the fourth question was not reached and in any event fairness did not require the Secretary of State to offer to pay.

23. Whilst we accept that Mr Dunlop was correct as to the first two questions, his response to the third overlooks the fact that there was a dispute as to a significant issue which is the extent to which the appellant represented a future risk. The appellant’s case was that he had reformed and had not committed further crimes. The judge was concerned that the appellant’s account of his criminal activities was at odds with the sentencing remarks and found that the appellant had not been truthful to himself. He concluded at [77]

“77. Drawing all the above together, I find the following:

...

(4) The Appellant was, according to the judge, part of a serious and well-organised drugs ring which, had it not been

stopped, would no doubt have continued to bring misery to the general public. Their activities had been covertly investigated over a number of months and was not a one-off event. The Appellant received the longest sentence of the five defendants, of equal length to the person he names as his supplier. The Judge expressly sentenced him as a person who had played a significant role in a conspiracy to deal in drugs over a period of several months and that it was serious and well-organised. The Appellant's own account of his activities as recorded in his own witness statement ("a small time provider supplying some drugs to seven or eight people") cannot be accurate in view of the Judge's remarks and the sentence he imposed. That diminished account of the Appellant's involvement is, however, to be found in the OASys report; and in the interviews given while in prison; and in the versions given by Mrs [L] and Mr Chesterfield. I find that it has informed each of their assessments of the Appellant as being a low risk of reoffending. The reality, in my view, is that the Appellant has sought to diminish his involvement in this "serious and well-organised drugs ring." This diminution of his role leads me to conclude that the Appellant has not been truthful in his witness statement (or to others) and that he presents a genuine, present and serious threat to society by repeating his association with serious, organised crime in the Albanian community. Whilst his marriage (and parenthood) could act as a benign influence upon him, I find that it is unlikely, given that his stable relationship with Mrs [L] over many years failed to prevent his criminal activities previously."

24. Diverging from the issues on which permission has been granted, we are satisfied that Mr Dunlop was correct in his submission that the judge had applied the wrong criteria. The judge found at [59] that as Mrs [L] was entitled to permanent residence, the appellant "as her spouse and family member [was] also entitled, subject to the provisions on regulations 19 and 21". This conclusion resulted in the second tier level of protection against removal, i.e. serious grounds of public policy or security being engaged. In our view, whilst there is no doubt that Mrs [L] was entitled to recognition as a permanent resident from October 2011, it did not automatically follow that any subsequent spouse would enjoy the same status. Regulation 15 provides:

"Permanent right of residence

15. (1) The following persons shall acquire the right to reside in the United Kingdom permanently—
- (a) an EEA national who has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years;
 - (b) a family member of an EEA national who is not himself an EEA national but who has resided in the United Kingdom with the EEA national in accordance with these Regulations for a continuous period of five years;

- (c) a worker or self-employed person who has ceased activity;
 - (d) the family member of a worker or self-employed person who has ceased activity;
 - (e) a person who was the family member of a worker or self-employed person where—
 - (i) the worker or self-employed person has died;
 - (ii) the family member resided with him immediately before his death; and
 - (iii) the worker or self-employed person had resided continuously in the United Kingdom for at least the two years immediately before his death or the death was the result of an accident at work or an occupational disease;
 - (f) a person who—
 - (i) has resided in the United Kingdom in accordance with these Regulations for a continuous period of five years; and
 - (ii) was, at the end of that period, a family member who has retained the right of residence.
- (2) Once acquired, the right of permanent residence under this regulation shall be lost only through absence from the United Kingdom for a period exceeding two consecutive years.
- (3) But this regulation is subject to regulation 19(3)(b).”

25. Mr Dunlop advanced an alternative basis for undermining the status of the appellant by reference to regulation 7:

“Family member

7. (1) Subject to paragraph (2), for the purposes of these Regulations the following persons shall be treated as the family members of another person—
- (a) his spouse or his civil partner;
 - (b) direct descendants of his, his spouse or his civil partner who are—
 - (i) under 21; or
 - (ii) dependants of his, his spouse or his civil partner;
 - (c) dependent direct relatives in his ascending line or that of his spouse or his civil partner;
 - (d) a person who is to be treated as the family member of that other person under paragraph (3).
- (2) A person shall not be treated under paragraph (1)(b) or (c) as the family member of a student residing in the United Kingdom after the period of three months beginning on the date on which the student is admitted to the United Kingdom unless—
- (a) in the case of paragraph (b), the person is the dependent child of the student or of his spouse or civil partner; or

(b) the student also falls within one of the other categories of qualified persons mentioned in regulation 6(1).

(3) Subject to paragraph (4), a person who is an extended family member and has been issued with an EEA family permit, a registration certificate or a residence card shall be treated as the family member of the relevant EEA national for as long as he continues to satisfy the conditions in regulation 8(2), (3), (4) or (5) in relation to that EEA national and the permit, certificate or card has not ceased to be valid or been revoked.

(4) Where the relevant EEA national is a student, the extended family member shall only be treated as the family member of that national under paragraph (3) if either the EEA family permit was issued under regulation 12(2), the registration certificate was issued under regulation 16(5) or the residence card was issued under regulation 17(4)."

26. It was argued by Mr Dunlop that as an extended family member, the appellant needed the issue of a family permit before he could be treated as a family member. This overlooks para 7(1). The appellant became a family member on marriage and the alternative route via extended family member status was not relevant. We are conscious that the challenge to the correctness of the judge's self-direction was not a ground of appeal and Mrs [L] does not currently have the advantage of legal representation. The law, however, is clear and when reconsidering the decision, the FtT will need to be aware of the correct test to be applied. The less demanding standard to be applied means that the risk assessment under para 21 will require an analysis for which the appellant's evidence may well be particularly crucial. Put another way, the length of the sentence combined with the sentencing judge's comments will make it all the more difficult for the appellant to clear the hurdle of the base level test. We do not express a view ourselves as to the outcome; our focus at this stage is on the ground of challenge which is whether the appellant had an effective and fair hearing.

27. Consideration of the issue of waiver requires in the first place an examination of what it is being relinquished. The two cases referred to by Mr Dunlop had the common feature of a codified right that could have been exercised. Paragraph 1(4) of the FtT Rules includes in its definitions of hearing the possibility of a video link. Paragraph 14(1)(e) provides a power to direct the manner of "a hearing". These provisions were examined in *Kiarie v SSHD; R (Byndloss) v SSHD* [2017] UKSC 42; [2017] 1 WLR 2380 together with the decision in *SSHD v Nare* [2011] UKUT 443:

"69. In *Secretary of State for the Home Department v Nare* [2011] UKUT 443 (IAC) the Upper Tribunal (Mr CMG Ockelton VP, UTJ Grubb and IJ Holmes), in the course of considering an allegation that a judge of the First-tier Tribunal had too readily allowed a witness to give evidence by telephone, gave guidance as to how the tribunal should approach any application for a direction that evidence be given by electronic link. At that time the rules specifically provided for such a direction to be given; now, by rules 1(4) and 14(1)(e) of the 2014 Rules, provision for it is

encompassed in the definition of a “hearing”, together with the power to direct “the manner in which any evidence or submissions are to be provided [including] orally at a hearing”. The Upper Tribunal prefaced its guidance by observing at para 17 that departure from the usual model of oral evidence given directly in the courtroom was likely to reduce the quality of evidence and the ability both of the parties to test it and of the judge to assess it. Its guidance, given in para 21, included:

- (a) that the application should be made and determined well before the substantive hearing;
- (b) that the application should not only explain the reason for evidence to be given on screen and indicate the arrangements provisionally made at the distant site but also include an undertaking to be responsible for any expenses incurred;
- (c) that, were the evidence to be given from abroad, the applicant should be able to inform the tribunal that the foreign state raised no objection to the giving of evidence to a UK tribunal from within its jurisdiction;
- (d) that the applicant should satisfy the tribunal that events at the distant site were, so far as practicable, within its observation and control, that the evidence would be given there in formal surroundings and be subject to control by appropriate officials and that nothing could happen off camera which might cast doubt on the integrity of the evidence; and
- (e) that a British Embassy or High Commission might be able to provide suitable facilities.”

28. As to the mechanics and effectiveness of exercising the option that was available to the appellant, the observations of Lord Wilson at [73] need to be borne in mind:

“73. It is already clear however that the cost of hiring the necessary equipment for use at the distant end of any evidence given by video link or Skype is only part of the cost which an appellant must bear. He must also bear the cost of providing the equipment for use at the hearing centre and he may well have to pay for the attendance beside him of someone able and willing to exercise the degree of control required by the tribunal. Apart, however, from having to meet the overall costs of giving evidence in that way, an appellant has to confront formidable technical and logistical difficulties. Powerful evidence is given by the appellants’ solicitors and other legal specialists in the field to the effect that:

- (a) it can be a slow and tortuous process to obtain the consent of the foreign state for evidence to be given from within its jurisdiction;
- (b) it can be difficult to achieve compatibility between the system adopted at the distant end and the system installed at the hearing centre, with the result that a bridging service sometimes needs to be engaged and funded;

- (c) it can be difficult to alight upon a time for the link to begin and end which is both acceptable to the tribunal and practicable at the distant end in the light of the time difference; and
- (d) if, as is not uncommon, the link fails during the hearing and cannot then and there be restored, the tribunal can prove reluctant to grant an adjournment to another date.”

29. We are aware that cost would have been an inhibiting factor for the appellant and even if that could be overcome, in our view, had the option of video linking been pursued, without greater assurance as to the effectiveness of any link, there are real doubts that it would have reliably resulted in a fair hearing of the issues. We do not consider this case can be resolved simply by regarding the decision not to request a video link as a waiver of an opportunity that existed. It will only be where an appellant is invited to give evidence by video link that meets the criteria in *Kiarie and Byndloss* but elects not to do so that he or she can be regarded as having waived the opportunity. Such an invitation will most likely arise in the situation described by the Tribunal in *AJ v SSHD* (HU/03027/2015),

“51. The third question is whether, in all the circumstances, hearing live evidence from the appellant is necessary. As we have observed, for the effect of Lord Wilson’s judgment is that in many if not most cases a fair hearing cannot take place unless the appellant is heard in person. The First-tier Tribunal will need to consider whether there are any disputed findings of fact. If there are not, then live evidence may not be necessary. Lord Wilson’s judgment however, makes it clear that, even if hard-edged facts are not in dispute, a judicial fact-finder in this area may nevertheless be properly swayed by seeing and hearing the appellant. For this reason, we consider that, in section 94B cases, the need for live evidence is likely to be present. A possible exception might be where the respondent’s stance is that, even if the appellant’s case is taken at its highest, so far as family relationships, remorse and risk of re-offending, are concerned, the public interest is still such as to make the appellant’s deportation a proportionate interference with the Article 8 rights of all concerned. It is, perhaps, more difficult to see how the respondent could adopt such a stance where the appellant is not a foreign criminal, unless his immigration history is particularly problematic.”

30. The difficulties that the appellant faced find parallel to those identified in *Kiarie and Byndloss* at [61]:

“61. The next question is whether, if he is to stand any worthwhile chance of winning his appeal, an appellant needs to give oral evidence to the tribunal and to respond to whatever is there said on behalf of the Home Secretary and by the tribunal itself. By definition, he has a bad criminal record. One of his contentions will surely have to be that he is a reformed character. To that contention the tribunal will bring a healthy scepticism to bear. He needs to surmount it. I have grave doubts as to whether he can ordinarily do so without giving oral evidence to the tribunal. In a

witness statement he may or may not be able to express to best advantage his resolution to forsake his criminal past. In any event, however, I cannot imagine that, on its own, the statement will generally cut much ice with the tribunal. Apart from the assistance that it might gain from expert evidence on that point (see para 74 below), the tribunal will want to hear how he explains himself orally and, in particular, will want to assess whether he can survive cross-examination in relation to it. Another strand of his case is likely to be the quality of his relationship with others living in the UK, in particular with any child, partner or other family member. The Home Secretary contends that, at least in this respect, it is the evidence of the adult family members which will most assist the tribunal. But I am unpersuaded that the tribunal will usually be able properly to conduct the assessment without oral evidence from the appellant whose relationships are under scrutiny; and the evidence of the adult family members may either leave gaps which he would need to fill or betray perceived errors which he would seek to correct.”

In our view the FtT failed to ask itself what we now know that it should have. It was required to deal with a tension between the nature and facts of the offending and the position taken by the appellant in his witness statement. The tribunal should have asked whether hearing live from the appellant might make a difference. In not asking that question we consider the Tribunal materially erred.

Ground 2

31. Article 24 was not raised as a ground of challenge in either of the appeals, which is understandable as the couple’s child had not been born. It was however raised by the appellant’s Counsel in her skeleton argument dated 23 January 2016. Reference is made to the child having a freestanding fundamental right with reference to *Abdul (Section 55 – Article 24(3) Charter)* [2016] UKUT 106 (IAC) with the accompanying submission that this provision impact on the unduly harsh test in the case as the child’s fundamental right would arguably be breached if the appellant is removed. The argument recognises that with reference to *MM (Uganda) & Anor v SSHD* [2016] EWCA Civ 450 the unduly harsh test is not an objective one but operates on a sliding scale. With criminality being at “the low end of the scale”, although the seriousness of an offence can impact on the unduly harsh test, the fundamental rights of a child can, and should modify the same test.
32. Reliance is placed on an extract from the judgment of Laws LJ in *MM* at [24] -[26]:-

“24. This steers the tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in

deportation in the particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.

25. The issue is not advanced with respect either by the terms of the Secretary of State's guidance in the Immigration Directorate Instructions or the learning on the use of the term "unduly harsh" in the context of internal relocation issues arising in refugee law. The IDIs are not a source of law and the asylum context of internal relocation issues is far removed from that of Rules 398 to 399. In fact authority in the asylum field emphasises the importance of context (see Januzi [2006] 2 AC 426 per Lord Bingham at paragraph 21).
26. For all these reasons in my judgement MAB was wrongly decided by the Tribunal. The expression "unduly harsh" in section 117C(5) and Rule 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history."

The skeleton analyses the position on this basis:

"It is submitted that as the extent of offending impacts on the "unduly harsh" test, arguably the converse will also be true. Namely, the personal characteristics of the child may impact on the unduly harsh test, such as disability, age, quality of relationship with the offender, these are arguably material and relevant circumstances. The best interests of the child will apply to all children in an immigration context, however, it will only be European citizens whose additional rights are protected and/or enhanced by the Charter. It is averred that a potential breach of Mr [L]'s son's fundamental rights equally are a relevant consideration, which will shift the scale to protect his interests. It is not just the relationship with his father which is at risk in the present case, but also his life chances due to the financial support his father will provide as compared to the relatively small sum that he can currently afford. Additionally, due to his son's age, he would not be able to foster and maintain a relationship using modern means of communication.

Alternatively, it is averred that Mr [L]'s son's fundamental right and its potential breach amounts to very compelling circumstances (rule 398)."

33. We are puzzled by the reference to paragraph 398 since the appellant's circumstances were to be considered with reference to the provisions in regulation 21(5). The First-tier Tribunal Judge did not address the Charter but instead approached the case under Article 8 having concluded that it was proportionate for the appellant to be deported to Albania on the basis of serious grounds of public policy under the Regulations. It would surprise us if an appellant is able to succeed on Article 8 grounds where he or she does not win under the Regulations as it appears to us there is no factor that Article 8 requires to be considered which is not encompassed by the principles in regulation 21(5).

34. Mr Dunlop's skeleton argument considers that it was unnecessary for the First-tier Tribunal to say anything more about Article 24(3) on the basis that there was no obligation on the FtT to reach a concluded view on whether Mrs [L] and the child would relocate to Albania to join the appellant. Deportation would prevent the appellant from having contact with the child. The Tribunal did all that was required by evaluating the impact on the child in either eventuality and had reached a conclusion open to it that deportation would not be unduly harsh for the reasons given. Article 24(3) adds nothing to Article 8 of the Human Rights Convention in the light of its status as a qualified right with reference to Article 52 of the Charter which may be limited where it is proportionate to do so.

35. Articles 24 and 52 are in the following terms:-

“Article 24 - The rights of the child

1. Children shall have the right to such protection and care as is necessary for their well-being. They may express their views freely. Such views shall be taken into consideration on matters which concern them in accordance with their age and maturity.
2. In all actions relating to children, whether taken by public authorities or private institutions, the child's best interests must be a primary consideration.
3. Every child shall have the right to maintain on a regular basis a personal relationship and direct contact with both his or her parents, unless that is contrary to his or her interests.

Article 52 - Scope and interpretation of rights and principles

1. Any limitation on the exercise of the rights and freedoms recognised by this Charter must be provided for by law and respect the essence of those rights and freedoms. Subject to the principle of proportionality, limitations may be made only if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others.
2. Rights recognised by this Charter for which provision is made in the Treaties shall be exercised under the conditions and within the limits defined by those Treaties.
3. In so far as this Charter contains rights which correspond to rights guaranteed by the Convention for the Protection of Human Rights and Fundamental Freedoms, the meaning and scope of those rights shall be the same as those laid down by the said Convention. This provision shall not prevent Union law providing more extensive protection.
4. In so far as this Charter recognises fundamental rights as they result from the constitutional traditions common to the Member States, those rights shall be interpreted in harmony with those traditions.
5. The provisions of this Charter which contain principles may be implemented by legislative and executive acts taken by institutions, bodies, offices and agencies of the Union, and by acts of Member States when they are implementing Union law, in the exercise of their

respective powers. They shall be judicially cognisable only in the interpretation of such acts and in the ruling on their legality.

6. Full account shall be taken of national laws and practices as specified in this Charter.
7. The explanation drawn up as a way of providing guidance in the interpretation of this Charter shall be given due regard by the courts of the Union and of the Member States.”

36. The Upper Tribunal gave guidance in *Abdul (Section 55 - Article 24(3) Charter)* [2016] UKUT 106 (IAC) on Article 24(3) in these terms:

“30. I am of the opinion that Article 24(3) creates a free standing right. It may, of course, be viewed as the unequivocal articulation of a concrete “*best interests*” right and, on this analysis, is a development, or elaboration, of Article 24(2). Furthermore, given the exception formulated in the final clause of Article 24(3), the nexus with Article 24(2) is unmistakable. However, I consider it clear that Article 24(3) was designed to create a discrete right, an analysis which is harmonious with general principles of EU law. These include the well known principle that every part of a measure of EU law is presumed to have a separate and individual effect and impact. Article 24(3) may also be viewed through the prism of the principle that where one has an amalgam of specific and general provisions, the former should normally be considered in advance of the latter. This construction is further fortified by the Commentary of the Charter of Fundamental Rights of the European Union (published by the EU Network of Independent Experts on Fundamental Rights), at p207:

“... Children are no longer considered as mere recipients of services or beneficiaries of protective measures but rather as rights holders and participants in actions affecting them.””

37. We draw in particular from this the point that Article 24(3) is an articulation of the “best interests”, right which is set out and codified in section 55 in the Borders, Citizenship and Immigration Act 2009. The duty regarding the welfare of children has been subject to continuous judicial scrutiny since the inception of section 55 and does not need repeating here. It is sufficient to summarise the best interests as being a primary although not the primary consideration in any case that impacts upon the welfare of children. The focus in this appeal is on Article 24(3) which sets out the right to maintain on a regular basis a personal relationship and direct contact with parents. Article 52 deals with limitations on the exercise of the rights and freedoms recognised by the Charter. Such limitations may only be made “if they are necessary and genuinely meet objectives of general interest recognised by the Union or the need to protect the rights and freedoms of others”. Regulation 21(5) is concerned with those very matters and we are not persuaded that in substance Article 24(3) adds additional criteria to those to be taken into account in decisions on public policy, public security and public health grounds.

38. The FtT addressed the child’s best interests at [76] as follows:

“76. I turn next to the Appellant’s son, born on 5 August 2016, so aged 5 months at the date of the hearing. He was born some eight months after the Appellant was removed to Albania. The son has, therefore, only ever lived with his mother and has only seen his father for, at most, six weeks in total. In so far as it has been possible in such restricted circumstances, the Appellant has bonded with his son and it is trite to say that it would ideally be in the child’s best interest to live with both his parents if possible. That need not necessarily be in the UK although this is where his mother wishes to exercise her treaty rights. The child was conceived and born at a time when his parents were both aware that there is a risk that the Appellant might not be able to live with him in the UK. I find, therefore, that his parents took the view that, if necessary, they would all live together and bring up their child outside the UK; or that he would live with his mother but visit his father and develop a relationship with him by other means as he grew older. Having found that there is a serious risk of reoffending, I find that it is ultimately in the best interest of the child that he lives with his mother, who would be able to give him the stability and security he needs whatever conduct the Appellant may display in the future.”

39. Whilst the FtT Judge did not make specific reference to Article 24(3), in substance he considered the very matters captured by Article 24 and reached conclusions rationally open to him on the evidence. We are not persuaded that the Tribunal materially erred by failing to specifically refer to Article 24(3) in consideration of the case under the Regulations.

Ground 3

40. This ground may be taken shortly. The judge was clearly alive to the quality of life that Mrs [L] has established in the United Kingdom. There was no evidence before him that Mrs [L] would be compelled to leave the Union in order for her family life with the appellant to continue. Her right to be joined by the appellant was the focus of the appeal and we agree with the analysis of Mr Dunlop’s skeleton in these terms:-

“The effective deportation on Mrs [L]’s free movement rights is built into the [Regulations]. It is precisely because of [Mrs [L]’s] free movement rights that the appellant was given the protection of Regulation 21(3) of the [Regulations] and could not be removed unless there were ‘serious grounds of public policy or public security’. The FtT found that test was met and hence any interference with [Mrs [L]’s] free movement rights was proportionate.”

We do not consider there was any material error by the judge on the basis of this ground.

Grounds 4 and 5

41. These may be taken together. There are two aspects to this challenge. The first is that there was no evidence of the appellant having repeated his association with serious organised crime in Albania and had failed to assess the risk of offending *ex nunc*. The second is that the Tribunal has

failed to materially consider the matters in place in the United Kingdom that would assist his rehabilitation.


42. Mr Dunlop's skeleton asserts this ground has no merit and directs us to passages from the Tribunal's decision in support of his argument that the Tribunal had directed itself correctly on the approach to proportionality and had taken into account evidence of rehabilitation in weighing all the evidence. It is argued that the conclusion reached that the appellant did present such a threat was open to the Tribunal.
43. This ground is now academic in the light of our conclusion regarding the lack of ready opportunity for the appellant to give live testimony. It is the judge's concern that the appellant had not been truthful about the extent of his activities in the drugs gang which is an important factor in assessing the threat and rehabilitation and it is that aspect which will no doubt be the subject of further scrutiny once the appellant has been given an opportunity to give live evidence.

Conclusion

44. In summary we are satisfied the decision of the First-tier Tribunal contains a material error of law. We set aside the decision and remit the case to the First-tier Tribunal for it to remake the decision which will include, inter alia, consideration of an opportunity for the appellant to give live testimony.

Signed

Date: 16 April 2018



Upper Tribunal Judge Dawson