



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

Appeal Number: PA/07689/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 12 March 2020**

**Decision & Reasons
Promulgated
On 29 April 2020**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

**FP
(ANONYMITY DIRECTION MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Collins, Counsel instructed by Sentinel Solicitors

For the Respondent: Ms Chuna, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is an appeal against the decision of Judge of the First-tier Tribunal Beach (“the judge”) promulgated on 11 September 2019 dismissing the appellant’s protection and human rights claim. The appellant is only appealing against the part of the decision concerning his private and family life under Article 8 ECHR and therefore I have only considered this aspect of the decision.
2. The appellant is a citizen of Albania born on 4 June 1990. She entered the UK in November 2010 using a counterfeit identity card. She was convicted

of possession and/or use of a false instrument and sentenced to eight months' imprisonment. In June 2011 she was deported to Albania. In November 2011 she re-entered the UK in breach of the deportation order.

3. The appellant is married to a British citizen and has three young children. The oldest was born in January 2013, the second oldest was born in November 2014 and the youngest was born in October 2017. All of the children are British citizens.

Decision of the First-tier Tribunal

4. The judge's findings in respect of Article 8 are set out in paragraphs 66 – 93 of the decision. The judge stated that the appellant's Article 8 claim is based on her relationship with her husband and her children.
5. The appellant's husband is of Albanian ethnicity, speaks Albanian, and has connections to Albania. The judge found that it would not be unduly harsh for him to relocate to Albania or remain in the UK without the appellant.
6. With respect to the appellant's children, the judge considered a report by an independent social worker, Ms Brown. The judge noted Ms Brown's view that it would not be in the children's best interests to be separated from either parent or to relocate as a family to Albania. The judge stated at paragraph 75:

“Ms Brown noted that both the appellant and her husband did not want their children to relocate to Albania. She states:

‘Should Mrs P be removed it is then inevitable that the children would become separated from their mother. This would be a cruel and debilitating process of the children, who would view it as a bereavement, a death. Mrs P's mental health is such that I am uncertain how she would manage alone in Albania’.

7. The judge noted the evidence of Ms Brown that the family are extremely concerned about the development, and anxiety, of the oldest child, and that the child's school (referred to as nursery in the decision) had commented on the distress. The judge observed, however, that the correspondence from the school did not mention this, or indeed any concerns about the child.
8. The judge considered the harshness of the children remaining in the UK without their mother. At paragraph 76 she stated:

“It is clear that there would be an emotional impact on the children if their mother were deported to Albania and they remained in the UK without her. The appellant is their primary caregiver and they have an emotional bond with her which will be adversely affected by her absence. Of course, visits to Albania cannot replicate their current contact and attachment to their mother. However, this is the case for many children whose parent faces deportation from the UK and the case law is clear in stating that there must

be something above and beyond this effect for the effects of deportation to be considered unduly harsh.”

9. The judge then considered the implications for the children of relocating to Albania. The judge concluded that it would not be unduly harsh, even if their father remained in the UK.
10. The judge, at paragraphs 84 – 85, considered medical evidence about the appellant including, in particular, that she had attempted suicide in 2017.
11. At paragraph 88 the judge considered whether there were “very compelling or exceptional circumstances”. The judge stated:

“I also consider whether there are very compelling or exceptional circumstances which would mean that the public interest in deportation were outweighed by the appellant’s circumstances. It was submitted that the appellant’s offence was not one which caused serious harm and that deportation was not therefore appropriate. However, whether the offence was sufficient to engage deportation proceedings is not the issue before me. The appellant’s deportation took place in 2011 and it was decided at that stage that deportation was in the public interest. Neither party provided me with a copy of that decision and so I cannot know the exact basis of the finding that deportation was in the public interest. However, the issue before me is whether the deportation should be revoked.”

12. The judge stated at paragraph 90:

“It is not only that the appellant committed an offence at the age of 18 when I accept that she was still at a young age, but the fact that in 2011 she knowingly defied the deportation order and chose to enter the UK clandestinely following which she made no attempts to regularise her status until her eldest child had been born.”

13. At paragraph 92 the judge concluded:

“The decision is a harsh decision for her husband and children as well as for the appellant because none of them wish to uproot themselves from the UK and relocate to another country. However, it is clear that the family are a close and supportive family unit who support and care for each other. Whilst the appellant and her husband state that the appellant’s husband and children will not relocate if the appellant has to leave the UK, the evidence does not show that such relocation would be unduly harsh or would lead to very compelling or exceptional circumstances. That is a choice which will have to be made by the family.”

Grounds of Appeal

14. There are three grounds of appeal.
15. First, it is argued that the judge applied the wrong test under the Immigration Rules.

16. Second, the grounds submit that the judge failed to properly or adequately consider the negative implications of the children being separated from their mother.
17. Third, it is argued that the judge failed to give proper or adequate consideration to the social worker reports dated 9 August 2017 and 27 August 2019.

Analysis

18. The applicable test under the Immigration Rules is that set out in Paragraph 399D, which states:

“Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.”

As explained in *SSHD v Saif Ullah* [2017] EWCA Civ 1069 (a case which, like this one, concerned a deportee who, in breach of a deportation order, had returned to the UK) the test in Paragraph 399D is more stringent than the undue harshness test applicable where a person is yet to be deported, as set out in paragraphs 398 and 399 of the Immigration Rules. Richards LJ stated at paragraph 45 of *Saif Ullah*:

“The difference in the language of paragraphs 398 and 399D, **suggesting a more stringent requirement under paragraph 399D**, reflects a real difference in the circumstances covered by each paragraph. Paragraph 398 addresses the question whether a deportation order should be made, or existing order maintained, against a person who has yet to be deported, whereas paragraph 399D addresses the very different case of a person who has been deported and then re-enters illegally and in breach of the order. In the latter case, any Article 8 claim that was raised by the deportee before his original deportation will, ex-hypothesis, have been decided against him. **It is readily understandable that in the cases covered by paragraph 399D the Secretary of State should have formed the view that there is a particularly strong public interest in maintaining the integrity of the deportation system as it applies to foreign criminals.**”
[Emphasis added].

19. The first ground of appeal submits that the judge mistakenly approached the appeal as if the relevant test was whether the appellant’s deportation would be unduly harsh when the correct question to ask was whether there were very exceptional circumstances. Reference is made to paragraph 46 of *Saif Ullah* where it is stated:

“In my view, the application by the FtT of the wrong paragraphs of the Rules was a material error of law, and it cannot be said that the FtT’s decision will inevitably have been the same if the judge had directed himself to the correct passages.”

20. I reject this argument for two reasons. Firstly, I am satisfied that the judge applied the correct legal test. At paragraph 88 the judge explicitly stated

that she was considering whether there were very compelling or exceptional circumstances and at paragraph 92 she concluded that there were not very compelling or exceptional circumstances. Very exceptional circumstances is the test in paragraph 399D. Therefore, it is apparent, on the face of the decision, that the correct test has been applied.

21. Secondly, even if (which I do not accept) Mr Collins is correct that the judge erred by failing to apply Paragraph 399D, the error was not material because, having found (applying the less stringent test under Paragraphs 398-399) that deportation would not be unduly harsh for the appellant's children, it is inevitable that the judge would have found (applying the more stringent test under 399D) that there were not "very exceptional circumstances". It is instructive to compare this appeal to *Saif Ullah*. In *Saif Ullah* the First tier Tribunal *allowed* the appeal having applied a less stringent test. It therefore could not be said that the First-tier Tribunal's decision would inevitably have been the same had the judge directed himself correctly. However, in this case, in contrast, the First tier Tribunal *dismissed* the appeal having applied a less stringent test and therefore it is inevitable that the same outcome would have been reached had the judge directed herself correctly.
22. The second ground of appeal submits that the judge did not "properly or adequately" address the "ramifications and consequential effect of the long-term separation of children this age from their mother, with whom each of them has lived the entirety of their lives". Mr Collins, in his submissions, argued that the judge had not paid adequate attention to the very close bond between the children and the appellant and the devastating impact of deportation, as recorded by the independent social worker, Ms Brown. He also argued that the judge failed to address the "real world scenario" of the children staying with their father and being separated from their mother.
23. I do not consider this ground to have any merit. The judge considered in detail the appellant's argument that she has a very close bond with her children and that deportation will have a devastating impact on them. At paragraph 76 the judge acknowledged that the appellant is the primary caregiver and the children have an emotional bond with her. At paragraph 92 the judge stated that it was clear that the family are "a close and supportive family unit who support and care for each other". At paragraph 75 the judge quoted from Ms Brown's report the evidence of Ms Brown that separation of the appellant and her children would be "a cruel and debilitating process for the children". It is clear, therefore, that the judge has addressed the evidence as to the "ramifications and consequential effect" of long-term separation.
24. Having accurately recorded the evidence on this issue, it was for the judge to decide whether the serious implications of long-term separation, taken together with other factors, gave rise to "very exceptional circumstances" within the meaning of Paragraph 399D. In reaching her conclusion it was necessary for the judge to have regard to the settled jurisprudence on

undue harshness as this is relevant to whether there are very exceptional circumstances. Lord Carnwath in *KO (Nigeria)* [2018] UKSC 53 stated:

“One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent”

25. The approach taken by the judge was entirely consistent with *KO*. The evidence before the judge was that the appellant’s children would be devastated by separation from their mother and that it could have significant long-term consequences for them. This is no more than the degree of harshness necessarily involved for any child faced with the deportation of a parent.
26. The appellant sought to establish something going beyond the normal harshness of deportation by arguing that the eldest child suffers from anxiety and developmental problems. However, the judge considered this, and in the light of the absence of any supporting evidence from the child’s school, did not accept that there were any such issues.
27. This ground of appeal is framed as a challenge on the basis of evidence not being “properly or adequately” addressed. However, given that the judge has given extensive consideration to the evidence relevant to the separation of the children from the appellant, this is in reality a rationality challenge. In the light of *KO* the conclusion that there are not “very exceptional circumstances” was one that was clearly open to the judge. Indeed, it is difficult to see how any other conclusion could be reached given that *KO* concerned a less stringent test.
28. The third argument in the grounds of appeal is that the judge failed to give “proper or adequate consideration” to the evidence of the independent social worker, Ms Brown. I reject this argument because it is clear from the decision that the judge considered Ms Brown’s reports in detail including her firmly expressed opinion on the best interests of the children and the impact of separation on them, as set out in paragraph 75 of the decision.
29. At the hearing, Ms Chuna raised the issue of whether the appellant’s removal would be contrary to *Zambrano v Office nationale de l’emploi (case C-34/09)* [2012]. However, *Zambrano* was not raised in the grounds and Mr Collins did not seek to pursue any such argument. I have therefore not considered this matter.

Notice of Decision

30. The grounds of appeal do not identify an error of law. The appeal is dismissed and the decision of the First-Tier Tribunal stands.

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

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

Signed



Upper Tribunal Judge Sheridan

Dated: 31 March 2020

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts, **the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent" is that appearing on the covering letter or covering email