Upper Tribunal (Immigration and Asylum Chamber) Appeal Number: HU/10755/2019

THE IMMIGRATION ACTS

Heard remotely by *Skype for Business*	**Decision & Reasons Promulgated**
On 22 February 2021	**On 3 March 2021**

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

MUSTAFA [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Daykin, instructed by Rashid & Rashid Solicitors
For the Respondent: Mr Melvin, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is an Albanian national who was born on 5 April 1981. He appeals, with permission granted by Upper Tribunal Judge Bruce, against a decision which was issued by FtT Judge Cockburn on 16 September 2020. By that decision, Judge Cockburn ("the judge") dismissed the appellant's appeal against the respondent's refusal of his human rights claim.

Background

2. The appellant is a man with little regard for immigration control. He entered the UK unlawfully in 2002 and made an unsuccessful claim for asylum. He did not leave the UK, and was convicted in 2008 of an

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identity card offence. Having served the fifteen month sentence of imprisonment for that offence, he accepted that he should be deported. The respondent deported him on 6 November 2008. That deportation order remains in force. Less then three months later, he re-entered the UK unlawfully for a second time. He made no attempt to regularise his status until, on 16 November 2018, he was joined as a dependent on an application made by his partner and their children for leave to remain on human rights grounds.

3. The appellant's partner and children were granted leave but the appellant's application was refused. The respondent considered the circumstances set out in the appellant's representations but she did not accept that there were very exceptional circumstances such that the extant deportation order should not be implemented. In so deciding, the respondent applied the test set out at paragraph 399D of the Immigration Rules. The appellant appealed to the FtT(IAC).

The Appeal to the First-tier Tribunal

4. The appeal came before the judge by way of a remote hearing on 8 September 2020. The appellant was represented by counsel, instructed by Marsh & Partners Solicitors. The respondent was represented by a Presenting Officer. Counsel provided the judge with copies of three authorities, one of which was the decision of the Court of Appeal in SSHD v SU (Pakistan) [2017] EWCA Civ 1069; [2017] 4 WLR 175. In that decision, the Court of Appeal found that the FtT had erred in failing to have regard to paragraph 399D of the Immigration Rules, which "encapsulates the public interest in ensuring that a deportation order is not only implemented but fully effective.": [41] refers.

5. So it was that the judge took as her focus the test in paragraph 399D. She adopted the balance sheet approach advocated by the Supreme Court in Hesham Ali [2016] UKSC 60; [2016] 1 WLR 4799, weighing the 'pros' and 'cons' of the appellant's deportation. Although she accepted that it would be in the best interests of the appellant's three children for him to remain in the UK, and that it would have a 'significant impact' upon them if he were deported, she found that there was nothing which permitted her to conclude that there were very exceptional circumstances. She dismissed the appeal accordingly.

The Appeal to the Upper Tribunal

6. Permission to appeal was refused by the FtT but granted by UTJ Bruce. She was unimpressed by the principal argument advanced in the grounds, which was that the judge had given insufficient reasons for concluding that the threshold in paragraph 399D had not been crossed. UTJ Bruce gave permission, however, so that counsel could develop the arguments he sought to advance in the grounds concerning the decision of the Court of Appeal in HA (Iraq) [2020] EWCA Civ 1176; [2020] HRLR 21.

7. In a rule 24 reply to the grounds which was filed and served on 19 February 2021, Mr Melvin argued for the respondent that the judge had

not erred in the manner contended in the grounds. She had directed herself to the authorities provided, including HA (Iraq), and had come to a properly reasoned conclusion that the appellant's deportation should be implemented. The final sentence in Mr Melvin's response, however, was "The Respondent is aware of the recent Tribunal decision in Binaku (s11 TCEA: s117C NIAA; para 399D) [2021] UKUT 34 (IAC)."

8. The appeal was listed to be heard at 1430 today. At 1401, the Upper Tribunal received an application to amend the grounds of appeal. It was apparent that the appellant was no longer represented by Marsh & Partners but by Rashid & Rashid Solicitors. The additional ground of appeal upon which the appellant sought to rely was that the judge had erred in law in taking paragraph 399D as her focus, when her task should have begun and ended with the statutory framework provided by Part 5A of the Nationality, Immigration and Asylum Act 2002. This new ground was premised on the decision in Binaku, to which Mr Melvin had referred.

9. I began the hearing by asking Mr Melvin what he said about the application to amend. He submitted that it had been made late, although he accepted that the decision in Binaku, on which the amended grounds were entirely based, had been published as a reported decision on the website on 11 February 2021. He submitted somewhat tentatively that the FtT had not fallen into error in failing to follow a decision which was not in existence at the date of its decision. He reiterated his argument that the original grounds did not disclose a material error of law but he accepted that he would be in some difficulty meeting the new ground of appeal in the event that permission to amend was granted. He had already sought instructions from senior staff in the Home Office to see whether a fresh decision might be issued but had not received a response.

10. I indicated to Ms Daykin that I did not need to hear from her. She nevertheless sought to explain that the application to amend had been made very late in the day because there had been a change of representatives. I indicated that I would permit the amendment to the grounds and would find that the judge had erred in law for the reasons given in the amended grounds. Both advocates submitted that the proper relief, in those circumstances, was for the appeal to be remitted to be heard afresh. I was able to intimate that I agreed with those submissions and I would order accordingly.

Analysis

11. For the avoidance of doubt, I agree with the submissions made in writing by Mr Melvin about the original grounds of appeal. The reasons why the judge found that the threshold in paragraph 399D was not reached are clear from her decision. She was plainly aware of the threshold and she took account of the authorities with which she had been provided. The original grounds fail to disclose a legal error on the part of the judge.

12. I therefore turn to the amended grounds. The first question is whether I should permit the amendment to the notice of appeal, given

that the application was made half an hour before the hearing of the appeal. I have written in the past about the public interest in discouraging late applications of this nature: Das [2019] UKUT 354 (IAC) refers. I am satisfied, however, that the circumstances in this case are rather different. The application to amend was prompted by the decision in Binaku, which was only published on 11 February 2021. An application to amend could certainly have been made more promptly but, as Ms Daykin observed, the appellant was in the process of changing representatives and it was only this morning that the papers were actually placed before her, at which point she realised that a written amendment was necessary. There is still a delay and it is a delay for which the appellant must be held responsible, but there is some explanation for it.

13. It remains for me to consider all the circumstances of the case. I recognise that courts and tribunals should, in considering applications for relief from sanctions or extensions of time, avoid extensive considerations of the merits. It is only where the merits are particularly strong or particularly weak that they might be relevant and, in Al Saud v Apex Global [2014] UKSC 64; [2015] 2 All ER 206 Lord Neuberger went so far as to say that the merits were only relevant (in a relief from sanctions case) were they were so strong that there was no real answer to them.

14. I consider this to be one of the comparatively rare cases in which there is no real answer to the amended grounds. It was decided in Binaku that a judge in the Immigration and Asylum Chambers of the FtT and the UT who is considering an appeal of this nature should focus not on paragraph 399D of the Immigration Rules but on the provisions of s117C of the 2002 Act. The judge in this appeal did not have the benefit of Binaku and she failed to adopt that approach. She did not turn her mind to the statutory exceptions to deportation contained in s117C(4) and s117C(5). The first of those was of no application, since the appellant has spent precisely no part of his life lawfully resident in the United Kingdom. The second exception might well have been relevant, however, as the children are qualifying children who have ostensibly been in the UK for more than seven years. The judge should – in light of Binaku – have considered whether the effect of the appellant's deportation upon those children was unduly harsh. Because she took her focus as paragraph 399D, instead of the statutory framework in s117C, she did not consider that important question at all.

15. In the circumstances, I considered that there was a minor delay in amending the grounds following Binaku's publication eleven days ago but that there was some explanation for that delay and that the merits of the amendment were very strong indeed. I permitted Ms Daykin to amend the grounds of appeal for these reasons. Mr Melvin did not seek an adjournment in which to consider the amended grounds. As Ms Daykin noted in her application, it was he who had first raised the decision in Binaku and he could not suggest that the respondent was prejudiced by the belated reference to it.

16. Mr Melvin recognised, in fairness to him, that there was little he could say in defence of the judge's decision if the amendment to the grounds were permitted. Rather half-heartedly, he suggested that the declaratory theory of the common law could not apply to decisions of the Upper Tribunal. The submission was not made with reference to authority and this is not the place for detailed consideration of it. I proceed on the basis that a decision of a superior court of record such as the Upper Tribunal, presided over by a puisne judge, is certainly one to which that rule applies. In a reported decision such as Binaku, therefore, the Upper Tribunal declares how the law has always been, and not how it is from that point onwards. In approaching her task as she did, therefore, the judge necessarily fell into error, although it was not an error for which she could properly be criticised.

17. The result of the judge's error is that there are no findings on material matters in her decision. Uppermost amongst the absent findings is that which I have mentioned above: resolution of whether the appellant's deportation would bring about unduly harsh consequences for the appellant's children. That question must be confronted squarely by a decision-maker who is uninfluenced by paragraph 399D of the Immigration Rules. The proper course, given the scope of the FtT's error and the necessity for a hearing afresh, is for the appeal to be remitted to the FtT .

18. I add this. Mr Melvin suggested that the respondent might issue a new decision letter in which she follows the structured approach required by NA (Pakistan) [2016] EWCA Civ 662; [2017] 1 WLR 207, rather than focusing upon paragraph 399D. That is a matter for the respondent and, for my part, I consider there to be no need for her to do so. Paragraph 399D contains the policy which she applies to those in the appellant's position. The fact that the IAC is not bound to adopt the same approach establishes no fault in the existing decision; it merely shows that decision making in the appellate body is governed by a different framework from that which applies in the decision under challenge.

Notice of Decision

The decision of the FtT involved the making of an error on a point of law and that decision is set aside. The appeal is remitted to the FtT to be heard de novo by a judge other than Judge Cockburn.

No anonymity direction is made.

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

18 March 2021