



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-002670
First-tier Tribunal No:
HU/02703/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 20 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

BESART SERDARI
(NO ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Presenting Officer

For the Respondent: Mr D Bazini, Counsel, instructed by Karis Solicitors

Heard at Field House on 24 January 2023

DECISION AND REASONS

Introduction

1. For ease of reference I shall refer to the parties as they were before the First-tier Tribunal: thus the Secretary of State is once more “the Respondent” and Mr Serdari is “the Appellant”.
2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Adio (“the judge”), promulgated on 11 May 2022, by which he allowed the Appellant’s appeal against the Respondent’s refusal of his human rights claim made in the context of deportation.

3. The Appellant is a citizen of Albania born in 1983. He came to the United Kingdom unlawfully in 2013 and was then granted periods of discretionary leave between 2016 and 2022. However, on 6 November 2020 (during the currency of the last period of leave) the Appellant was convicted of producing Class B drugs and was sentenced to fourteen months' imprisonment.
4. An intention to deport letter was issued on 7 January 2021 and a deportation order signed on 4 March of that year. The Appellant put in written submissions based on Article 8 which were deemed to constitute a human rights claim. That claim was refused by a decision dated 25 March 2021. It was that decision which was the subject of the appeal before the judge.
5. During his residence in the United Kingdom, the Appellant formed a relationship with a British citizen (Mrs V S). She had two children from a previous relationship, X and Y. X was born in 2000 and Y in 2004. The Appellant and Mrs V S had a child together, S, born in 2018.

Decision of the First-tier Tribunal

6. Having set out the relevant background in the case, the judge recorded that Exception 2 under section 117C(4) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act") could not be satisfied, as had been accepted by the Appellant.
7. The judge then turned to address Exception 2 under section 117C(5) of the 2002 Act. He found that the Appellant had a genuine and subsisting parental relationship with all three children (notwithstanding the fact that X was at the relevant time already an adult). The judge found as a fact that X and Y's biological father had suffered from significant mental health problems and that this has had caused them difficulties in their lives. The judge accepted that the Appellant had "brought about stability" to X and

Y's life and that Y in particular had benefited from the Appellant as a dependable role model. The judge considered that the Appellant's absence would likely have brought emotional harm to Y and S. Mrs V S had struggled whilst the Appellant was in prison, suffered from stress, and there were issues relating to her employment. The judge acknowledged that X and Mrs V S's sister had assisted at times whilst the Appellant was incarcerated. The judge was satisfied that the Appellant was in the process of rehabilitating himself following his conviction. In all the circumstances, the judge concluded that the "elevated degree required by the undue harshness test had been met in respect of the two qualifying children, namely Y and S. The judge also concluded that it would be unduly harsh to separate Mrs V S from the Appellant. For the avoidance of any doubt, there was no dispute that the children could not have gone to live in Albania without it being unduly harsh on them.

8. The appeal was accordingly allowed on Article 8 grounds.

The Respondent's grounds of appeal

9. The grounds of appeal all fall under the heading entitled "Making a Material Misdirection/Lack of Adequate Reasons". I will address the grounds of appeal in more detail, below. For present purposes, they can perhaps be summarised as follows. The reasoning set out by the judge in regard to the conclusions on undue harshness did not "establish" that the high threshold had been met. Various authorities were cited in the grounds, although it is somewhat hard to discern precisely in what way these identify errors of law. There is an assertion that the judge had failed to make a finding on whether Mrs V S would be able to cope in caring for the children in the Appellant's absence. It is asserted that X and Y could both assist Mrs V S (and presumable S as well) if the Appellant were not there. Other forms of support would have been able available to Mrs V S, including "schools, the NHS, Local Authority Children's Services and Social

Services if need be.” The judge had failed to provide reasons as to why there was family life between the Appellant and X. The judge had also failed to consider that S was very young at the time the Appellant went to prison.

10. Permission was granted on all grounds.
11. Following the grant of permission the Appellant provided a concise rule 24 response. In essence, this asserted that the grounds of appeal amounted to little more than argumentative disagreements with the judge’s decision and did not identify any errors of law.

Procedural history

12. When the case was first listed it was deemed appropriate for it to be heard before a panel comprising a High Court Judge (Lang J) and Upper Tribunal Judge Norton-Taylor. Directions were issued for the Respondent to provide a skeleton argument. This was done. The document, dated 4 October 2022, raised a number of points to which I will return in due course. On the day of the hearing, an administrative problem arose in respect of the Respondent’s allocation of cases to the relevant Senior Presenting Officer. Unfortunately, this led to an adjournment. The case was relisted before myself sitting alone.

The hearing

13. Mr Tufan relied on the grounds of appeal and the skeleton argument. He queried whether the judge had in fact applied the high threshold applicable to the undue harsh test. He stated that the Respondent’s challenge was based both on reasons and perversity.
14. For the Appellant, Mr Bazini relied on his rule 24 response. He submitted that none of the relevant points raised in the skeleton argument appeared

in the grounds of appeal and the Respondent should not be permitted to rely on these matters now. In any event, Mr Bazini submitted that the points raised had no merit. There was nothing irrational about the judge's assessment of the evidence or his conclusions, the reasons provided were legally adequate, and the judge had clearly directed himself correctly in law. Mr Bazini helpfully went through each and every point raised in the skeleton argument for the sake of completeness. He submitted that they were misconceived and/or simply argumentative in nature.

15. At the end of the hearing and following a short adjournment, I announced to the parties my conclusion that the judge had not materially erred in-law and that the Respondent's appeal to the Upper Tribunal would be dismissed. I set out my analysis and reasons for this conclusion, below.

Conclusions

16. At the outset I remind myself of the need for appropriate judicial restraint in the Upper Tribunal before interfering with a decision of the First-tier Tribunal. That is particularly so where the judge below has seen and heard evidence from a variety of sources and has engaged in a fact-finding exercise and then an evaluative assessment within the applicable legal framework. The need for such restraint has been made clear on numerous occasions over recent years. There is no requirement for reasons for reasons and I am not looking for a perfect, or even the best possible, decision, I am concerned with whether the Respondent can identify errors of law which could have had a material effect on the outcome and have been properly raised in these proceedings. On the last point, I remind myself of the importance of procedural rigour, which includes the need to draft clear grounds of appeal setting out identifiable alleged errors: see, for example, Joseph [2022] UKUT 218 (IAC) and R (Talpada) [2018] EWCA Civ 841.

17. I begin, then, with the Respondent's grounds of appeal, which at no stage have been the subject of any application to amend. Paragraph 1 of the grounds is somewhat difficult to understand. It appears to conflate a reasons challenge with one based on perversity. In my view, where perversity is alleged, it should be made explicit. I have mentioned the importance of clear grounds, above.
18. In the present case, it is plain that the judge's conclusions were not irrational as that term is properly to be employed in the error of law jurisdiction. Another judge may have come to a different conclusion on the same facts and one might be able to construct an argument that his decision was generous. That does not come close to it being beyond the range of reasonable responses open to a properly directed expert Tribunal. The reference to PG (Jamaica) [2019] EWCA Civ 1213 adds nothing to the Respondent's case. It rather looks to me as though it is being used as a factual precedent, something which is to be deprecated in all but a rare case.
19. Paragraphs 2 - 5 of the grounds of appeal refer to authorities including KO (Nigeria) [2018] UKSC 53, MK (Sierra Leone) [2015] UKUT 2 to 3 (IAC) and the Court of Appeal's judgment in HA (Iraq) [2020] EWCA Civ 1176. Again, this adds nothing to the Respondent's challenge in this case. The judge directed himself to the same authorities in his decision. He referred at numerous stages to the "elevated degree" required by the undue harshness test. It would take some persuading on the Respondent's part to convince me that this judge, having referred himself to the elevated threshold and relevant authorities, had then simply failed to apply it immediately thereafter and again and again throughout his decision. Nothing in the Respondent's grounds or oral argument comes close to any such persuasion.
20. In relation to paragraph 6 of the grounds, there was no requirement for the judge to make a specific finding that Mrs V S would be "unable to cope" with caring for the children in the Appellant's absence. The judge

viewed a number of factors in the round, which included the stress and other practical difficulties faced by her when the Appellant had last been absent. His overall assessment went further than that, however, also relying on the impact on the children, particularly Y. The reference in paragraph 6 of the grounds to X and Y being of “an age where they can assist” does not disclose an error of law: whilst X was an adult, Y was still a minor. The judge clearly had this in mind when making his assessment and the grounds appear to gloss over the fact that it was Y who would suffer perhaps the greatest “emotional harm” were the Appellant to be deported, as found by the judge on the evidence before him.

21. The judge was fully aware that Mrs V S was a British citizen and was potentially entitled to benefits and such like. Generalised references to support from other sources, such as Children’s Services or Social Services did not seem to form any real part of the Respondent’s case before the judge. In any event, there was no obligation on the judge’s part to deal expressly with these matters. For my part, I wonder whether the Respondent is in effect suggesting that the family unit situation would have to become so significant that local authorities would have to step in at some point and I wonder in turn whether that is a tenable position to take.
22. I note that the reliance on BL (Jamaica) [2016] EWCA Civ 357. Yet that that judgment simply involved the Court of Appeal finding that the Upper Tribunal had been entitled to take account of the fact that Social Services would perform their duties under the law in that particular case. Again, it rather looks as though a judgment from the Court is being employed as a factual precedent.
23. Moving on to paragraph 7 of the grounds, it is plain that the judge was aware of S’s age when the Appellant went to prison.
24. In respect of paragraph 8, the position of X played no material part in the overall assessment of undue harshness as he was already an adult.

25. Stepping back, the grounds of appeal themselves fail to make out any material errors of law in the judge's decision. He had taken relevant evidence into account and was entitled to make the primary findings which he did. He adopted a child-focused approach, in keeping with the judgments of the Court of Appeal and the Supreme Court in HA (Iraq). He took account of Ms V S's situation if the Appellant were to be deported, as that would have had an impact on Y and S.
26. In summary, the judge's assessment and conclusions are sustainable.
27. Before moving on to the Respondent's skeleton argument, I note Mr Bazini's submission that the judge had also in fact found that it would be unduly harsh on Mrs V S were the Appellant to be deported: paragraph 28. This particular conclusion, whilst relatively brief in its reasoning, has not in fact been challenged by the Respondent in the grounds of appeal. That of itself presents the Respondent with a problem. Even if there were errors in relation to the unduly harsh test and the children (which there are not) the appeal would have succeeded in respect of the conclusions on Mrs V S.
28. The skeleton argument is problematic for the Respondent as well. A skeleton argument is there to elaborate on matters set out in grounds of appeal. It is not there as a means of circumventing (intentionally or otherwise) the need to apply to apply to amend grounds. Nor is it there to in effect treat the grounds of appeal as some form of dress rehearsal for the challenge mounted at a hearing.
29. In this case, as I mentioned previously, there has never been any attempt to amend the original grounds of appeal despite the Respondent having ample opportunity to have done so. The skeleton argument raises a large number of points which simply do not feature in the original grounds of appeal. To the extent that this is so, my primary conclusion is that the Respondent is not entitled to rely on them at this stage. I reiterate the importance of procedural rigour. It is of real importance that parties (a) think carefully when drafting their original grounds of challenge, (b)

undertake further consideration of the merits of their challenge post-permission and (c) if it is thought that new matters should be raised, that an application is made in good time for that to be done.

30. For the sake of completeness and because Mr Bazini has undertaken a helpful process of going through the points raised one by one, I shall address them in any event.
31. The judge had all of the evidence before him and would have been aware that X had been working in order to help pay his way through university. Whilst the evidence may not have been as clearly set out as it might have been, it is close to fanciful to suggest that any earnings from his work would have been able to not only meet his own costs, but to have materially assisted in respect of the rest of the family's expenses. Further, and in any event, the judge was alive to the fact that X had helped out. Any lack of clarity by the judge was most at peripheral to the overall assessment in respect of the two younger children.
32. The next point relates to Mrs V S and her employment. The judge was aware of difficulties she was experiencing in that regard. There was no requirement for the judge to have specifically stated how long she had taken off.
33. At paragraph 3 of the skeleton argument the Respondent raises the issue of rehabilitation and unduly harsh test. I accept Mr Bazini's submission that on one view the question of whether the Appellant was in the process of rehabilitating himself had some relevance to the unduly harsh test insofar as it indicated that he was a "dependable role model" for the younger children and Y in particular. It went to the type of father figure whose presence significantly benefited the younger children.
34. In the alternative, if one were to excise that particular factor from the assessment, what remains was plainly sustainable, with particular regard to the "emotional harm" likely to be suffered by Y if the Appellant were deported.

35. The point raised at paragraph 4 of the skeleton argument relates to Y and is in my judgment a poor attempt at rearguing the case that might have been put forward before the judge. It entirely ignores the judge's assessment of the evidence and comes nowhere near identifying an error of law.
36. In respect of the next point made relating to the possibility of support from Mrs V S's sister, the judge acknowledged that this had taken place in the past (and in relation to X as well) but nonetheless reached the conclusion he did. It cannot be said that he simply failed to take this matter into account.
37. Paragraphs 5-8 give rise to further concerns on my part. Again they appear to ignore the judge's assessment of the evidence. Beyond that, they implicitly seem to suggest that there had to be medical evidence and/or an independent social worker's report in order for the Appellant to succeed in his appeal. There was of course no such requirement. The judge was obliged to deal with the evidence which was before him. He clearly accepted the evidence in all material respects. The fact that there were no medical diagnosis in respect of, for example, Y, is beside the point.
38. In conclusion, the skeleton argument amounts to simple disagreements with the judge's decision and contains no attempted challenges which bear any merit.
39. The judge's decision is legally sustainable and should not be interfered with. His conclusion that the Appellant was able to satisfy Exception 2 under section 117C(5) of the 2002 Act was open to him, both in respect of the two younger children and Mrs V S.

Notice of Decision

40. **The decision of the First-tier Tribunal did not involve the making of an error of law.**

- 41. The Secretary of State's appeal to the Upper Tribunal is accordingly dismissed and the decision of the First-tier Tribunal shall stand.**

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 22 March 2023