



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000627

First-tier Tribunal No: HU/55542/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 June 2023

Before

UPPER TRIBUNAL JUDGE KEBEDE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SAMI DAJQ
(No anonymity order made)

Respondent

Representation:

For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr A Gilbert, instructed by Milestone Solicitors

Heard at Field House on 2 June 2023

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Dajq's appeal against the respondent's decision to refuse his human rights claim further to a decision to deport him from the UK.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Dajq as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

Background

3. The appellant is a citizen of Albania, born on 12 April 1981. He first entered the UK on 28 October 1998 and he claimed asylum the following day in the identity of Sami Dajqi, a national of Kosovo born on 27 September 1981. His asylum claim was refused on 4 July 2000 and his appeal against the refusal of his claim was dismissed on 11 May 2004. The appellant became appeal rights exhausted on 25 May 2004.

4. On 30 September 2005, the appellant was convicted of two counts of causing grievous bodily harm and was sentenced to 7 years' imprisonment on count 1, and five years' imprisonment on count 2, to run concurrently. That was subsequently varied on 31 August 2006 to five years' imprisonment. The criminal offence leading to the conviction involved a brutal revenge attack which left the victim blinded in one eye, where the appellant hit the victim at least three times with a weapon aimed at his head.

5. On 17 August 2007 a decision was made to deport the appellant, on conducive grounds, by virtue of section 3(5)(a) of the Immigration Act 1971 (as amended by the Immigration and Asylum Act 1999) and a deportation order was signed against him on 13 September 2007. On 27 September 2007 the appellant returned to Kosovo under the facilitated returns scheme. He went from Kosovo to Albania and in the summer of 2009 he moved to Greece and then went back to Albania. He then moved to Belgium to join his partner, Rachel Caton, with whom he had commenced a relationship in the UK in July 2007. They lived together in Belgium as a couple and Ms Caton fell pregnant and decided to return to the UK to live with her parents. In December 2011 the appellant re-entered the UK in breach of the deportation order, to join Ms Caton, and their son, Albert, was born on 12 May 2012.

6. On 12 December 2012 the appellant was detained by immigration officers. On 18 January 2013 removal directions were set for his return to Kosovo but those were subsequently cancelled on 17 January 2013 and a judicial review claim was lodged on 14 February 2013 challenging his removal to Kosovo. The appellant withdrew the judicial review claim on 14 March 2013 and on 22 March 2013 he applied to revoke the deportation order previously signed against him. On 17 January 2014 he and Ms Caton had a daughter, Pandora. The appellant's application to revoke the deportation order was refused on 1 May 2014 and on 23 January 2015 the appellant's appeal against that decision was dismissed by the First-tier Tribunal. The appellant became appeal rights exhausted on 18 November 2015. On 20 January 2016 he was listed as an absconder. It seems that the appellant and Ms Caton separated for some time, since she informed the respondent, in a letter of 26 May 2016, that he was not her partner, had never been her partner, had never resided with her and that she did know his whereabouts.

7. On 22 August 2019 the appellant was encountered when arrested by the police and was detained. On 24 August 2019 his legal representatives submitted further representations, followed by further submissions on 24 September 2019 on Article 3 (medical) and Article 8 grounds, relying on his family life with his partner and three children, Albert, Pandora and Eldon (born on 21 September 2017). The submissions were rejected by the respondent on 27 September 2019, but following the threat of judicial review the respondent agreed to reconsider the submissions and to make a fresh decision.

8. By this time the appellant's true identity had come to light, and a decision was made to re-issue the original deportation order of 13 September 2007 in his correct identity, with that original order remaining in force. A subsequent decision to deport the appellant was made on 30 September 2020 in the appellant's correct identity. The appellant's solicitors responded on 4 February 2021 by making further submissions in

regard to the appellant's family life with his partner and three children and providing evidence, including an independent social worker report, in support of a claim under Article 8, as well as in relation to the appellant's mental health and suicide risk under Article 3 of the ECHR. On 7 September 2021 the respondent refused the appellant's human rights claim and granted him a right of appeal.

Respondent's decision under appeal

9. In that decision, the respondent accepted that the appellant had a genuine and subsisting parental relationship with his three children and that he had, at present, a genuine and subsisting relationship with Ms Caton. However the respondent did not accept that it would be unduly harsh for the appellant's partner and children to relocate to Albania with him or for them to remain living in the UK with Ms Caton's parents without the appellant. The respondent did not accept that the appellant had been lawfully resident in the UK for most of his life, did not accept that he was socially and culturally integrated in the UK and did not accept that there were very significant obstacles to his integration in Albania. It was not accepted that there were very compelling circumstances outweighing the appellant's deportation and it was therefore not accepted that his deportation would breach his Article 8 rights. The respondent considered further that the appellant's deportation would not breach his Article 3 rights on medical grounds..

Appeal before the First-tier Tribunal

10. The appellant appealed against that decision and his appeal was heard on 12 December 2022 by First-tier Tribunal Judge Bartlett. The evidence before the judge included the psychological report of Dr Isabelle Hung dated 23 December 2020 and the report from the social worker Barbara Pietrzykowski of Social Workers Without Borders dated 29 December 2020 previously submitted to the respondent, as well as a more recent psychological report from a registered psychologist, Lisa Davies.

11. The judge found as follows: that the appellant had a genuine and subsisting parental relationship with his three children and that he had a genuine and subsisting relationship with Ms Caton despite a previous rupture in their relationship; that the appellant carried out considerable caring duties for his children because Ms Caton worked; that Ms Caton's parents had a good relationship with her children and the appellant and carried out considerable childcare tasks; that if the appellant were to be deported to Albania Ms Caton and her parents would be able to care for the children; that the children would not be financially detrimentally affected if the appellant were to be deported to Albania; that if the family were split up by the appellant returning to Albania that would have a negative effect on the children and that their best interests were to remain in a family unit with their father; that the appellant had close family in Albania which included his parents and brother and he had worked previously in Albania, Greece and Belgium after he was deported from the United Kingdom and would be able to find similar work in Albania if he was returned there; that the appellant retained linguistic, social and cultural ties to Albania; that if the children were to go to Albania that would cause significant disruption to their schooling but their integration would be assisted by their father and other family members in Albania; that the children are still young and the focus of their life was more towards their family than outside ties and that they would be able to adjust when they changed countries; that the appellant suffered from depression, anxiety and PTSD symptoms but did not take medication and had expressed a desire not to engage in counselling such that the availability of replication of treatment in Albania was largely irrelevant; that the appellant was not at risk of committing suicide if returned to Albania; and that

the appellant was at low risk of reoffending and did not represent a risk of harm to the public and was rehabilitated.

12. On the basis of those findings of fact, the judge concluded that the appellant's claims under Article 3 related to medical grounds and suicide failed. She concluded further, with regard to private life under Article 8, that the appellant could not meet the exception to deportation because he had not been lawfully resident in the UK for most of his life and there would not be very significant obstacles to his integration in Albania. She found further that the appellant could not meet the family life exception to deportation as it would not be unduly harsh for his partner and children to remain in the UK without him. She found that, whilst all members of the family would suffer significant emotional pain and distress at being separated, Ms Caton would be able to continue supporting the family, they would not suffer financially, Ms Caton and the children would still benefit from her parents being able to assist with childcare, and they could maintain a relationship with the appellant though modern means of communication and visits albeit that relationship would be diminished. The judge did not consider that it would be unduly harsh for the children and Ms Caton, in the alternative, to re-locate to Albania as a family unit with the appellant, as he would be able to work there and Ms Caton as a hairdresser had skills which were transferable, so that they would be able to support themselves as a family unit, they would have help integrating through the appellant's close family members there and, whilst there would be a period of readjustment for the children, they would be able to adjust.

13. The judge went on to consider whether there were very compelling circumstances outweighing the public interest in the appellant's deportation and she carried out a balance sheet approach.

14. The judge considered the factors in favour of the respondent: that the appellant had been in the United Kingdom unlawfully at all times and had a truly terrible immigration history; that there was a public interest in his deportation given his substantial prison sentence and given that he had entered the United Kingdom in breach of the deportation order; that the appellant was convicted of two serious crime and the circumstances of those offences led to the victim losing the sight in one eye (although she noted that the appellant had not carried out a random unprovoked attack); that the appellant had created his family life in the United Kingdom with Ms Caton and had children with her in the full knowledge that he had and had never had any leave to remain in the United Kingdom and that he was subject to a deportation order such that it was unlikely he would be granted leave; and that the appellant could not benefit from the exceptions set out in section 117C of the 2002 Act as he would be able to form a new life for himself and his family in Albania although that was not what he wanted and would cause significant disruption to the children's lives, and Ms Caton and the children would alternatively be able to remain in the United Kingdom without him, living with her parents and she would be able to continue to financially support the children.

15. The judge then considered the factors in favour of the appellant: that the offence which gave rise to the conviction on which the deportation was based took place in 2005 which was 17 years ago and that there was therefore some force in the argument that the public interest in deportation had diminished; that the deportation decision was re-issued in 2020 because the appellant's true identity had come to light but it was effectively a re-issue of the deportation order from 2007, some 15 years ago; that the appellant had a loving relationship with his children and Ms Caton and it was likely that they would not return to Albania with him, so that relatively young children would be separated from their loving father which would cause significant

distress to all family members whereas their best interests were for them to remain as a family unit in the United Kingdom; and that the appellant was rehabilitated, albeit that that was a factor which did not carry considerable weight.

16. The judge then concluded as follows at [24]:

“Having considered the above factors, I consider that the very substantial elapse of time since the conviction relied on in relation to the deportation and the fact that a deportation order was made in respect of the appellant in 2007 but, as set out by the Respondent, in 2020 a decision was made to re-issue the deportation decision in the appellant’s correct identity, means that the public interest in the appellant’s deportation is considerably diminished. I recognise the appellant’s appalling immigration history and that he only departed from the United Kingdom for 4 years. I have given careful consideration to the weight I should attach to the passage of time. I recognise there is no presumption that the public interest in deportation orders continuing has fallen away after 10 years or any fixed period. I consider that this is a very finely balanced case. In all the circumstances of the case, I have decided that the considerable elapse of time has diminished the public interest such that overall, the balance sheet is in the appellant’s favour and there are very compelling circumstances over and above the exceptions in S117C of the 2002 Act.”

17. On that basis the judge allowed the appellant’s appeal on human rights grounds.

18. The respondent then sought permission to appeal against that decision on the grounds that the judge’s findings on ‘very compelling circumstances’ amounted to a finding that the passage of time since the appellant’s offence outweighed the public interest in his deportation, which was not a lawful basis upon which to reach such a conclusion. The respondent asserted in her grounds that the judge had failed to have adequate regard to the fact that the appellant had never sought to apply to revoke the deportation order against him and that the delay in re-issuing the deportation order, in his correct identity, was caused by his own actions since he had relied on a false identity and nationality in his asylum claim in 1998, he had re-entered the UK in breach of the first deportation order and then absconded in 2016 and it was his attempts to frustrate the intentions of the immigration rules that had led to the delay. The respondent asserted that the judge had failed to have regard to Reid v Secretary of State for the Home Department [2021] EWCA Civ 1158 in regard to the delay.

19. Permission was initially refused in the First-tier Tribunal, but was granted by Upper Tribunal Judge Rintoul on 17 April 2023, following a renewed application, on the following basis:

“It is arguable that, having found that neither Exception 1 nor Exception 2 were met, the judge erred in law in concluding that there were nonetheless very compelling reasons why the appellant should not be deported, in that the judge erred in concluding that the public interest was diminished by delay. It would appear that arguably the appellant bore significant responsibility for the delay by using a false identity and entered in breach of a deportation order and the judge failed to apply the relevant case law.

All the grounds are arguable in what might also be meritoriously characterised as a perversity challenge.”

20. There was no Rule 24 response from appellant and no challenge by the appellant to Judge Bartlett’s findings.

Hearing in the Upper Tribunal

21. The matter then came before me and both parties made submissions.

22. Mr Tufan submitted that the judge had failed to have regard to the principles in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 and to the emphasis at [51] on the very strong public interest in deportation. He submitted that, although the judge carried out a 'balance sheet' approach, the factors in favour of the appellant did not amount to much. Those factors included the passage of time and the re-issuing of the deportation order against the appellant, which were in fact due to his illegal return to the UK and absconding, and also included speculations about the appellant's partner and children not returning with him to Albania. There were therefore no real factors in the appellant's favour. Mr Tufan accepted that the case of Reid v The Secretary of State for the Home Department [2021] EWCA Civ 1158, which was relied upon in the grounds, was not really applicable, but he relied in turn upon the case of RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 0033. He submitted that the judge was wrong to permit the appellant to succeed on the basis of a passage of time when that was all due to him having previously used a false identity. He asked me to set aside the judge's decision allowing the appeal and to re-make the decision by dismissing the appellant's appeal on the findings made by the judge.

23. Mr Gilbert submitted, with regard to Mr Tufan's reliance upon HA (Iraq), that the judge had properly directed herself on the law, at [18] to [21] of her decision, and had had regard to the great weight to be given to the public interest. Mr Gilbert relied upon a Speaking Note which he had produced, where he set out his response to the respondent's grounds as categorised by three contentions. Firstly, with regard to the contention that the First-tier Tribunal Judge had failed to have adequate regard to the fact that the appellant had never sought to apply to revoke the deportation order, Mr Gilbert submitted that the judge had had full regard to the appellant's immigration history. He submitted that, in any event, a failure to apply for revocation of the deportation order was irrelevant to the outcome of the appeal, given that the same structured approach applied in cases of foreign criminals re-entering the UK in breach of an extant deportation order, as held in Binaku (s. 11 TCEA; s. 117C NIAA; para 399D) [2021] UKUT 34 to which the judge referred. Secondly, with regard to the contention in the grounds that the judge had failed to acknowledge that the appellant's attempts to frustrate the intentions of the immigration rules had led to the delay, Mr Gilbert submitted that the judge had considered and given weight to the appellant's terrible immigration history and that that was at the centre of her reasoning throughout her decision. Thirdly, with regard to the contention that the judge had failed to have regard to the principles in Reid in regard to the delay, Mr Gilbert submitted that that case was not authority for a principle that delay in enforcing a deportation order was not a relevant matter in general, but it related to the 'unduly harsh' question. He submitted that Judge Bartlett had properly directed herself that the public interest was diminished over time, as found in various authorities including Hesham Ali (Iraq) v Secretary of State for the Home Department [2016] UKSC 60, with reference in particular to [77] of the judgment. Mr Gilbert submitted that the judge was therefore entitled to consider the passage of time, but that was not all that she relied upon since she considered a wider constellation of factors including in particular the impact upon the family and the children of the appellant's deportation. Mr Gilbert submitted that care had to be taken not to categorise as an error of law something which was in reality a disagreement or a matter of the weight to be given to factors. He submitted that the judge's decision ought therefore to be upheld.

24. With regard to the matter of disposal in the event that I decided to set aside Judge Bartlett's decision, Mr Gilbert did not agree that the decision had to be re-made by dismissing the appeal. He submitted that there were details within the evidence that were not reflected in the judge's decision which bore upon the holistic approach. He

was, however, content for the decision to be re-made by myself without a further hearing, but upon a full assessment of that evidence and having regard to his skeleton argument before the First-tier Tribunal.

Discussion

25. In granting permission to appeal to the Upper Tribunal, Upper Tribunal Judge Rintoul commented that the grounds could arguably be characterised as a perversity challenge and found there to be arguable merit in such challenge. Mr Gilbert referred to the judgment of the Court of Appeal in the case of Herrera v The Secretary of State for the Home Department [2018] EWCA Civ 412, as quoted at [41] of Reid, in cautioning against such an approach and he submitted that the challenge to Judge Bartlett's decision was simply a disagreement with her decision and with the weight that she gave to various factors. He submitted that the judge had properly directed herself on the law, she had had full regard to the strong public interest in deporting foreign criminals and she had considered all relevant matters in her 'very compelling circumstances' assessment, taking full account of the appellant's terrible immigration history, and that it was open to her to allow the appeal on the basis that she did.

26. However, I simply cannot agree with that submission. It is relevant to look further in the decision in Reid, where at [56] the Court of Appeal considered the Upper Tribunal's finding, when setting aside the decision of the First-tier Tribunal, that "*there was nothing in the facts of this case which was properly capable of justifying a finding that Mr. Reid's deportation would be unduly harsh to the qualifying child, and that the FTT judge must have applied the wrong test or applied it wrongly in reaching the conclusion she did*", and agreed with that finding. It seems to me that that is the same in this case and that there is nothing in the facts of this case which was properly capable of justifying a finding that there were very compelling circumstances outweighing the public interest in the appellant's deportation, and that the First-tier Tribunal Judge must have applied the wrong test or applied it wrongly in reaching the conclusion she did, given the findings of fact she had otherwise made.

27. I have to agree with the respondent that the only factor which the judge relied upon in finding that the test had been met was the passage of time since the appellant's conviction in 2005 and the making of the deportation order in 2007. I disagree with Mr Gilbert that the judge relied upon a wider constellation of factors. I observe from his speaking note at [10] that he was referring to the change in the appellant's lifestyle since 2007 and since the previous Tribunal decision in 2015, by reference to the unchallenged findings at [23], [22] and [13] to [14]. However I fail to see how those findings provide any positive benefit to the appellant. Although the judge, at [14], made findings about the close family relationships and the best interests of his children being for the family unit to remain together, the disruption to the children's lives by relocating to Albania, the appellant's depression and anxiety and his low risk of reoffending, she went on to find that the threshold for Article 3 was not met on medical grounds, that there would be no very significant obstacles to the appellant's integration into Albania and that it would not be unduly harsh for his partner and children to relocate to Albania or to be separated from him. The findings made by the judge at [22] were not favourable to the appellant and indeed, at [22(iv)], the judge specifically found that the impact on the appellant's family was not in itself a very compelling circumstance over and above the exceptions to deportation. Neither did the matters identified by the judge at [23(ii)] as factors in the appellant's favour amount to anything, as Mr Tufan submitted. [23(ii)(a) and (b)] related to the passage of time, [23(c)] referred back to matters previously considered not to meet the 'unduly

harsh' test and [23(d)], referring to rehabilitation, was specifically identified by the judge as a factor which did not carry considerable weight.

28. Accordingly it was the passage of time upon which the judge was relying to give rise to very compelling circumstances, despite her finding that the exceptions to deportation had not been met. The respondent's grounds rely upon the Court of Appeal's findings at [59] in Reid in challenging that finding, but Mr Tufan accepted that that case was not really on point. The Court of Appeal in that case was addressing the respondent's delay in enforcing the deportation order in relation to the 'unduly harsh' test, which was not the issue in this appellant's case. Nevertheless, in according so much weight to the passage of time since the appellant's conviction and the making of the deportation order, it seems to me that the judge clearly erred in law. I accept that the question of weight was a matter for the judge. I also observe that the judge specified, at [24], that she was taking account of the appellant's appalling immigration history and his limited period of time outside the UK after being deported when reaching her decision. I accept that she was entitled to find that the weight to be given to the public interest is diminished to some extent with the passage of time, as the Court of Appeal agreed in Reid. However it seems to me that the judge failed at that point in her decision-making actually or properly to engage with the circumstances of the appellant's appalling immigration history and its impact upon the passage of time. I simply cannot agree that the factor she relied upon was properly capable of justifying a finding of 'very compelling circumstances' and I conclude that the finding was not reasonably open to the judge in light of the otherwise adverse findings she had made.

29. Accordingly I set aside the judge's decision to allow the appellant's appeal.

30. I turn to the question of the disposal of the appeal. Mr Tufan asked me to re-make the decision by dismissing the appeal. Mr Gilbert agreed that there was no further evidence to be produced and no change in circumstances necessitating a further hearing, but he asked me to make my own assessment on the evidence available.

31. I have considered all the evidence which was before the First-tier Tribunal and have had full regard to Mr Gilbert's skeleton argument before the judge, which relied in particular upon the psychological assessment report and the independent social worker's report. I have of course given careful consideration to the appellant's family and private life in the UK, to the close family relationships existing in his family unit and to the disruption to the lives of the appellant's partner and children which his deportation will cause. However I do not set out any detailed findings of my own in that regard because those matters and the reports and other evidence before the First-tier Tribunal were carefully considered and addressed by Judge Burnett in findings which have not been challenged by the appellant. Those findings were properly made by the judge on the evidence before her and I am to re-make the decision on the basis of those findings. It seems to me, in such circumstances, and given my observations and discussion above, that I need only be brief.

32. The appellant is not able to meet the exceptions to deportation on private or family life grounds. There are no very significant obstacles to his integration to Albania and it would not be unduly harsh for his partner and children to relocate with him to Albania or to be separated from him, albeit it is not disputed that the best interests of his children would be served by the family remaining together. The only factor of weight which could be regarded as favourable to the appellant when considering the question of 'very compelling circumstances' is the passage of time since his conviction in 2005 and the issuing of the deportation order in 2007. However any weight to be accorded to that matter is significantly reduced by the appellant's own contribution to the passage of time by the fact that he relied upon a false identity to pursue his asylum

claim and remain in the UK, that he re-entered the UK illegally in breach of the deportation order after only four years outside the UK, that he absconded for over three years until encountered and arrested shortly after unsuccessfully appealing against the decision to refuse to revoke the deportation order and that the discovery of his true identity then led to the deportation order having to be re-issued in that correct identity. The fact that it is now some 18 years since he committed the offences giving rise to the deportation order and that he has not been convicted of any offences since then, albeit relevant factors to consider, cannot possibly be sufficient reason to justify the revocation of the deportation order on human rights grounds, in light of the significantly adverse factors in the appellant's case and the fact that the exceptions to deportation cannot be met.

33. In the circumstances I find there to be no very compelling circumstances outweighing the public interest in the appellant's deportation and I re-make the decision by dismissing the appellant's appeal.

Notice of Decision

34. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law. The Secretary of State's appeal is allowed and the decision is set aside to the extent stated above.

35. The decision is re-made by dismissing Mr Dajq's appeal against the refusal of his human rights claim.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 June 2023