IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001181

First-tier Tribunal Nos: HU/56377/2021
IA/15204/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 19 October 2023

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

Dan Peka
(ANONYMITY ORDER NOT MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: unrepresented
For the Respondent: Mr D Clarke

Heard at Field House on 29 August 2023

DECISION AND REASONS

1. The Appellant is a citizen of Albania. His date of birth is 22 June 1994. While there is no reason to anonymise the Appellant, I have referred to his family members by initials in order to protect the identity of his children.

2. On 2 May 2023 Upper Tribunal Judge Blundell granted the Appellant permission to appeal against the decision of the First-tier Tribunal (Judge Turner) to dismiss his appeal against the decision of the SSHD on 2 October 2021 to refuse his application for leave to remain (LTR).

3. The Appellant is a foreign criminal. On 13 October 2016 he was convicted of offences including theft, possession with intent to supply class A drugs, dangerous driving and possession of an article for use in fraud. He was

sentenced to two years and ten months' imprisonment on 3 March 2020, having failed to attend court to be sentenced on 13 October 2016.

4. The SSHD made a decision to deport the Appellant on 23 April 2020. The issue for the First-tier Tribunal was whether the decision to deport the Appellant breaches the Appellant's rights under Article 8 ECHR. The Appellant relied on his family life with his partner, GC, her two daughters and the Appellant and GC's children born on 18 February 2019 and 8 October 2020 respectively. The Appellant had been living with his family since he was released from prison in October 2020.

5. The hearing before the First-tier Tribunal was on 23 February 2023. The judge set out the legislative framework at paragraph 35, including s.117C of the Nationality, Immigration and Asylum Act 2002. The judge heard evidence from the Appellant and his partner. The judge set out the evidence at paragraphs 38 – 41.

6. The judge made findings of fact at paragraph 43 – 72. Those can be summarised as follows:-

(i) It would be unduly harsh for the children to relocate to Albania. It would be unduly harsh and impractical for the older children to remain in the UK without their mother and younger siblings and it would be unduly harsh for the younger siblings to be separated from their older siblings with whom they have lived all their lives.

(ii) The decision to deport the Appellant to Albania whilst the children remain in the UK with their mother does not meet the definition of "unduly harsh" for the purpose of paragraph 399(a) of the Immigration Rules.

(iii) The judge noted that it was conceded by the Appellant that he did not form a relationship with CG while he was in the UK lawfully.

(iv) Exception 1 is set out in s.117C(4) does not apply in this case as the Appellant has not been lawfully resident in the UK for most of is life.

(v) The effect of deportation would not be unduly harsh on the Appellant's partner.

7. In terms of general proportionality the judge said that he referred to NA (Pakistan) and SSHD [2016] EWCA Civ 662 and he concluded at paragraph 69 that there are no:

> "Compelling circumstances that militate against the Appellant's deportation. I have considered the various factors raised in support of the Appellant's appeal both in isolation and cumulatively. I have considered these in relation to the affect that they would have on the Appellant, his wife, his children, and the family as a unit."

8. The judge concluded at paragraph 71 that the decision was a "proportionate means of achieving the legitimate aim of securing the public interest through the consistent application of immigration controls".

The grant of permission

9. Judge Blundell did not find that there was substance in the grounds of appeal. He was critical of the grounds; however, he found that the decision disclosed Robinson obvious error (R v SSHD ex parte Robinson [1997] 3 WLR 1162). He gave the following reasons:-

> "3. The judge's decision was issued in February 2023. His conclusion that deportation would not have unduly harsh consequences on the appellant's family was informed by the Upper Tribunal's decision in Imran [2020] UKUT 83 (IAC). The significance which he attached to the guidance given in that decision is arguably clear from [52] and [53] of his decision. The judge was clearly not aware that the decision made by the Upper Tribunal in Imran was overturned by the Court of Appeal in November 2021: MI (Pakistan) v SSHD [2021] EWCA Civ 1711. The Upper Tribunal was held by the Court of Appeal to have misunderstood and misapplied what was said in PG (Jamaica) v SSHD [2019] EWCA Civ 1213, which was the other authority cited by the judge in his decision. It is doubtful that all of what was said in PG (Jamaica) survived by the subsequent decision in SSHD v HA (Iraq) & Ors [2022] 1 WLR 3784, and I note that the judge did not cite the Supreme Court's decision at any stage.
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> 4. It is arguable for these reasons that the threshold used by the judge to gauge whether deportation was unduly harsh on the appellant's family was wrong. I grant permission for that reason. It will obviously be for the Upper Tribunal to decide whether the judge did indeed err in that respect, and, if so, whether any such error was material, given the other findings made by the judge. For the present, however, I am satisfied that the threshold in AZ (Iran) is met, given the apparent reliance by the judge on authority which had been overturned by the Court of Appeal."

The decision of First-tier Tribunal

10. The judge heard evidence from the Appellant and CG. CG's evidence was that the Appellant's stepchildren continued to have contact with their biological father and paternal family during school holidays. This evidence was accepted by the judge who said "I accept [CG's] evidence that she would not be permitted to leave the UK with all her children to relocate to Albania, given her older daughter's ongoing contact with their biological father in the UK."

11. The judge said when considering whether it was unduly harsh for the children to remain in the United Kingdom, "I am reminded of the test of 'unduly harsh' as set out in MK (section 55 – Tribunal options) [2015] UKUT 223 which notes that." The judge set out part of the decision in MK relating to the unduly harsh test and said:

> "The Tribunal in MK makes findings that deportation of that Appellant would be unduly harsh on the children in those circumstances however the conclusion in that decision makes it clear that the test is very fact specific. It notes both emotional and financial dependency upon the Appellant amongst other things".

12. The judge referred to a letter from the Appellant's son's preschool and stated that this was vague and lacking in detail and it did not give detail regarding how often each parent undertakes the role of pickup and drop off. The judge said "It may be that the Appellant only occasionally drops off his son or collects him from

pre-school. Even if he undertakes this role frequently, for reasons noted below there are alternative options available to [CG] in the Appellant's absence".

13. The judge took into account that the Appellant spent seven months in custody in 2020 and that while he was in custody CG had to support herself and three children. She was also pregnant at this time. She claimed that she had managed with little support and no intervention from the Social Services or other organisations. There was no expert evidence regarding any impact that the arrangement had on the children or CG. Both the evidence of CG and the Appellant was that her family and the Appellant's family are in the UK but they were vague regarding the support that each side of the family "did or are able to provide".

14. The judge rejected the submission that should the Appellant be deported, CG would have to terminate her employment which would have financial implications on the children. The judge noted that the older children are in school and the younger children are in nursery. The judge found that "it may be the case that [CG] could not continue working night shifts as she does at present however, I do not accept that she could not find suitable alternative employment which could accommodate her childcare commitments." The judge noted that there are many single parents who manage a working life whilst caring for their children. The judge did not accept that family members would not provide some form of practical support to her even if it was limited.

15. The judge found that the children could seek emotional support from their mother and extended family should the Appellant be returned to Albania. The judge noted that the children maintained contact with the Appellant whilst he was in custody using audio and video calls and were excited when this happened. The judge found that the children could maintain some form of relationship with the Appellant using remote means.

16. The salient findings of the judge are follows:-

> "51. The Appellant has not presented any other special characteristics or factors in this case that would indicate that the decision would be unduly harsh on the children on any other basis. Mr Azmi refers me to documentary evidence which describes the care from the Appellant as 'crucial, critical, vital and significant' however I found the evidence lacking in detail. I did not find that the evidence indicated the care provided by the Appellant to the family went above and beyond that provided during normal family life.
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> 52. I have seen nothing beyond that described by the Judge in the case of Imran (Section 117C(5); children, unduly harsh) [2020] UKUT 00083 (IAC). In the case of Imran, the First Tier and Upper Tribunal Judges accepted that the Appellant had a particularly close relationship with his three sons to the extent that they even received support from their school to deal with the absence of their father whilst he was serving a custodial sentence. Despite this, the decision of the Tribunal was that the 'unduly harsh' test was not met. The case of PG Jamaica was also cited in Imran. Whilst recognising the degree of harshness that the children in that case would experience because of their father being deported, the Judge concluded that 'All children should, where possible, be brought up with a close relationship with both parents. All children deprived of a parent's company during their formative years will be at

risk of suffering harm. Given the changes to the law introduced by the amendments to 2002 Act, as interpreted by the Supreme Court, it is necessary to look for consequences characterised by a degree of harshness over and beyond what every child would experience in such circumstances.'

53. I do not find that I have been presented with evidence to shows (sic) that the relationship between the Appellant and his children goes beyond the close relationships described in Imran nor in PG Jamaica.

54. Overall, I do not find that the decision to deport the Appellant to Albania whilst the children remain in the UK with their mother meets the definition of 'unduly harsh' for the purpose of paragraph 399(a)."

17. At paragraph 59 the judge stated:

"59. I have discussed above the issue of whether the decision would be unduly harsh on the children. In relation to [CG], many of the factors discussed above have similar application to her. She has support from her family to meet her emotional needs. She can access family or organisations should she required (sic) practical or financial support. I note that the Appellant was receiving financial support from his family whilst he was unable to work which he claims in his witness statement he gave to [CG] to support the children. There is no evidence to indicate that this could not continue. As noted above, I find that [CG] can work to support herself and the children financially in any event. She can seek financial and practical support from the state and other organisations should she require this."

18. When going on to consider the wider Article 8 the judge found at [61] that the offences were serious and resulted in a lengthy custodial sentence. He stated as follows:

"The offences were serious in nature and resulted in a lengthy custodial sentence. I asked the Appellant about the context of the offence and how he came to be involved in said activity. He claimed that he had returned to Albania after his failed asylum claim in 2015. He then required the assistance of others to return to the UK illegally for which he subsequently owed a debt. He was required to deal drugs to pay off the debt. I am invited by Ms Azmi to find that this is something of a mitigating feature in this case, that the Appellant did not choose to carry out this activity. I find the contrary to the case. The Appellant not only used people to re-enter the UK by illegal means but must have been aware of his obligations when he arrived. I do not accept that the demand to engage in criminal conduct came as a surprise to the Appellant in lieu of payment. I note this explanation in the context of the fact that the Appellant has never had legal status in the UK, despite making several unsuccessful applications. I consider the Appellant's conduct in relation to his immigration history to demonstrate a complete disregard for immigration laws."

19. The judge took into account that the Appellant was arrested in 2016 and released on bail. However, he failed to attend a hearing to be sentenced. He evaded the authorities for a prolonged period until March 2020 when he was sentenced. The judge found that this was a matter which weighed heavily against the Appellant in the proportionality assessment.

20. The judge took into account that the Appellant met and formed his relationship with CG while he was not only in the UK illegally but "wanted for sentence by the courts for serious offences". The judge found that this weighed heavily against the Appellant and took into account that CG acknowledge that she was aware of it. He did not find her explanation that she had not really considered the prospect of the Appellant returning to Albania without her and that "you cannot help who you fall in love with" not to be reasonable. The judge found that the Appellant and CG had simply had no regard to the Rules that applied to the Appellant in the circumstances.

21. The judge took into account evidence of good conduct when the Appellant was in custody but also that this conduct had occurred after he had been served with the decision regarding deportation in April 2020. The judge found that it was more likely that the Appellant had realised the seriousness of is position and acted accordingly. The judge took into account that the Appellant had remained out of trouble since he was released in October 2020 but found this to be a neutral factor. The judge took into account letters of support and witness statements from friends and family. However, the judge said that he found to be "vague and repetitive of what is claimed in the witness statements of the Appellant and his partner".

22. The judge noted at paragraph 67 that the Appellant had confirmed in oral evidence that he stayed in his family home in Albania when he returned on the last occasion. The judge noted that the property remains unoccupied but is still owned by the Appellant's father. The judge found that the Appellant could "utilise this property for his return". The judge took into account that the Appellant is an adult with no health issues and found that it is reasonable to expect him to be able to secure employment on return to Albania.

Submissions

23. The SSHD relied on a response under Rule 24 (dated 16 May 2023). It is asserted therein that the First-tier Tribunal correctly reminded themselves of the nature of the test at paragraph 46 before embarking on their assessment of the evidence. It is submitted that it is clear that what the judge was looking for was something that elevated the consequences of the Appellant's removal beyond that which might be described as harsh to something that met the elevated "unduly harsh" threshold. From the findings at paragraphs 47 – 51 it is apparent that that threshold was not met.

24. I heard oral submissions from Mr Clarke. The unrepresented Appellant made submissions. Mr Clarke submitted that the judge made comprehensive findings of fact and it is difficult to know what else he could have done. The Appellant drew my attention to the evidence that was before the First-tier Tribunal and informed me that his son has now started school. He said that his wife could not cope with the four children and find employment.

Unduly Harsh

25. The issue for me is whether the judge properly applied the "unduly harsh" test in s.117C(5) of the 2002 Act (Exception 2). (While the judge refers to the Rule 399 of the Immigration Rules, the provision is now in primary legislation).

26. In HA (Iraq) v SSHD 2022 UKSC 22 the Supreme Court rejected the argument presented by the SSHD that the Court of Appeal (HA (Iraq) v SSHD [2020] EWCA Civ 1176) had wrongly lowered the threshold in KO (Nigeria) v SSHD [2018] UKSC 53 by disapproving of comparing the degree of harshness that would be experienced by a qualifying child to that which would necessarily be involved for any child. The Supreme Court endorsed the Court of Appeal's approach. I summarise the correct approach to the "unduly harsh" test:

1. There is no notional comparator test.

2. The test is not whether the effect of deportation would be anything other than that which is ordinarily to be expected.

3. The criterion of undue harshness sets a bar which is elevated and carries a much stronger emphasis than undesirability.

4. The essential question is whether the harshness caused to the partner or child is of a sufficiently elevated degree.

5. The Tribunal will not err in law if it carefully evaluates the likely effect of deportation on a particular child and decides it is merely harsh but not unduly harsh.

6. It is not necessarily wrong to describe "an ordinary" level of harshness but it may be misleading if used incautiously.

7. There is no reason why undue harshness may not occur quite commonly.

8. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of ordinariness.

9. Undue harshness is an objectively measurable standard.

10. The Tribunal must made an informed evaluative assessment and carefully analyse all relevant factors.

Conclusions

27. The judge said that he applied the reasoning in Imran; however, the Court of Appeal in MI found that the UT had erred in applying the unduly harsh test. Moreover, the judge did not refer to the correct test set out by the Court of Appeal and endorsed by the Supreme Court. The judge's reference to "special circumstances" supports the application of the wrong test. While Mr Clarke submitted that the judge did not apply the notional comparator test, this is difficult to reconcile with what the judge said, particularly considered the final sentence of paragraph 51 (the reference to normal family life) and the final sentence of paragraph 52 (the reference to every child). I conclude that the judge applied the wrong test and this amounts to an error of law.

28. I accept Mr Clarke's argument that the judge evaluated the likely effect of deportation on the Appellant's children and partner. The judge took into account all the evidence and made findings that were open to him on the evidence. He

properly directed himself in respect of and applied MK. He had the advantage of hearing oral evidence from the Appellant and his partner. He was entitled to take into account that that was no expert evidence concerning the impact of deportation on the children. He was entitled to find aspects of the evidence vague. He was entitled to conclude that the Appellant's partner would find alternative employment in the event of the Appellant's deportation and that the children would be able to seek emotional support from their mother and family. The Appellant was not represented at the hearing before me; however, he was represented at the hearing before the First-tier Tribunal. I have considered the statements of evidence that were before the judge. The judge made an assessment on the evidence before him.

29. The criterion of undue harshness sets a bar that is elevated and is stronger than undesirable. The problem with the Appellant's case is that there was no evidence before the First-tier Tribunal that the harshness caused to the children or Appellant's partner was of a sufficiently elevated degree to meet the test. The judge made sustainable findings which did not support the Appellant's case from which it follows that the elevated test could not be met.

30. I have considered the grounds of appeal in their entirely and I agree with the observations made by UTJ Blundell. The grounds of appeal were drafted by the Appellant's solicitors. There is no cogent argument advanced therein that the judge did not take into account material evidence or that he made insufficient findings of fact.

31. The judge did not make an error of law that makes any difference to the outcome in this case taking into account the evidence that was before the First-tier Tribunal. The decision of the First-tier Tribunal to dismiss the Appellant's appeal is maintained.

Notice of Decision

The Appellant's appeal is dismissed

Joanna McWilliam

Judge of the Upper Tribunal
Immigration and Asylum Chamber

19 October 2023