IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001051; UI-2024-001052
First-tier Tribunal No: EA/05483/2022; HU/52471/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of June 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SAINI

Between

BABIHARAN BALAMURALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr B Lams, Counsel; instructed by Reiss Edwards Limited
For the Respondent: Ms C Everett, Senior Home Office Presenting Officer

Heard at Field House on 9 May 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal judge Parkes (the judge), who dismissed the appellant's appeal against the refusal of the Respondent to revoke a deportation order made against the Appellant under the EEA Regulations 2016 and a linked human rights claim.

2. The grounds of appeal may be summarised as follows:

   (i) Ground 1: Erroneous approach to assessment under s.117C(5) (*cf.* §§35-37 of the judge's decision):
   When assessing whether or not the Appellant's removal would result in unduly harsh consequences under s.117C(5) for the Appellant's wife, the judge failed to assess the impact of removal on the Appellant's wife,

particularly when assessing the circumstances established prior to the Appellant's deportation; §35 ends prematurely; the judge's conclusion at §36 that the Appellant's life with his wife was formed whilst in the UK illegally is incorrect as the Appellant commenced a relationship with his wife in 2014 prior to his deportation in 2016. The judge failed to properly take into account and assess the weight to be given to the private and family life established prior to the Appellant's removal, together with the present circumstances which were materially different to those when the Appellant was first deported to Norway.

(ii) Ground 2: Erroneous approach to Article 8 assessment outside of the Immigration Rules (*cf.* §47 of the judge's decision):
The judge failed to adopt a balance sheet approach as endorsed in Hesham Ali v. Secretary of State for the Home Department [2016] UKSC 60 when assessing Article 8 and proportionality outside the rules; there is no explicit reference to or discussion of factors required to be assessed in the proportionality assessment as set out at [26]-[29] of Hesham Ali; there is no assessment of his private and family life established whilst in the UK as a minor and young adult prior to his deportation; no explicit reference to letters from family and friends and the Appellant had rehabilitated himself; there is no assessment of the children's best interests characterised by no reference being made to the second child, only the first; and the judge failed to address delay in removal as a relevant factor.

3. The judge found he had no jurisdiction to consider any challenge to the deportation under the Immigration (European Economic Area) Regulations 2016 (the EEA Regulations) and there was no challenge in relation to that approach by the judge. The matter was only considered in relation to the statutory context of deportation on human rights grounds. Permission to appeal was granted on both grounds by First-tier Tribunal Judge Saffer.

4. By way of brief background, it is noteworthy that the bases of the deportation order that the Respondent refuses to revoke pertain to convictions for attempted theft on 21 March 2014, and three convictions for 10 offences (2 fraud and kindred offences, 7 theft and kindred offences and 1 miscellaneous offence) committed between 21 March 2014 and 17 July 2014. These offences resulted a deportation order against which the Appellant appealed. However his appeal was dismissed by First-tier Tribunal Judge Grant in a decision promulgated on 31 July 2015. The Appellant was removed from the UK to Norway on 17 June 2016. The Appellant applied for a Registration Certificate as confirmation of a right to reside however that application was refused and his appeal against that decision was dismissed by First-tier Tribunal Judge Osborne in a decision promulgated on 1 August 2016.. The Appellant then unlawfully returned to the UK in breach of the extant deportation in December 2018.

Conclusions

5. At the hearing before us Mr Lams relied on the grounds drafted by previous counsel and expanded upon the grounds emphasising that the judge had to look at factors pre-dating the return in breach of the deportation order, and the difficulty the Appellant's wife would have in running the business for 3 days a week, without him present to look after their child, as well as pointing to medical evidence that was presented showing that the Appellant's mother cannot work due to her osteo-arthritis and cannot assist with the shop. Mr Lams accepted

however that there was no evidence that the business would collapse if they left. Mr Lams also pointed to evidence that was before the judge which indicated that the older child may have a genetic condition.

6. There was no rule 24 reply. However, we received submissions from Ms Everett which we mention so far as necessary in our findings below.

7. Taking the grounds in turn, in relation to the challenges to the judge's assessment of unduly harsh consequences under s.117C(5) for the Appellant's wife, we reject the argument that the judge failed to assess the impact of removal on the Appellant's wife, as the judge carefully sets out the status quo of the wife's circumstances at §33 including that the Appellant's wife runs a shop which she part-owns with her mother. The judge was aware that her parents ran the shop before she took over and that there was a mortgage of £380,000, a loan to the café of £20,000 and that the business account is overdrawn to the sum of £7,000. She said that she is paying off the debts. The judge was also aware that the wife is working fewer hours, from 6.30 am to 5pm, 3 days a week (increasing to finishing at 10pm). The judge also noted at §34 that the Appellant was looking after the children whilst his wife worked for those 3 days a week. The judge also noted at §36 the length of the wife's residence in the UK and that the business is successful and that it provides for their family and her parents. As such, there is no merit to the argument that the judge was unaware of or failed to consider the wife's circumstances when considering whether there were unduly harsh consequences to her.

8. In relation to assessing the Appellant and his wife's circumstances established prior to the Appellant's deportation, the judge noted at §28 of the decision that the Appellant and his wife married on 7 October 2015 and that she is a Danish citizen who grew up in the UK, whilst noting the content of Judge Grant's decision which discussed the circumstances prior to deportation and was therefore known to the judge. The judge was thus aware that she was previously his girlfriend, as was Judge Grant, and that he was facing deportation proceedings and had lost his appeal when the couple married on 7 October 2015, thus being aware that he was liable to deportation and the precariousness of their situation and his continued residence in the UK.

9. Concerning the last sentence in §35 ending prematurely, it is plain from the tone and content of that sentence (i.e. "While I accept that there are debts which need to be serviced and that the Appellant's wife is working long hours"), and the preceding findings, that the judge was not going to pronounce that the removal of the Appellant would result in unduly harsh consequences for the wife as the shop was impliedly being managed by other persons in her absence (i.e. it was not suggested that the shop was run for only 3 days a week) and the business could run in the Appellant's absence given the family support network surrounding her. In any event, this omission is plainly immaterial to the remainder of the decision and the conclusion the judge reached. Although Mr Lams pointed out that the Appellant's mother cannot work it is not said by the judge that she should run the shop, and indeed it appears from §35 that the judge impliedly formed the view that the remainder of the family could rally to support the Appellant's wife as he indicated that although the wife's parents were providing limited support, there was no medical evidence to show they are unable to work and support their daughter.

10. In relation to Mr Lams' point, in liberal expansion of the grounds he did not draft, arguing that the judge failed to consider the consequences for the wife without the Appellant present to look after their child, the difficulty this submission faces is that the Appellant has not directly challenged any of the findings at §§40-45, which include criticism of a report that sought to argue that separation of the Appellant from his child would be harsh. Thus, the judge's conclusion at §§44-45 that the Appellant and his wife's preference to continue family life in the UK "presents them with a choice, which is not itself unduly harsh" and that "it has not been shown that (the older child's) needs cannot be met adequately by support from other sources", nor that the family cannot "remain together and travel to Norway as a unit and the Appellant's support continue without interruption".

11. Turning to the complaint that the judge's conclusion at §36 that the Appellant's life with his wife was formed whilst in the UK illegally is incorrect is misguided and shows a lack of care in reading the last sentence. The sentence reads: "The life that the Appellant has established, and the business his wife has taken over from her parents, have been formed with the Appellant in the UK illegally and when all of them knew that he was here in breach of the deportation order and remains liable to removal". It is plain that the judge is referring at this stage of the decision to the Appellant's day to day life that has been established since his illegal entry in December 2018 and it is also clear that the judge was aware that the Appellant's relationship with his wife began in 2014 prior to his deportation in 2016 as the earlier passages in the decision reveal. It cannot rationally be said that the judge has become confused a few paragraphs later whereas it is clear that the judge is drafting his decision by setting out the events in chronological order setting out his awareness and consideration of the facts as he proceeded. There is therefore no merit in this argument.

12. Thus, having considered these complaints individually there is no merit in Ground 1. The difficulty the Appellant faces is that the judge was aware of the relevant facts and considered them and reached a conclusion that was against the Appellant. That is something that the judge was entitled to do and thus we are not entitled to interfere with the decision as an error of law appeal jurisdiction, as opposed to deciding the appeal for ourselves.

13. Turning to Ground 2, and the argument that the judge failed to adopt a balance sheet approach as endorsed in Hesham Ali when assessing Article 8 and proportionality outside the rules and that there is no explicit reference to or discussion of factors required to be assessed in the proportionality assessment as set out at [26]-[29] of Hesham Ali, there is no merit in these arguments either.

14. First, the judge correctly directed himself in relation to Hesham Ali at §12 of the decision.

15. Second, neither the grounds nor Mr Lams pointed to any of the individual Boultif factors mentioned in Hesham Ali, supported by evidence before the judge, that demonstrated a material omission in the judge's consideration. As explored above, the judge was aware of and mentioned the relevant considerations complained of in Ground 1.

16. Third, having considered the judge's decision ourselves with great care, it is evident that the Boultif criteria have, in fact, all been considered in the decision and conclusions reached upon each factor so far as relevant. Thus, if those

criteria fail to meet the unduly harsh threshold, and if nothing further is pointed to by the Appellant, cumulatively or otherwise, that could meet the *higher* threshold of very compelling circumstances, then it is difficult to see the materiality in the judge failing to explicitly list the criteria one by one, especially where those findings have been imported into his global conclusion at §46 onwards and given that he finds that there is nothing further or "something positive" that can assist the Appellant in order to meet that higher threshold outside the rules.

17. Fourth, the further difficulty the Appellant faces is that this point was recently considered by the Court of Appeal in Akhtar v. Secretary of State for the Home Department [2024] EWCA Civ 354 at [71]-[73] which confirms that the tribunal is not "required to list, when considering whether there were very compelling circumstances, all the factors it had taken into account when considering the Exceptions" and the tribunal simply has to "make the decision about very compelling circumstances against the background of all of its findings about the Exceptions" which is what the judge did in this matter also. We conclude that it is clear from §§46-47 that the judge understood that in considering whether there were very compelling circumstances, he was bringing everything into account. The tribunal was not required mechanically to list everything again in order to show that it had done so.

18. In relation to the finer points put in supplementation of the Hesham Ali point, it is complained that there is no assessment of the Appellant's private and family life established whilst in the UK as a minor and young adult prior to his deportation. In our view there is no merit in this ground given that §28 onwards of the decision shows a consideration that the Appellant entered the UK when aged 14 years old and that he effectively grew up in the UK and spent over 9 years in the by the time the deportation appeal came before Judge Grant.

19. As to the complaint that there is no explicit reference to letters from family and friends and the Appellant had rehabilitated himself, it is not a requirement for the judge to explicitly list every piece of evidence before them and in any event, this omission is immaterial given that the judge was concerned with the Appellant's character at having returned to the UK in breach of a deportation order in December 2018 and in given that he only came to the authorities' attention in 2020 due to his drink-driving offence, which the judge was clearly unimpressed by as he also noted that this did not explain why the Appellant did not try to regularise his position earlier and that the Appellant had previously not revealed his status as a deportee subject to an extant deportation order on re-entering the UK. Thus, it is clear that even absent consideration of the letters, they could not have arguably altered the outcome of the appeal and the conclusion the judge reached.

20. Turning to the complaint that there is no assessment of the children's best interests characterised by no reference being made to the second child, only the first, we do not find any merit in this argument as first, the second child was born on 20 November 2023 and was less than 3 months old when the matter came before the judge and clearly his best interests were less impactful at that age than that of his older sibling. In relation to the older child's best interests, as Ms Everett pointed out, the evidence that Mr Lams pointed to in his submissions concerning the child's developmental delay and difficulties were known to the judge and were explicitly mentioned by him at §§34, 38, 41, 45 and 46 of the decision, noting in particular that the "older boy has a number of issues including

vision impairment, he sees in 2D rather than 3D, and receives treatment for that every 3 months or so. He is non-verbal at present and has motor skills delay, he cannot run. He has attended nursery but that was not a success as he was too distressed and shorter periods did not work either. At present the Appellant looks after their children when she is working". Mr Lams did point to appointments investigating a potential genetic condition and undergoing an MRI on 29/01/24, however, the difficulty with that submission is that the investigations were ongoing (and still are according to the new material we have looked at *de bene esse* taking into account the child's best interests) and no diagnosis nor conclusion has been reached which shows that there is a genetic condition, less any evidence that treatment for such a condition is unavailable in Norway. As Ms Everett was thus able to argue, if the Appellant is caring for child and the child has not managed to transition to nursery, it reinforces the view that the family could relocate with minimal interference (which finding has not been challenged in any event). In any event, we cannot see that any of the best interests factors in Zoumbas v. Secretary of State for the Home Department [2013] UKSC 74 have not been taken into account by the judge and neither were any specifically pointed to in the grounds nor in the oral submissions made by Mr Lams.

21. Turning finally to the argument that the judge failed to address delay in removal as a relevant factor, we do not find any merit in this argument given that the Appellant did not reveal his adverse immigration status upon returning to the UK via Ireland in December 2018 and given that it is only due to his drink-driving that he crossed paths with the authorities in 2020. Ms Everett highlighted that, as the judge was aware the Appellant is still subject to an extant deportation order (under the EEA Regulations) which is a relevant factor . The judge found that, in this instance, the Appellant has to be outside the UK in order for the Deportation Order to be revoked and that he has no jurisdiction to consider this as the Appellant is not outside the UK, which finding has not been challenged by the Appellant. It is manifest from §47 that the judge had regard to the overall circumstances.

22. We note that the grounds of appeal appear to challenge the "stay" scenario but not the "go" scenario. As stated by Lord Hamblen at [17] of HA (Iraq) v. Secretary of State for the Home Department [2022] UKSC 22: "Whilst section 117C(5) poses the single question of whether the effect of deportation on a qualifying child or partner would be "unduly harsh", as the Court of Appeal held, it should be interpreted in line with paragraph 399 so that both scenarios are addressed. This means that the unduly harsh test is only satisfied if the answer in relation to both scenarios is that the effect would be unduly harsh" (underlining emphasis supplied). Thus, even if the grounds were made out, which has not been established, they would have been immaterial to the overall outcome of the appeal as the assessment of the go scenario has not been directly challenged.

Notice of Decision

23. In conclusion, the decision is free from material error and must therefore stand.

24. The appeal is dismissed.

P. Saini

Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 May 2024