



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002491

First-tier Tribunal No: PA/52589/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 8th of October 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE GREY

Between

JB
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr K. Pullinger, counsel

For the Respondent: Mr M. Parvar, Senior Home Office Presenting Officer

Heard at Field House on 27 September 2024

DECISION AND REASONS

1. This is the re-making of the decision in the appellant's appeal, following the setting aside of the decision of the First-tier Tribunal (Judge Wilsher), in a decision promulgated on 8 August 2024.
2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and JB as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.
3. The appellant is a citizen of Albania born in 1988. The full background to this appeal including the appellant's immigration history is detailed in the setting aside decision at [3] to [11].

4. On 15 January 2019 the appellant was convicted of possession with intent to supply a controlled drug of class A (cocaine); possession/control of identity documents with intent; being concerned in supplying a controlled drug of class A; and acquiring/using/possessing criminal property. On 12 June 2019 he was sentenced to two years and ten months imprisonment. He was served with a decision to deport him which he did not challenge. Having been accepted on to FRS he was then deported to Albania in 2019.

5. The appellant returned to the UK in November 2021 in breach of the deportation order. On 19 August 2022 he made an asylum and human rights claim and a referral was made to the NRM on 21 February 2023 as a victim of modern slavery, but a negative reasonable grounds decision was made in respect of that referral. The appellant's asylum and human rights claim was refused on 11 April 2023. The appellant appealed against the respondent's refusal and his appeal was allowed by Judge Wilsher by a decision promulgated on 9 April 2024.

6. The Judge found the appellant's protection claim failed because there would be sufficiency of protection from the Albanian authorities, although found that the respondent failed to discharge the burden in respect of the section 72 Nationality, Immigration and Asylum Act 2002 (the '2002 Act') certification. In respect of the appellant's human rights claim the Judge found that it would not be unduly harsh for the appellant's partner, CG, or the children of the family to either remain in the UK without the appellant or go to Albania with the appellant. However, the judge concluded that there were very compelling circumstances which outweighed the public interest in the appellant's deportation. He noted that the respondent had accepted, and he also found, that the appellant's crimes were committed when he was under the control of a criminal gang of traffickers and that he had been the subject of serious threats to his and his family's safety. He considered that if the trial judge had been aware of the full context, the appellant's convictions would not have occurred as the appellant would have been able to rely upon the defence of duress. The Judge considered that the appellant's conduct since the crimes confirmed that he did not have any inherent criminal proclivity and found that he did not present a risk to the public. He found that the appellant was a victim of trafficking and had been coerced into the crimes in question. The Judge found that the appellant played a responsible role as a parent and partner and that it would cause hardship for the family if he had to return to Albania. The Judge found that the public interest in deportation was reduced by the special circumstances in which the appellant was coerced into crime and concluded that the appellant's deportation would be disproportionate and accordingly he allowed the appeal on human rights grounds.

7. The respondent sought permission to appeal in respect of the Judge's findings in relation to section 117C(6) of the 2002 Act. Permission was granted by the First-tier Tribunal on the basis that it was arguable there was insufficiency of reasoning and an inconsistency in the Judge's findings, having found that the Exception under section 117(5) was not made out but that there were compelling circumstances over and above those in section 117(5).

8. Following a hearing on 30 July 2024, Upper Tribunal Judge Kebede accepted that the Judge's findings on section 117(6) were inconsistent with other findings made and were insufficiently reasoned, and determined that Judge Wilsher had made an error of law. The Judge's decision was set aside in relation to his findings on section 117(6). In a decision promulgated on 8 August 2024, UTJ Kebede found that it was not for the Judge to speculate about the likelihood of the appellant not having been convicted and that it was clear this matter featured as a significant factor in his decision on section

117C(6). She found that it was difficult to ascertain from the Judge's decision what it was about the appellant's circumstances that the judge found to be very compelling and that the Judge appeared to have conducted an ordinary Article 8 balancing exercise rather than applying the 'very compelling circumstances' test. Further, in relation to the Judge attaching significant weight to the trafficking issue in reducing the public interest in the appellant's deportation, he had failed to consider the fact that the appellant had never appealed his sentence or sought to have the conviction quashed on the grounds of coercion into criminal activity.

9. The matter was listed for a resumed hearing on 27 September 2024 and came before us for the decision to be re-made.

Hearing for the Re-making of the Decision

10. The appellant produced some additional evidence for the hearing, namely witness statements from the appellant's two step-children. There was no cross-examination of the witnesses.

11. Both parties made submissions before us.

12. Mr Pullinger submitted that the appellant's deportation would negatively affect the welfare of the whole family including the appellant's partner and the three children of the family who were all British citizens. If the children were to go to Albania with the appellant they would lose contact with their biological families, the appellant's partner would be taken away from an important job in the UK and the children away from their school. If the appellant were to return to Albania alone his son and stepchildren would lose a father and father figure who has been a positive influence in their lives. The appellant's eldest stepchild has previously had traumatic experiences in her life and would be re-traumatised if the appellant were forced to leave. The appellant would be limited to occasional visits from his partner and children, and 'remote' contact with them. Mr Pullinger emphasised that the respondent has accepted that the appellant was trafficked to the UK and that his criminal acts were committed whilst he was under the influence of his traffickers. Although he could not go so far as to say that the appellant would not have been found guilty if he had advanced a modern slavery defence in criminal proceedings, it was pertinent that the trial judge had not been fully aware of the circumstances surrounding the appellant's offending. He submitted that the appellant had been found to be credible and that he had been re-trafficked to the UK and that his illegal re-entry must be seen in that context. There were very compelling circumstances over and above the Exceptions to deportation and the appeal should be allowed

13. Mr Parvar submitted that the appellant is a convicted drug offender who pleaded guilty to the offences. The harm to society of drugs offending is important to acknowledge. Although there was an acceptance in the refusal decision that the appellant had been trafficked and was acting under the influence of his traffickers, he submitted that this was in the context of his protection claim which was assessed at the lower standard of proof and this was not an acceptance that the appellant should not have been convicted. It was relevant, he submitted that the appellant did not raise a defence of duress in the criminal prosecution and that there had been no appeal against his conviction. In relation to the Judge's findings on section 117C(5) he did not find that this was a 'near-miss' but made clear findings that the appellant's deportation did not amount to unduly harsh for the appellant's family in relation to both the 'stay' and 'go' scenarios. The appellant's biological son was just under one year old and could be expected to adapt to a change in circumstances at such a young

age. The older children of the family would have a family network and one another for support either in the UK or Albania. If the appellant's partner and children remained without him in the UK, his partner would be able to financially support the family through her work. There was no evidence before us as to any relationship between the stepchildren and their biological fathers. He submitted that limited weight should be attached to the appellant's private life and his relationship with his partner which was started and has developed whilst the appellant has been in the UK unlawfully. In Mr Parvar's submission there is nothing in this case that comes close to the rare 'very compelling circumstances' required to outweigh the public interest in his deportation.

14. At the conclusion of the hearing we reserved our decision.

Analysis

15. As was made clear in the error of law decision of 8 August 2024, the only issue for us to determine is whether there are very compelling circumstances outweighing the public interest in the appellant's deportation. Judge Wilsher's findings in relation to section 117C(5) were not challenged and are preserved.

16. It is common ground that the appellant is classed as a medium offender for the purposes of the statutory scheme under section 117C of the 2002 Act, having received a sentence of two years and ten months for his convictions for Class A drug supply offences, possession of a false identity document and possession of criminal property. In the case of a medium offender who cannot satisfy the requirements of the two Exceptions in subsections (4)-(5) a full proportionately assessment is required – weighing the interference with the Article 8 rights of the appellant and his family against the public interest in his deportation.

17. In conducting the proportionality assessment we are required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that “the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2”. We remind ourselves that “The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.” (section 117C(2)).

18. In HA (Iraq) [2022] UKSC 22 ([60] to [71]) the Supreme Court confirmed that the seriousness of an offence is assessed by reference to the sentence imposed but where it is clear that a sentence has been adjusted due to matters such as personal mitigation or a guilty plea which “can have a significant impact on the sentence but ... has nothing to do with the seriousness of the offence”, then that is a matter which can properly be taken into account where there is a clear indication as to how the sentence had been influenced by factors unrelated to the seriousness of the offence.

19. According to the Judge's sentencing remarks, the assessment of the appellant's culpability took account of the fact the appellant's offending was to re-pay a debt of £15,000 incurred for his journey and entry into the UK. However, the Judge stated that there is high culpability for anyone who involves themselves in dealing with Class A drugs for money. The Judge indicated that the starting point for the appellant's drug supply offences was four and a half years' imprisonment. However, making allowance for the appellant's previous good character, his guilty plea, and his personal and offence mitigation, the sentence was reduced to two years and ten months.

20. The only clear indication of the basis upon which the starting point sentence had been reduced was in relation to the appellant's guilty plea. The sentencing judge

indicated that a 25% discount was applied to the appellant's sentence due to this. Without the 25% discount we find that the assessment of the seriousness of the appellant's offending would take him towards the top end of the bracket for medium offenders for the purposes of section 117C.

21. As confirmed in Akinyemi v SSHD (No 2) [2019] EWCA Civ 2098 and referred to at [71] of HA (Iraq), the public interest is not fixed solely by the seriousness of the offence and we have regard to the nature and circumstances of the appellant's offending.

22. We find that this case gives rise to some difficulties in striking the correct balance in relation to very compelling circumstances because it poses a challenge on how to correctly identify the level of public interest in the deportation of the appellant in light of various concessions made by the respondent in the refusal decision.

23. A factor which we consider in assessing the seriousness of the offending is the extent to which, if at all, we should make allowance for the circumstances regarding the appellant's offending raised in his protection claim. In the refusal decision the respondent accepted that the appellant was forced to deliver drugs in the UK by an Albanian smuggling gang; was trafficked in Europe; forced to work in a cannabis house in France; and trafficked to the UK and forced to work in a cannabis house. We take into account the fact that this concession was made by the respondent in the context of the appellant's protection claim in which he was required to establish his claim to the lower standard of proof; a reasonable degree of likelihood. However, a referral was made to the NRM on 21 February 2023 which resulted in a negative reasonable grounds decision. Although aware of the negative NRM decision at the time of the respondent's refusal there is no explanation provided which sheds light on the different approach taken by the NRM and the respondent.

24. The courts have consistently treated drug-related crimes as being at the most serious end of the criminal spectrum. We remind ourselves that the appellant's drug offending related to Class A drugs, the most serious and dangerous controlled drugs.

25. Whilst the respondent's concessions (particularly that the appellant was forced to deliver drugs in the UK) cannot be wholly disregarded and we find have some bearing on an assessment of the nature and circumstances of the appellant's offending, in light of the appellant's unchallenged convictions and the sentencing comments, we find that any reduction in the public interest in the appellant's deportation as a result of coercion into criminal activity can be no more than modest for the purposes of this Article 8 assessment. Consequently, the appellant remains firmly within the parameters for medium offenders for the purposes of assessing the seriousness of his offending and weighing the public interest in his deportation.

26. In relation to the public interest in deportation, we take account of the fact the appellant returned to the UK in breach of an extant deportation order at a time when, on the findings of Judge Wilsher, he was not being subjected to, or at risk of, persecution. Although the respondent accepts, to a reasonable degree of likelihood, in the context of the appellant's asylum claim that the appellant was trafficked from Belgium and then from France to the UK in November 2021 and worked for four days at a cannabis house in the UK, he did not bring his asylum claim until August 2022, some ten months later.

27. In assessing the public interest we also have regard to the risk of the appellant reoffending. Although we do not have any OASys report or other evidence before us in

relation to the appellant's risk of re-offending, there is no evidence of any further criminal offending committed by the appellant or evidence which would indicate that the appellant presents an ongoing risk to the public. We remind ourselves that although the respondent certified the appellant's protection claim under section 72 of the 2002 Act, Judge Wilsher found that the respondent had not discharged the burden in respect of section 72 and found that the appellant did not present a threat to public security.

28. We turn to consider the matters weighing in the appellant's favour in the Article 8 assessment.

29. It is accepted that the appellant enjoys family life in the UK with his partner, CG, his two step-children and his 11 month old son. However, in respect of section 117C(5) Judge Wilsher found that it would not be unduly harsh for the family to return together to Albania nor would it be unduly harsh for the family to remain in the UK without the appellant. The Judge noted that there was no evidence adduced in respect of either father of the two stepchildren as to the degree of attachment between them, their situation in the UK, or how the arrangements regarding their respective children would be affected if CG went to live in Albania. Further, the Judge noted that there was no social work report or child welfare assessment adduced which he regarded as a "serious gap" in the evidence. The Judge noted that the two step-children have ongoing relationships with their respective fathers. However, this appears to be at somewhat at odds with the witness statements of the appellant and CG which state that A's father is not in his life. Further, in the witness statement of D dated 25 September 2024 she refers to living between her mother and her grandmother's house and having no daughter/father bond.

30. It is still the case that there is no social work report or child welfare assessment to shed any further light on the impact of the appellant's deportation on the children of the family. The only additional available to us that was not before the First-tier Tribunal is a witness statement from the appellant's eldest step-child, D, and a short statement from the youngest step-child, A.

31. It is clear from D's statement that she regards the appellant with considerable affection and attributes him with helping her to create and strengthen a bond with her mother in recent years. She states that she sees the appellant one to three times a week when she visits him and her mother. She refers to the close bond between the appellant and A and how he regards the appellant as his father.

32. Although Mr Pullinger submits that the deportation of the appellant would re-traumatise D, there is no evidence before us in relation to the nature, timing and extent of any previous trauma other than a reference to D seeing her mother taken away from her by police in 2018. There is no independent evidence in relation to the risk of further trauma in the event of the appellant's deportation and the effect that might have on D.

33. Whilst it is apparent that the appellant has been a positive presence in the lives of his two step-children and that the best interests of the children of the family would be to remain in their current family unit, we remind ourselves that the preserved findings of Judge Wilsher are that it would not be unduly harsh for the family to go to Albania with the appellant.

34. In accordance with section 117B(4) we are required to attach little weight to the appellant's private life and the relationship formed with his partner which was

established at a time when he was in the UK unlawfully. However, we take into account the respondent's acceptance that there is a reasonable degree of likelihood that the appellant's presence in the UK, albeit unlawful, was as a result of being trafficked and we acknowledge that 'little' weight does not mean no weight.

35. Although we do not doubt that should the family decide to go to Albania with the appellant there would be a significant period of adjustment for all concerned, we are not persuaded that this would amount to very compelling circumstances which would outweigh the public interest in deportation for the purposes of section 117C(6) of the 2002 Act. Equally, there is insufficient evidence before us that the impact of the appellant's deportation on his partner and the children should they remain in the UK without him reaches the high threshold of very compelling circumstances, particularly in view of the retained findings that both the 'stay' and 'go' scenarios in relation to the appellant's deportation would not be unduly harsh for the appellant's partner or the children of the family.

36. For all these reasons we conclude that the appellant's deportation is in the public interest. The decision to refuse to revoke the deportation order previously made is proportionate and is not in breach of his Article 8 rights.

DECISION

37. The decision of the First-tier Tribunal having been set aside, the decision is re-made by dismissing the appellant's asylum and human rights appeal.

Signed: S Grey
Upper Tribunal Judge Grey

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 October 2024