IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-003061

First-tier Tribunal No: HU/51734/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 15th of October 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

AB
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr H Broachwalla of counsel, instructed by Saifee Solicitors
For the Respondent: Mr N Wain, Senior Home Office Presenting Officer

Heard at Field House on 8 October 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant, who is a national of Albania, seeks to challenge the decision of First-tier Tribunal Judge Chohan ("the judge") promulgated on 25 April 2024 dismissing his appeal against the respondent's decision dated 25 January 2023 to refuse his human rights claim and deport him from the United Kingdom.

Background

2. The appellant entered the UK on 4 October 2000. While aged 18 and a national of Albania, he falsely claimed asylum on the basis that he was an unaccompanied minor from Kosovo. The appellant's asylum claim was refused on 21 June 2001, however, believing him to be a child, the respondent granted him exceptional leave to remain ("ELTR") until 10 August 2003. On 22 July 2003, the appellant successful applied for further leave to remain and, on 5 January 2011, he was granted indefinite leave to remain ("ILR"). Throughout this time, the appellant maintained his false identity.

3. On 17 January 2013, the appellant applied for naturalisation as a British citizen, again using his false identity. However, his application was refused on 8 February 2013 on the basis that the appellant did not meet the good character requirement.

4. On 11 November 2020, the appellant's ILR was revoked on the basis that he had obtained it by deception. The appellant was also served with notice that he liable to removal to Albania.

5. On 24 January 2022, the appellant was convicted of being concerned in the production of a Class B drug (cannabis) and was sentenced to 38 months' imprisonment. He was also convicted of concealing/disguising/converting/transferring/removal of criminal property and sentenced to 21 months' imprisonment to be served concurrently. This led to the appellant being served with notice on 10 March 2022 that he was liable to deportation. In response, the appellant's solicitors sent representations to the Home Office arguing that the appellant's removal would breach his rights under Article 8 of the European Convention on Human Rights because he had a British wife and children in the UK.

6. In the decision dated 25 January 2023, the respondent refused the appellant's human rights claim and a deportation order was made against him.

The appeal before the First-tier Tribunal

7. The appellant's appeal against the respondent's decision to refuse his human rights claim was heard by the First-tier Tribunal on 5 April 2024. In his decision promulgated on 25 April 2024, the judge found that the appellant did not meet either of the two exceptions to deportation set out in subparagraphs (4) and (5) of s.117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). (It was not argued before the judge that there were very compelling circumstances to the appellant's case over and above those described in Exceptions 1 and 2.)

Grounds of appeal to the Upper Tribunal

8. In a decision sealed on 6 August 2024, Deputy Upper Tribunal Judge Wilding granted the appellant permission to appeal the First-tier Tribunal's decision on the following grounds:

   (1) The judge erred in law by finding that the appellant had not been lawfully resident in the UK for most of his life for the purposes of s.117C(4)(a).

(2) The judged erred in law in finding that:

a. the appellant was not socially integrated into the UK for the purposes of s.117C(4)(b); and
b. there would be no very significant obstacles to him reintegrating into Albania for the purposes of s.117C(4)(c).

(3) The judge erred in law by taking into account that letters from the NHS and their GP did not mention that the appellant's son, RB, had been violent towards his mother in circumstances where this had not been put to the appellant or his wife when they gave oral evidence.

The relevant legislation

9. Section 117C(1) of the 2002 Act reflects Parliament's view that the deportation of foreign criminals is in the public interest. Subsection (2) explains that the more serious the offence, the greater the public interest is in deportation. However, subsection (3) says that in the case of a foreign criminal who has not been sentenced to a period of imprisonment of four years or more, there is no public interest in their deportation if they meet the requirements of Exception 1 or 2. It is against these Exceptions that the judge considered the appellant's case.

10. Exception 1, which is set out under s.117C(4), says:

> "Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported."

11. Exception 2, which is set out under s.117C(5), says:

> "Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

Findings – Error of Law

Ground 1: Lawful residence

12. As set out at para 10 above, the first of the three criteria that a foreign criminal must meet under Exception 1 is that they have been lawfully resident in the UK for most of their life.

13. In the present case, the judge noted that the appellant had previously held ELTR and ILR, but he found that this could not be taken to be "lawful residence" for the purposes of s.117C(4)(a) because the appellant had obtained that leave by deception: see [11] to [13]. In his grounds of appeal, the appellant argues that the judge erred in law because, while his ILR had been revoked on account of his

deception coming to light, revocation does not have retrospective effect: see NM (No retrospective cancellation of leave) Zimbabwe [2007] UKAIT 00002.

14. It is right that leave cannot be revoked with retrospective effect. However, that does not necessarily mean that a person who has obtained leave by deception can be described as having "lawful residence" in the UK for the purposes of s.117C(4)(a). As both parties accepted, there is no definition of "lawful residence" in the 2002 Act. On consideration, I am satisfied that the judge was rationally and reasonably entitled to find that the appellant's periods of leave were not lawful for the purposes of Exception 1 for three reasons.

15. First, obtaining leave to enter or remain by deception is a criminal offence under s.24A(1)(a)(i) of the Immigration Act 1971 ("the 1971 Act"). Therefore, while the appellant had been granted leave by the respondent, he had not obtained it lawfully. Second, it seems unlikely that, in enacting s.117C(4)(a), Parliament would have intended that a foreign criminal could rely on periods of leave obtained by deception in order to benefit from an exception to the public interest in their deportation. To the contrary, arguably such deception would add weight to the public interest considerations. Third is the longstanding principle of public policy, ex turpi causa non oritur actio, whereby no court will lend its aid to a person who founds their cause of action upon an immoral or illegal act. The applicability of that principle to immigration appeals was considered by the Asylum and Immigration Tribunal in the case of FS (Breach of conditions: Ankara agreement) Turkey [2008] UKAIT 00066. At [16], the panel said: "…as a matter of proportionality, we doubt whether it could be convincingly argued that it was disproportionate to refuse to allow a person to rely on immigration offences in order to establish an ordinary immigration benefit". In the present case, the immigration offence is that under s.24A of the 1971 Act and the immigration benefit is the ability, under Exception 1, for a foreign criminal to negate the public interest in their deportation.

16. Moreover, even if the judge had erred in that regard, it was immaterial. That is because the appellant entered the UK on 4 October 2000 when he was aged 18. By the date of the hearing before the judge, he was aged 41. He had held ELTR and then ILR in the UK between 21 June 2001 and 11 November 2020, when his ILR was revoked, a total of 19 years and four months. Consequently, the appellant had not by any measure been lawfully resident in the UK for most of his life.

17. I am therefore satisfied that the judge's findings in relation to s.117C(4)(a) are not vitiated by a material error of law.

Ground 2: Consideration of integration and very significant obstacles to reintegration

18. There are two elements to this ground. The first relates to the judge's assessment of the appellant's integration in the UK for the purposes of s.117C(4)(b). The appellant argues that the judge failed to take into account that he had been resident in the UK for 24 years and had a British wife and children and that no account was given to the numerous letters of support provided in the appellant's bundle. I accept that there is some merit to this criticism of the judge's findings. However, the error is immaterial because, as I have discussed above, the judge was entitled to find that the appellant did not meet the

requirements of s.117C(4)(a) and, on that basis alone, he did not meet the requirements of Exception 1, which sets out a cumulative test.

19. The second element relates to the judge's assessment of the very significant obstacles to the appellant's ability to reintegrate in Albania under s.117C(4)(c). The appellant argues that the judge failed to assess the appellant's mental health issues. However, the evidence of this before the judge was limited. There was a printout of the appellant's GP records that showed he had been prescribed citalopram and mirtazapine and the respondent's bundle contained at section M a Home Office Healthcare Enquires form dated 27 September 2022 which says that the appellant suffers from depression and took citalopram daily. The appellant also refers to his mental health briefly at para 26 of his witness statement. The point is also raised in the appellant's skeleton argument before the First-tier Tribunal at para 19(iii), where it is said the appellant's mental health will deteriorate on return to Albania. However, there appears to have been no medico-legal report before the tribunal to show that the appellant's health would deteriorate on return or any country information to show that treatment would be unavailable to the appellant on return. I am not therefore satisfied that had the judge considered the evidence before him regarding the appellant's mental health, he would have reached a different decision on reintegration. In any event, as explained above, any error in this respect would be immaterial given that the appellant could not meet the lawful residence requirement under Exception 1.

20. I am therefore satisfied that Ground 2 does not disclose any material errors of law.

Ground 3: Failure to put it to the appellant and/or his wife why the medical letters did not mention their son being violent to his mother

21. This ground relates to the judge's assessment of the unduly harsh consequences of the appellant's deportation under Exception 2.

22. It was the evidence of the appellant and his wife that they have a son, RB, who has ADHD and autism spectrum disorder ("ASD") and that when the appellant was in prison, RB's behaviour towards his mother became extremely difficult to control and that he would hit her. There was no specialist report before the tribunal because the appellant could not afford one. However, the appellant did rely on a letter from the NHS Autism Assessment Service dated 24 April 2023 and a letter from RB's GP dated 7 March 2024. Of particular relevance, the GP's letter confirms that RB has been diagnosed with ADHD and ASD and that when the appellant was imprisoned, "this had a significant impact on [RB's] mental health and behaviour".

23. At [25] the judge confirmed that he had taken note of the NHS and GP letters and explained that RB's medical conditions are not disputed. At [26], the judge records the appellant's evidence that his wife found RB difficult to control when he was in prison and that his wife gave evidence that RB would hit her. The judge also takes into account a letter from RB's school which confirmed behavioural issues. At [27], the judge refers to the absence of any specialist expert report but he again notes that the contents of the medical evidence that is before the tribunal has not been disputed. At [28], the judge sets out the appellant's case that he has a calming effect on RB and that if he was to be removed from the UK, it would have an adverse effect on RB's behaviour. At [29], the judge sets out the

appellant's claim that his removal would have an adverse effect on his wife as she would struggle to cope with RB alone.

24. It is [30] that the appellant takes issue with. In that paragraph, the judge says,

> "…it is interesting to note that the NHS letter of 24 April 2023, [sic] makes no mention of RB being violent towards his mother. Indeed, even the GP letter of 7 March 2024, [sic] makes no mention of such issues. That is not to say that the appellant's wife has not had a challenging time with RB but if RB was as difficult as claimed by both the appellant and his wife, it stands to reason that the NHS letter and the GP letter would have referred to those issues".

Mr Broachwalla argued that it was unfair for the judge to make that finding without the appellant or his wife being cross-examined on why the letters did not mention that RB hit his mother. Mr Wain, however, submitted that this was not about the fairness of putting the question to the appellant or his wife, but the weight the judge was entitled to attach to the medical letters. The judge was, he said, entitled to evaluate the evidence in the round and find that there was no evidence to support the claim that RB was violent to his mother.

25. On careful consideration, I am not satisfied that Ground 3 discloses a material error of law. As Mr Wain submitted, the judge was entitled to assess the evidence of the appellant and his wife and consider that in the round with the documentary evidence, including the medical letters. He was accordingly entitled to attach less weight to the claim that RB was violent towards his mother. In any event, the judge undoubtedly attached weight to the evidence that RB suffers from ADHD and ASD and that his has led to him displaying behavioural problems. At [31], the judge accepted that looking after RB in the appellant's absence would be challenging for the appellant's wife but he concluded "that is very different to saying that it would be unduly harsh". Furthermore, at [32], the judge expressed sympathy for the appellant's wife and children and he accepted that separation from the appellant would be distressing or "even traumatic" for them. At [32], the judge also found that the appellant's wife and children would all be able to access medical support if required. Mr Broachwalla submitted that by accepting that separation would be traumatic for the children, that met the threshold for undue harshness. I have some sympathy with that submission, but when the judge's findings are read together, that cannot be what he meant. He was clearly of the view that separation would not meet the unduly harsh threshold (see [34]).

26. In the circumstances, I am satisfied that the judge had proper regard to the evidence before him and that his conclusions in relation to the unduly harsh test were reasonably and rationally open to him.

Notice of Decision

There is no material error of law in the decision of First-tier Tribunal Judge Chohan.

The appeal is dismissed.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

10th October 2024