



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-004546

First-tier Tribunal No: HU/60457/2023
LH/00782/2024

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 January 2025

Before

UPPER TRIBUNAL JUDGE O'BRIEN
DEPUTY UPPER TRIBUNAL JUDGE MERRIGAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

KLEVIS DISHA
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:

For the Appellant: Ms S McKenzie, Senior Home Office Presenting Officer
For the Respondent: Mr S Kerr, Counsel, instructed by Karis Solicitors

Heard at Field House on 4 December 2024

DECISION AND REASONS

Introduction

1. The Secretary of State appeals, with permission granted on 3 October 2024 by a judge of the First-tier, against the decision ("the decision") of First-tier Judge Behan ("the judge") promulgated on 12 August 2024.
2. To avoid confusion, we will refer to the parties as they were before the First-tier Tribunal: Mr Disha as the appellant and the Secretary of State as the respondent.

Background

3. The appellant is an Albanian national, born on 24 October 1985. On 25 February 2001, the appellant entered the UK illegally as an unaccompanied minor. Two

days later, he made an asylum claim on the basis of political persecution. He stated, falsely, that he had been born in the former Yugoslavia in 1986. It also appears that the appellant gave a false name.

4. The appellant's asylum claim was refused on 14 September 2001, the Secretary of State not being satisfied that the appellant had a well-founded fear of persecution. The appellant sought to appeal, though that process was withdrawn on 6 March 2003.
5. The appellant was granted Exceptional Leave to Remain on 8 September 2005 and Indefinite Leave to Remain on 26 September 2005. The appellant was naturalised on 6 December 2007.
6. The appellant met A, his partner, in 2006. A is a naturalised British citizen. They are still together. They share two children: B, born in 2009; and C, born in 2014. It is common ground that C has additional needs.
7. On 2 September 2017, the appellant was sentenced to two years' imprisonment for the offence of acquisition of, use or possession of criminal property: he had been stopped and searched while in possession of over €300,000 in cash, being the proceeds of crime.
8. This conviction led to the Deprivation and Revocation Team informing the appellant on 15 October 2019 that a deprivation of citizenship process had commenced. On 15 July 2021, the appellant was deprived of UK citizenship, on the basis that it had been acquired through deception. A deprivation order was served on his legal representatives. Judicial review was sought by the appellant on 21 July 2021 and permission refused on 5 October 2021.
9. The appellant appealed under the provisions of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") against the respondent's decision dated 14 August 2023 to refuse his human rights claim following the making of the deportation order.
10. The matter came before the judge on 27 June 2024. The judge heard oral evidence from both the appellant and A. B wrote a short letter dated 25 June 2024 in support of the appellant.
11. Conducting a "stay and go" analysis, the judge concluded at [36] to [38] that it would not be unduly harsh for A either to follow the appellant to Albania, or to remain in the UK without him. In particular, the judge noted that A speaks Albanian and has family in Albania if she followed the appellant; and would be resilient and capable enough to remain in the UK without him. The judge likewise considered that it would not be unduly harsh for B to go to Albania: she considered that she had some Albanian, and would be able to return to the UK to study in the future should she so wish. The judge did not separately consider a "stay" analysis for B, though that is not challenged today.
12. In [39] to [50], the judge decided that both "stay" and "go" scenarios would be unduly harsh for C. Accordingly, she allowed the appeal on human rights grounds (right to respect for family life). It is on this part of her decision only that the appeal before us turns.

Ground of Appeal

13. The Secretary of State's grounds of appeal dated 16 August 2024 set out a single ground: making a material error in assessing and/or failing to give adequate reasons for finding that deportation would be unduly harsh on C, for the purposes of s.117C(5) of the 2002 Act. Permission to appeal was granted by a First-tier Tribunal Judge on 3 October 2024.
14. That ground is set out over 13 paragraphs, although the focus of Ms McKenzie's submissions today has been C's additional educational needs. She said that:
- a. there is no formal diagnosis of C's educational needs; and
 - b. there is no professional assessment of whether those additional needs could be met in Albania, beyond the appellant's (and A's) assertion that they cannot.
15. As such, given the judge's unchallenged findings in respect of A and B, the respondent contends that the judge erred in concluding that it would be unduly harsh for C either to remain in the UK without the appellant, or to travel to Albania with him.

Hearing and submissions

16. We had before us a bundle containing all documents relied upon by the parties, including all the material before the judge, plus Mr Kerr's skeleton argument dated 3 December 2024.
17. In oral argument, Ms McKenzie relied on the grounds of appeal. At the start of the hearing, Ms McKenzie clarified that she submitted the judge's decision was perverse or irrational.
18. Ms McKenzie submits that HA (Iraq) [2020] EWCA Civ 1176 sets a high threshold for 'undue harshness'. The judge gave inadequate reasons for concluding that C's case met that threshold. The judge had not explained why she accepted the expertise of the report writer, a trainee educational psychologist, nor why she placed weight on claimed educational difficulties without any formal diagnosis of learning difficulties. It was not open to the judge to conclude that C would face 'very great problems' in Albania in the absence of any evidence of what services were available to him there.
19. Mr Kerr argued in his skeleton and amplified in submissions that the respondent's grounds raise no more than mere disagreement with the Judge's decision. He submits that the judge correctly identified the test of undue harshness as set out in HA (Iraq) [2022] UKSC 22 and correctly applied it to the facts. He invites us to treat the summary at [24] that "*Professionals have identified C as having a lack of confidence and self-esteem, literacy delay, emotional dysregulation, and social communication difficulties*" as a finding that the professionals involved are correct, which then supports the judge's reasoning at [39] to [49].
20. In reply, Ms McKenzie argued that over and above a failure correctly to apply the undue harshness test, there is insufficient reasoning for a proper "Stay and Go" analysis in respect of C.

Decision

21. Having referenced HA (Iraq) [2022] UKSC 22 at [13], the judge correctly reminded herself at [49] of her decision that “harsh” denotes something “severe” or “bleak”; and “unduly” raises that threshold still further.
22. However, the judge also said at [15] that the parties’ oral evidence is supported by “credible documentary evidence”. While we have no reason to consider the documentary evidence to be factually inaccurate, we do not consider it to be capable of carrying much weight as a whole. We turn first to the professional input that C has had.
23. By writing at [40] “A plan and interventions are in place for C, he is “in the system” should he need further input from CAHMS...” the judge appeared to accept A’s assurance that there had been CAHMS involvement. However, an email from C’s school dated 18.06.24 confirms that “CAHMS have said that he does not meet the threshold for them yet, but suggest a referral to the Educational Wellbeing Service”. We asked Mr Kerr for his observations on that apparent discrepancy: he submitted that the email showed that professionals were involved with C, even if CAHMS was not yet directly involved. Our reading of [40] however is that the judge placed weight on C having to, as she put it, “restart an assessment process”, and did consider that CAHMS-work was one of the services that would need to be restarted. The latter was a finding which was not reasonably open to the judge.
24. We note that while C has been identified as having special educational needs, he has no formal diagnosis. C does have an Individualised Educational Plan (“the plan”), which lists as its areas of concern: emotional regulation, independence; reading and writing. As to the latter concern, we note that contrary to A’s evidence as recorded at [29] of the decision, C’s first language is said in the plan to be Albanian.
25. The plan also records that C is being seen by an educational psychologist. The judge was provided with a report dated 25.03.24 by Rachel Rabello (“the report”). However, she is a trainee educational psychologist, and no CV has been supplied, either for her or her supervisor. We agree with Ms McKenzie that any reasonable judge should be cautious in placing too much weight on a trainee’s report without knowing further how she came to be involved, what evidence there was of Ms Rabello’s experience, or why she was considered by C’s school to be the appropriate expert for C. Information from C’s teachers is mediated only through the report and the plan: these two documents are, in effect, the sum of the professional evidence. But in any event, as judge Behan herself noted at [40], there is no evidence to support the appellant’s contention that the support Ms Rabello recommends is unavailable, or even not readily available, in Albania. The judge’s reasoning at [41] exposes the crux of the evidential gap:
- “I do not have a report from a professional that assesses the effect on C of moving to Albania or staying in the UK without his father however I consider [I] have sufficient information from his teachers as reported by Ms Rabello, Ms Rabello’s conclusions, and from his parents from which I may make a reasonable assessment of the likely effect on C.”*
26. The point is that none of the professional evidence considers the effect of C moving to Albania, or of C remaining in the UK without the appellant. Indeed,

there is no more general prognosis for whether the assistance suggested by the report is likely to assist C, or whether the strategies set out in the plan have improved C's situation overall. There is no confirmation of whether that assistance would be available in Albania or not. We do not, therefore, consider that the professional evidence, even taken at its height, is capable of demonstrating that the appellant's deportation, with or without C, would be unduly harsh. In any event, we agree with Ms McKenzie that without a CV or information as to how Ms Rabello became involved with C, no reasonable judge could place any significant weight on her report. We turn to the rest of the evidence.

27. Although not addressed in submissions before us, we have seen from the bundle that the appellant also relied upon two letters in support. One, written by a neighbour named Jacqueline Humphries and dated 21 June 2024, mentions that C has "*special needs*", but does not say what these are. The other, written by a family friend named Sabit Krasniqi and dated 26 June 2024, states that the appellant "*has been supportive of helping [C] through this stressful time trying to get a diagnosis*". Again, there is no detail about what C's special needs are, or specifics as to how the appellant ameliorates them. This evidence would not on any reasonable view take the case further.

28. We therefore turn finally to the parents' evidence of C's difficulties and, specifically, A's input into assuaging these difficulties. The judge records the following:

"I am satisfied...He plays a full role in domestic life and in parenting his children, for example when his work allows, he will do school runs. He... eats with the family, helps C when he has an episode of dysregulation, helps him with his homework and spends time with him playing Lego figures." [21]

"Ms A said the appellant is "heartbroken" about C's difficulties and C sees the appellant as "his safety blanket". Every day they go through the book that the school sends home about C and the appellant sits with C to do home work while Ms A does house work" [30]

"About the effect on C if the appellant were deported Ms A said, "if his dad does not come home early enough to see him he wakes up and asks where daddy is. It would break his heart"" [31]

29. We accept that it was open to the judge to find at [44] that the appellant and A are "*supportive and interested parents*". However, we cannot find anything in the decision that justifies her conclusion that the appellant's deportation would be unduly harsh in the context of C's additional needs; and the support that the appellant provides to C.

30. The appellant argues that C's extra needs go beyond education; at [25] to [27] the judge records what he and A described.

"...C finds it difficult to express himself, sometimes he will pull his hair and he and Ms A will try to calm him down. He has episodes of dysregulation more often at school than at home...we don't give him a reason to go into a panic at home." [25]

“Ms A describes the sensory difficulties that C has, these relate to clothing, in particular socks, and also to food. She told me C will be triggered by several things by “triggered” she means he seizes up and “he will refuse to do anything, it takes a very long time to encourage him to do what he needs to do, what we are trying to do as a family.” [26]

31. But considering the “Stay and Go” scenarios separately, we can only see in the decision a single example of why C could not go to Albania at [27]: *“C will not eat the type of chicken nuggets that are available abroad”*. We are not persuaded that the addition of this sole example approaches anywhere near the level of harshness for a reasonable judge to find it to be “unduly” so. Were C to remain in the UK, we cannot see how any reasonable judge could find that A, who is found by the Judge at [37] to be *“robust and capable”* would be incapable of caring for C without the appellant or that it would be unduly harshness for her to do so.
32. Ms McKenzie invited us to find that the decision in respect of C is irrational or perverse; and to preserve findings in respect of A and B. We do so for the reasons given above. It follows that we are satisfied that there is an error of law in the decision that it would be unduly harsh for C were the appellant to be deported.
33. No challenge is made to the judge’s findings that the appellant’s deportation would not be unduly harsh on A or B. Therefore, we set aside the judge’s consideration at [39] onwards allowing the appeal on Article 8 ECHR grounds. As for the earlier paragraphs, no challenge was made to the judge’s actual findings therein and so we preserve them, although we record that paragraphs [23] to [38] of the Decision merely recite the evidence before the judge and make no findings per se.

Notice of Decision

- 1. The judge’s decision involved the making of an error of law.**
- 2. We set aside [39] to [50] of the Decision and the allowing of the appeal on Article 8 ECHR grounds.**
- 3. We preserve up to [38] of the Decision, including the conclusions at [36] to [38] that it would not be unduly harsh for A or B to remain in the UK or travel to Albania, were the appellant to live in Albania.**
- 4. We remit the matter to the First-tier Tribunal to be heard by a different judge to decide the sole issue of whether the consequences of deportation would be unduly harsh on C.**

D. Merrigan

Judge of the Upper Tribunal
Immigration and Asylum Chamber

17 December 2024