Upper Tribunal

(Immigration and Asylum Chamber) **Appeal number: HU/16822/2017 (P)**

THE IMMIGRATION ACTS

Heard Remotely at Manchester CJC	**Decisions & Reasons Promulgated**
On 4 September 2020	**On 10 September 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MS

(ANONYMITY ORDER MADE)

Respondent

DECISION AND REASONS (P)

For the appellant: Mr D Clarke, Senior Presenting Officer

For the Respondent: Mr D Bazini, instructed by Gulbenkian Andonian Solicitors

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. At the conclusion of the hearing I reserved my decisions and reasons, which I now give. The order made is described at the end of these reasons.

1. For the purposes of this decision, to avoid confusion, I have referred below to the parties as they were before the First-tier Tribunal.

2. The appellant is a citizen of Kosovo with date of birth given at 8.11.81. He is married to a British citizen (born in Kosovo), and is the father of their child, now aged 7, and step-father to his wife's child from a previous relationship, now aged 13. Both children are British citizens. It is accepted that he has a genuine and subsisting relationship with his partner and both children.

Chronology and Relevant Background

3. In August 2015 the respondent decided to deport the appellant, relying on the appellant's criminality, including not only offences committed in the UK between 2011 and 2015 but also his conviction in Pristina, Kosovo, for an offence of attempted murder, for which he was sentenced to a term of imprisonment of 3 years and 6 months, so that his deportation was considered to be conducive to the public good and therefore he was liable to deportation pursuant to s3(5)(a) of the 1971 Act. It should be noted that at the First-tier Tribunal appeal hearing the appellant did not accept that he had been convicted in Kosovo.

4. In June 2016 the respondent refused the appellant's human rights claim made against deportation, relying on his criminal offending behaviour, by then including his further criminal behaviour, including the most recent conviction and sentence in March 2016 for three offences: burglary of commercial premises, possession of a prohibited weapon (CS gas), and commission of an offence during the currency of a suspended sentence (offences from 2015 of driving whilst disqualified and uninsured, and taking a vehicle without consent). These last offences were committed whilst the appellant was the subject of a suspended sentence and after being served on 17.8.15 with the decision to make a deportation order against him. The sentencing exercise before the Crown Court in resulted in a cumulative term of 15 months' immediate imprisonment. However, it is significant to the preliminary point raised by Mr Bazini (set out below) to note that the total of 15 months imprisonment comprised consecutive sentences for the three offences, being 8 months, 4 months, and 3 months.

5. The decision refusing and certifying the appellant's human rights claim made in June 2016 was withdrawn because of the Kiarie & Byndloss ruling and remade on 8.12.17. At paragraph [19] of the decision, under the heading of 'Reasons for Deportation', the respondent relied on the appellant's Kosovo conviction for attempted murder, together with his subsequent convictions in

the UK, ranging between 2011 and 2016, including the three offences which resulted in the total term of 15 months' imprisonment.

6. At [24] of the respondent's decision, the respondent stated, "*Your deportation is conducive to the public good and in the public interest because you have been convicted of an offence for which you have been sentenced to a period of imprisonment of less than four years but at least 12 months. Therefore, in accordance with paragraph 398 of the Immigration Rules, the public interest requires your deportation unless an exception to deportation applies*." In the light of that statement, it is not clear the extent to which the foreign conviction was relied by the respondent. References to the appellant's offending behaviour in some of the subsequent paragraphs of that decision, including at paragraphs [68] and [69], refer only to the UK criminal convictions. In considering whether there were very compelling circumstances at paragraph [73] of the decision the respondent stated that there was a significant public interest in deporting the appellant, relying on a list of his convictions, beginning with the Kosovo conviction for attempted murder. Nevertheless, at [74] the respondent stated that "notwithstanding" the conviction in Kosovo, the UK convictions demonstrated a blatant disregard for the laws of the UK and showed no inclination to curb his offending, and that his actions were not those of a person predisposed to rehabilitation. The extent of reliance on the foreign conviction in the decision of the respondent is relevant to the preliminary argument addressed below, because the First-tier Tribunal judge declined to take it into account, concluding at [5] of the decision that the respondent had failed to produce evidence of the conviction despite earlier directions to do so.

7. On 27.9.19, the First-tier Tribunal allowed on human rights grounds the appellant's appeal against the respondent's reasons for deportation decision of 8.12.17. The appeal was allowed on the basis that it would be unduly harsh for the elder child, then aged 12, to leave the UK with the appellant, assessing her best interests were to remain in the UK. The judge concluded at [20] that those best interests "just tips in the balance of allowing the appellant to remain the UK."

8. The respondent sought to appeal the decision of the First-tier Tribunal to the Upper Tribunal. Permission was refused by the First-tier Tribunal on 18.10.19. However, when the application was renewed to the Upper Tribunal on 15.11.19, a week out of time, Upper Tribunal Judge Hanson extended time and granted permission on 31.12.18.

9. The appeal to the Upper Tribunal was originally listed for a panel hearing on 26.2.19. However, the appellant raised argument at the hearing that the grant of permission or more particularly the extension of time under Rules 5(3)(a) and 21 of the Tribunal Procedure (Upper Tribunal) Rules 2008, was unlawful. Although counsel for the appellant urged the panel to reconstitute itself to hear a challenge by way of judicial review, that was not possible as the Upper Tribunal cannot judicially review itself. The panel concluded that the statutory appeal could not proceed until this preliminary issue was decision. The appeal

was, therefore, adjourned with the understanding that the appellant would apply to the Administrative Court for permission to pursue judicial review and keep the Upper Tribunal informed of progress.

10. The matter was further considered by Upper Tribunal Judge Norton-Taylor on 8.3.19, 15.3.19. In the absence of notification of resolution or progress in relation to the judicial review application, the matter was listed for a Case Management Review. However, on 3.12.19 Judge Norton-Taylor considered that no useful purpose would be served by holding an oral CMR until a decision on permission had been made by the Administrative Court. Further directions were issued requiring the appellant to provide an update on the judicial review proceedings as soon as there was any material change, and in any event to provide a confirmation of progress no later than 6.1.20.

11. On 15.10.19, permission to apply for judicial review was refused on the papers by the Administrative Court, but followed by an application to renew at an oral hearing, which took place 11.12.19. However, permission was again refused.

12. On 18.12.19, the appellant filed an application with the Court of Appeal for permission to appeal the decision of 11.12.19 refusing permission for judicial review.

13. On 6.1.20, the appellant sent the Upper Tribunal a written progress report, detailing the above stages and confirming that the application to the Court of Appeal remained outstanding without any indication of date of resolution.

14. By letter to the Upper Tribunal dated 4.7.20, the appellant's representatives confirmed that the application for permission to appeal to the Court of Appeal had been refused on the basis that there was no right to renew an application for permission to appeal to the Court of Appeal at an oral hearing and there was no avenue for the appellant to make onward appeal challenge to the Supreme Court. In the premises, the challenge to Upper Tribunal Judge Hanson's decision to extend time had come to an end, so that the statutory appeal to the Upper Tribunal could proceed in due course. In consequence, the Upper Tribunal directed the matter be set down for a remote hearing of the error of law issue.

The Judge's Findings

15. As stated above, for the reasons set out at [5] of the decision, primarily a lack of evidence, the judge declined to rely on the appellant's alleged conviction in Kosovo for attempted murder.

16. The judge made a number of findings adverse to the appellant. Despite his conviction in the OASYS report it is recorded that the appellant denied being present at either burglary in his record and did not present as currently motivated to address his offending behaviour. The judge concluded at [17] that at the date of the OASYS assessment in June 2017 the appellant "sought to minimise his offending behaviour, deny involvement or culpability and

provide untrue and unsupported explanations for offences." At [18] the judge assessed the evidence of the appellant and his partner as not credible, pointing out in particular the discrepancy between her claims to work all hours and the limited income declared to HMRC. The judge found she was continuing to receive tax credits for which she had made a false claim.

17. Although the appellant apologised for his crimes, at [19] the judge found his evidence to be "*characterised by an impatient attitude, a failure to accept and recognise the seriousness of his offences and an attempt to minimise his role at every opportunity*."

18. The judge considered the best interests of the children at [20] of the decision, noting that the respondent accepted that it would be harsh to expect the elder child to relocate to Kosovo. The judge found that it would be "*very difficult*" for her to move home and school as she did not speak other than English and was settled in secondary school in the UK and all her friends, family and ties were in the UK. The judge concluded that it would unduly harsh for this child to move to Kosovo. Within [20] the judge found that given that the younger child was then only 5 years old, she would be more adaptable and although it would be a difficult transition, it would not be unduly harsh for this younger child to relocate to Kosovo.

19. At [23] the judge set out the relevant considerations required of the Tribunal, though it is not clear what particular findings were made in respect of these considerations.

20. At [24] the judge accepted that offences fell towards the less serious end of the scale and took into account that it related to three separate offences. He had been in the UK for some 10 years and his marriage had lasted more than 10 years. He could not be said to have lost his ties to Kosovo and had some family there. However, he had not committed any further offences and the judge considered his past convictions as petty offences with only one suspended sentence.

21. Noting that it had already been found that it would be unduly harsh for the elder child to leave the UK as a 12-year-old British child, and that her best interests were to remain in the UK, the judge then stated, "This, of course, is not decisive but I must accord it significant weight. There is a public interest in deporting foreign criminals but when weighing all the other factors in this case I find that it just tips in the balance of allowing the appellant to remain in the UK."

The Grounds of Appeal

22. In summary, the primary ground of appeal is that the First-tier Tribunal made a material misdirection in law and failed to provide adequate reasons. The primary complaint is that whilst the judge found that it would be unduly harsh for the elder child to leave the UK, is submitted that the First-tier Tribunal omitted to consider the second limb of the unduly harsh test under paragraph

399(a)(ii)(b), as mirrored in s117C(5) of the 2002 Act, to determine whether it would also be unduly harsh for the child to remain in the UK without the appellant. The judge did not consider whether separation of any kind would amount to unduly harsh consequences of deportation. Mr Clarke accepted that in the light of KO (Nigeria) [2018] UKSC 53, the grounds were a little out of date in respect of their reliance on MM (Uganda) [2016] EWCA Civ 450.

23. The grounds argue that although the evidence of the appellant and his partner was found to lack credibility, this and the other adverse findings were not incorporated into the proportionality balancing exercise.

24. Complaint is also made that the judge failed to make a finding in relation to the overseas conviction, in respect of which the appellant was allegedly imprisoned in Kosovo for attempted murder. However, this is patently wrong as at [5] of the decision the judge gave reasons for not being able to rely on the conviction for attempted murder, as the respondent had failed to produce evidence of it. Mr Clarke did not pursue this ground.

The Grant of Permission

25. Permission to appeal was granted by Upper Tribunal Judge Hanson on the basis that it was considered arguable that the judge erred in failing "*to consider the second thread of the requisite test of considering whether it will be unduly harsh for the family to remain in the United Kingdom if the appellant is deported*."

26. Judge Hanson also considered it arguable that "*the proportionality assessment is incomplete as it was necessary for the Judge to clearly establish whether the appellant is able to meet the requirements of the Immigration Rules first and if not, why not. If it was not found unduly harsh for the family to remain in the United Kingdom whilst the appellant was removed the respondent's decision could be said to be arguably proportionate*."

Preliminary Issue

27. At the outset of the hearing, Mr Bazini raised an entirely new issue, not the subject of any of the grounds of appeal, and despite the absence of any cross-appeal. Mr Bazini, who represented the appellant at the First-tier Tribunal appeal hearing, also confirmed that he did not raise the issue outlined below at the First-tier Tribunal.

28. As well as raising this issue at this very late stage of proceedings, without notice to the respondent, not even in a Rule 24 reply, Mr Bazini did not see fit to give any advance notice to the Tribunal or submit a skeleton argument to assist the Tribunal. Only after close of office bours in the evening of the day before the hearing, unfortunately not forwarded to me until shortly before the start of the 2:30pm hearing, the appellant's representatives sent the Upper Tribunal a series of emails attaching, without any explanation, several documents and copies of case authorities on which Mr Bazini proceeded to rely at the hearing before me in making his preliminary point.

29. Given the unacceptably late raising of this preliminary issue, on more than one occasion I enquired of Mr Clarke whether he needed time to consider or take instructions on the argument raised by Mr Bazini, or whether he wished to make an application to adjourn. However, Mr Clarke was content to proceed and addressed the preliminary issue in his various submissions.

30. The preliminary point raised by Mr Bazini was that, whilst it is accepted that the judge failed to conduct the second limb of the unduly harsh assessment, for the reasons relied on by Mr Bazini, the respondent cannot show a material error of law in the decision of the First-tier Tribunal. The substance of the reasoning for this submission can be summarises as follows.

31. It is clear from [24] of the refusal decision that the respondent relied on the automatic deportation provisions for a 'foreign criminal' under s32 of the UK Borders Act 2007, on the basis that the appellant had been sentenced to a period of imprisonment of at least 12 months. However, Mr Bazini argued that as the judge did not accept the Kosovo conviction and as s38(1)(b) of that Act, mirrored in s117D(4) of the 2002 Act, does not include a person sentenced to a period of imprisonment of at least 12 months '*only by virtue of being sentenced to consecutive sentences amounting in aggregate to more than 12 months*,' the appellant did not fall within the definition of a 'foreign criminal' and is not, therefore, subject to the automatic deportation provisions.

32. Mr Bazini drew my attention to the recent decision of the Upper Tribunal in SC (paras A398-399D: 'foreign criminal': procedure) Albania [2020] UKUT 00187 (IAC), where the panel held that the expression 'foreign criminal' in paragraph A398 is to be construed by reference to the definition of that expression in section 117D of the 2002 Act. The panel also held that a foreign national who has been convicted outside the UK of an offence is not, by reason of that conviction, a 'foreign criminal' for the purposes of paragraphs A398-399D of the Rules, because s117D(2) requires the conviction to be in the UK. It follows that argument about the Kosovo conviction is irrelevant to the issue as to whether the appellant is a 'foreign criminal' for the purposes of application of the unduly harsh tests under paragraph 399.

33. In response to Mr Bazini's submissions on the preliminary point, whilst accepting that aggregated sentences cannot be relied on to define a person as a 'foreign criminal', Mr Clarke submitted that Mr Bazini's argument was misconceived because the respondent's case at the First-tier Tribunal was advanced on the basis that the appellant was a persistent offender under s117D(2)(c)(iii), an alternative qualification for a 'foreign criminal'. Mr Clarke referred me to [15] of the First-tier Tribunal decision where the judge stated, "*The respondent's case is that the appellant has a long and persistent history of offending*." Mr Clarke also pointed out, as noted above, that this issue now advanced was not taken by Mr Bazini at the First-tier Tribunal, who, to the contrary, argued that deportation would be unduly harsh and that the offending was towards the lower end of the scale, as recorded by the First-tier Tribunal Judge at [14] of the decision. Mr Clarke maintained that at no stage

previously had the appellant argued that he fell outside the definition of a 'foreign criminal'.

34. In response, Mr Bazini submitted that the respondent's decision which was the subject of the appeal to the First-tier Tribunal never asserted a reliance on the appellant being a 'persistent offender'. He further argued that the respondent would have had to make a specific decision that the appellant's deportation is conducive to the public good and in the public interest because "*in the view of the Secretary of State… they are a persistent offender who shows a particular disregard for the law*,' pursuant to paragraph 398(c) of the Immigration Rules. Mr Bazini stated that no part of the refusal decision relied on 398(c), and pointed out that the decision to make a deportation order in 2015 was triggered by the appellant's alleged Kosovo conviction. However, for the reasons set out above, it is not entirely clear which convictions the respondent has relied on, a conundrum made more difficult by the passage of time and supervening events since the decision to deport was originally made.

35. I do not accept Mr Clarke's argument, relying on [15] of the decision to assert that the respondent put its case at the First-tier Tribunal appeal hearing on the basis of the appellant being a persistent offender. I am satisfied that the judge's statement at [15], referred to above, was not a characterisation of the respondent's case on appeal as being a reliance on the 'persistent offender' criteria but rather the incidental but relevant argument that as appellant had a long and persistent history of offending, there was a risk of further offending if he was allowed to remain. To that extent, Mr Clarke's argument appears to be clutching at straws.

36. As the 'particular disregard for the law' phrase is not found within the statutory definition of a 'foreign criminal' at s117D(2)(c)(iii) or s32, I am not satisfied that Mr Bazini is correct in arguing that to qualify as a 'foreign criminal' it has to be shown that a 'persistent offender' has a 'particular disregard for the law', or that the respondent has to make a specific decision on that basis to be able to rely on that reason for deportation. Nevertheless, I note that the reference to that phrase at 398(c) of the Immigration Rules is an additional trigger for consideration of paragraphs 399 and 399A, including the 'unduly harsh' test. There may be a lacuna in the difference. However the point is academic, as I agree with Mr Bazini's submission that the 'persistent offender' qualification for a 'foreign criminal' was not what the respondent relied on either in making the decision to deport in 2015 or the decision in 2017 to refuse the appellant's human rights claim against deportation, even though reference was made to the appellant's "*blatant disregard for the laws of the United Kingdom*". Neither was it the basis upon which the respondent put its case at the First-tier Tribunal. Of course, it would remain open to the respondent to make a further decision on the basis of the appellant being a '*persistent offender who shows a particular disregard for the law*,' as that is an interpretation open on the appellant's poor history of criminal offending, including during the operational period of a suspended sentence.

37. Mr Clarke further argued that the appeal was an appeal against a decision on a human rights claim and whether or not the respondent's decision was flawed, it was not open to the First-tier Tribunal, or the Upper Tribunal, to allow the appeal on the basis that the decision of the respondent was made in error of law. He also pointed out that this was not raised as a ground of appeal to the First-tier Tribunal. The issue for the First-tier Tribunal, submitted Mr Clarke, was whether the appellant's deportation breached the Human Rights Act. He further submitted that s117A(2) required the judge in considering the public interest question to have regard to the considerations in s117C. It was, therefore, not determinative, submitted Mr Clarke, that the appellant did not meet the 'foreign criminal' definition, or such a finding was not open to the judge, because the judge was considering a human rights appeal and had to consider the factors under s117A-D in order to make an article 8-compliant decision, including the undue harshness exception 2. However, as Mr Bazini quickly pointed out, s117A(2)(b) relates only to a 'foreign criminal' and if the appellant does not fall within the definition of a 'foreign criminal' the 'unduly harsh' does not apply.

38. Mr Bazini made the further argument in submissions that in the light of paragraph [60] of the very recent decision of the Court of Appeal in HA (Iraq) [2020] EWCA Civ 1176, there was no need for the First-tier Tribunal Judge to consider the exceptions, "*where a tribunal is satisfied that there is a combination of circumstances, including but not limited to the harsh effect of the appellant's deportation on his family, which together constitute very compelling reasons sufficient to outweigh the strong public interest in deportation, but where it may be debatable whether the effect on the family taken on its own (as section 117C(5) requires) is unduly harsh*." However, that decision is not this case, in which the judge did not find very compelling circumstances but allowed the appeal on the basis that it would be unduly harsh to expect the elder child to go to Kosovo, which finding was considered to narrowly tipped the proportionality balance in favour of the appellant. In the circumstances I do not accept this part of Mr Bazini's wide-ranging arguments. However, in light of my findings, the point is academic.

39. It is not for this tribunal to make a finding that the respondent's decision or decisions were not in accordance with the law, or that the respondent was wrong to rely on the Kosovo conviction in the refusal decision. Contrary to the grounds, the First-tier Tribunal judge gave cogent reasons for not accepting and taking into account that conviction, which in any event, applying SC (Albania), could not render the appellant a 'foreign criminal'.

40. I have also found that the respondent did not put its case on the basis of the appellant being a 'persistent offender.' Even without the application of SC (Albania), which had not been decided at the date of the First-tier Tribunal decision, it necessarily follows that once the judge rejected the Kosovo conviction for an absence of evidence, the appellant could no longer fall within the definition of a 'foreign criminal', as he had no qualifying sentence of 12

months or more. It also follows that the automatic deportation provisions of statute or the Rules did not apply. On that basis, the 'unduly harsh' tests of 399 or s117C(5) did not need to be applied or the exceptions met to justify allowing the appeal.

41. The issue before the First-tier Tribunal was whether the appellant's deportation to Kosovo would involve a breach of article 8 ECHR. If the appellant did not meet the definition of a foreign criminal', as stated above, the considerations in s117C could not be applied to him. Neither could the considerations under paragraphs 399 and 399A apply. Further, in SC (Albania), the Upper Tribunal declined to follow the wider interpretation in Andell (foreign criminal – para 398) [2018] UKUT 198 (IAC), which had held that the relevant provisions of the Immigration Rules include not only foreign criminals as defined in Part 5 of the 2002 Act but also other individuals who, in the respondent's view, are liable to deportation because of their criminality and/or offending behaviour. It follows that the deportation provisions only apply to a person qualifying as a 'foreign criminal' as defined by s117D(2)(c).

42. Had the judge accepted the Kosovo conviction, even though it would not have rendered the appellant a 'foreign criminal' it would have been a relevant and powerful public interest factor favouring deportation to be taken into account in the proportionality balancing exercise. However, as stated above, I accept that the Judge was entitled not to rely on it, for failure of the respondent to produce satisfactory evidence of it. The only course properly open to the judge, had it been realised that the 'foreign criminal' provisions did not apply, would have been to conduct an article 8 ECHR proportionality balancing exercise adopting the Hesham Ali 'balance sheet' approach in which the imperative of a stronger pubic interest in deporting either a 'foreign criminal' or a person with a foreign conviction for attempted murder, did not apply.

43. Whilst the 'unduly harsh' test was clearly flawed as it failed to consider whether it would be unduly harsh for the children and/or the appellant's partner to remain in the UK without him, the finding that it would be unduly harsh for the elder child to go to Kosovo was certainly relevant to that balancing exercise, as was the appellant's offending behaviour and other factors arising from the UK conviction history, including the issue of rehabilitation. The judge was also required to have regard all other relevant factors, including the best interests of the children, and the considerations in section 117B of the Nationality, Immigration and Asylum Act 2002. I am satisfied that in light of the matters addressed above, the decision discloses an adequate proportionality balancing exercise at [24] of the decision.

44. It follows that in the peculiar circumstances of this case, I cannot find that the errors of law identified by the respondent could or would have led to any different outcome to the appeal, so that those errors cannot be material.

45. In the circumstances and for the reasons set out above, I find no material error of law in the decision of the First-tier Tribunal such as to require it to be set aside.

Decision

The appeal of the Secretary of State to the Upper Tribunal is dismissed.

The decision of the First-tier Tribunal stands so that the appeal of the appellant remains allowed on human rights grounds.

I make no order for costs.

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 7 September 2020

Anonymity Direction

I am satisfied, having had regard to the guidance in the Presidential Guidance Note No 1 of 2013: Anonymity Orders, that it would be appropriate to make an order in accordance with Rules 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 in the following terms:

"*Unless and until a tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.*"

Signed: *DMW Pickup*

Upper Tribunal Judge Pickup

Date: 7 September 2020