IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001157

First-tier Tribunal No: HU/54088/2023
LH/04038/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st October 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

BLEDAR ISMAILAJ
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R. Halim, instructed by M Reale Solicitors
For the Respondent: Mr T. Lindsay, Senior Home Office Presenting Officer

Heard at Field House on 07 May 2024

DECISION AND REASONS

1. The Upper Tribunal has been conscious of, and apologises for, the delay in promulgating this decision. The delay was in part caused by an unavoidable and fairly lengthy period of fitness absence of one of the panel members, which was followed by a phased return to work.

2. The appellant appealed the respondent's decision dated 07 March 2023 (served 08 March 2023) to refuse a human rights claim in the context of deportation proceedings.

First-tier Tribunal appeal

3. First-tier Tribunal Judge Rodger ('the judge') dismissed the appeal in a decision sent on 10 January 2024. The judge summarised the background [3]-[9]. The appellant entered the UK illegally on an unknown date. He claimed asylum on 02 September 2014, but the claim was treated as withdrawn when he was recorded as an absconder. On 12 October 2017 the appellant was convicted of possession with intent to supply a controlled Class A drug (cocaine) and other offences relating to identity documents and driving a vehicle without insurance or a licence. The appellant was sentenced to 2 years and 3 months' imprisonment. A deportation order was made on 25 January 2018. The appellant did not oppose deportation and was removed from the UK on 23 April 2018. We note that the reasons for deportation letter of the same date made clear that a deportation order invalidates any leave to enter or remain and prohibited the appellant from re-entering the UK while the order is in force.

4. The judge noted that the appellant claimed to have entered the UK illegally for a second time in May 2019. He started a relationship with a British citizen. On 24 September 2021, their son was born. On 03 February 2022 he applied for leave to remain as a partner. On 07 March 2023 the respondent refused the application on human rights grounds.

5. It was accepted that the appellant could not meet the requirements of the private life exception to deportation contained in section 117C(4) of the Nationality, Immigration and Asylum Act 2002 ('NIAA 2002') [15]. The judge identified that the key issue in the appeal was whether the effect of deportation would be 'unduly harsh' on the appellant's partner and child with reference to section 117C(5) NIAA 2002 [24].

6. The judge gave careful consideration to the evidence relating to the appellant's partner and child before concluding that the effect of deportation would not be 'unduly harsh' within the meaning of the relevant law [24]-[25]. The judge considered the concerns raised by the appellant's partner about relocation to Albania (the 'go scenario'), and accepted that, as a matter of fact, she would not relocate [27]-[28]. However, the judge concluded that, despite the fact that the partner and child did not want to relocate, it would not be unduly harsh for them to do so. The appellant had supportive family members remaining in Albania. Both the appellant and his partner were fit enough to work. The appellant's partner and child could learn the language. Their son was young enough to adapt to life in Albania. The appellant's partner and child would be free to come and go to the UK.

7. The judge went on to consider the effect of deportation if the appellant's partner and child remained in the UK (the 'stay scenario'). In considering this element, the judge took into account the fact that the appellant's partner had entered into the relationship in the knowledge that he had a criminal conviction, had previously been deported from the UK, and had re-entered the UK illegally [30]. They continued the relationship in the knowledge that there was no expectation that the appellant would be able to remain in the UK unless he was granted leave to remain. The judge found that the appellant's partner might consider it harsh if he could not remain in the UK, but it would not be unduly harsh [31]. She went on to say:

> '31. … She may not enjoy being separated from the Appellant but there is no persuasive evidence that the effect on her will be one over and above the

> normal emotional reaction to being separated from a loved one due to deportation. There is no persuasive evidence that she would not be able to cope with being a single parent or with being able to work and continue to provide for her son… Further, she has family close by and there is no persuasive evidence that she would be destitute or would suffer any mental health condition such that she would not be able to care for her son in the event that the appellant were to be deported.'

8. The judge went on to remind herself of the stringent nature of the test [32] before concluding that the effect of deportation would not be 'unduly harsh' on the appellant's partner [33].

9. The judge then considered the best interests of the appellant's child. She noted that he was only 2 years old and was in a close and loving relationship with both parents. For this reason, she concluded that it was in his interests to be brought up with both parents. However, she concluded that the parents would do whatever they considered to be in his best interests if the appellant were to be deported to Albania. There was no evidence to suggest that there would be any safeguarding concerns if his mother chose to remain to bring him up in the UK [34]. As noted above, the judge had already found that it would not be unduly harsh for the family to relocate to Albania if they wished to remain together.

10. The judge went on to consider the effect on the child if he were to be brought up by his mother in the UK [35]-[36]. She accepted that the child would lose the day to day contact with his father and might initially be upset and confused as to where his father had gone. She went on to say:

> '35. … However, he is a young toddler and he will remain in the care of his mother and given his young age and ongoing parental support, I am satisfied that he will be able to adapt to change in circumstances and change in his family unit and that he would be able to continue to benefit from daily remote contact with the Appellant and from the Appellant's support, advice and assistance through telephone calls and facetime calls in between his visits to him in Albania or them meeting up in countries outside the UK as facilitated by his parents. Their son is not likely to lose the love, support and devotion of his father and given that there is no evidence that his reaction to being absent from him would be anything other or more severe than one would expect for a very young child separated from his father, I am not able to find that it would be unduly harsh on him to remain in the UK in the care of his mother if the Appellant is deported to Albania.'

11. In her further assessment of the situation that the child might face, the judge took into account the fact that there was no evidence to suggest that the appellant's partner could not work and support the child if he were to be deported. The child had the benefit of extended family members in the UK. Whilst she had sympathy with the situation that the appellant's partner found herself in, she concluded that their situation did not meet the elevated threshold to be unduly harsh [24]-[25].

12. The judge noted that no submissions were made in relation to the alternative test of 'very compelling circumstances' for the purpose of section 117C(6) NIAA 2002 [37]. Nevertheless, she went on to consider the weight that must be placed on the public interest in deportation [38]-[39]. She considered the appellant's circumstances, including the fact that he re-entered the UK illegally in breach of a deportation order, and his family life with his partner and child. She concluded that even when all the facts were taken into account, the appellant's

circumstances were not such that they outweighed the public interest in deportation [45].

Upper Tribunal appeal

13. The appellant applied for permission to appeal to the Upper Tribunal on the following grounds:

(i) The First-tier Tribunal erred in its assessment of whether the effect of deportation would be 'unduly harsh' on the appellant's child by applying a 'notional comparator' test, which is an approach that was disapproved in *HA (Iraq) v SSHD* [2023] UKSC 22.

(ii) The First-tier Tribunal erred in taking into account the appellant's immigration history in assessing whether the effect of deportation would be 'unduly harsh'.

(iii) The First-tier Tribunal failed to take into account the relevant consideration that the appellant's partner suffers from celiac disease, which was mentioned in oral evidence.

(iv) The First-tier Tribunal failed to take into account the evidence given by the appellant that the economic situation in Albania was dire and that his family members would be unable to support them if they relocated there.

14. We have considered the First-tier Tribunal decision, the documentation that was before the First-tier Tribunal, the grounds of appeal, and the submissions made at the hearing, before coming to a decision in this appeal. It is not necessary to summarise the oral submissions because they are a matter of record, but we will refer to any relevant arguments in our decision.

15. The Supreme Court in *HA (Iraq) v SSHD* [2022] UKSC 22 reiterated that judicial caution and restraint is required when considering whether to set aside a decision of a specialist tribunal. In particular, judges of the specialist tribunal are best placed to make factual findings. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently: see *AH (Sudan) v SSHD* [2007] UKHL 49 and *KM v SSHD* [2021] EWCA Civ 693. Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account: see *MA (Somalia) v SSHD* [2020] UKSC 49. When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out: see *R (Jones) v FTT (SEC)* [2013] UKSC 19. We have kept these considerations in mind when coming to our decision.

Decision and reasons

16. Having considered the arguments made by the parties and the evidence before the Upper Tribunal, we conclude that none of the grounds disclose a material error of law in the First-tier Tribunal decision that would justify setting the decision aside.

17. The first ground argues that the judge erred in paragraphs [31] and [35] of the decision in appearing to apply a 'notional comparator' test i.e. where the degree of harshness is assessed by reference to a comparison with the harshness that would necessarily be involved for any partner or child faced with the deportation of a partner or parent. We can see why the wording used by the judge in those paragraphs might have given rise to this argument, but for the following reasons we conclude that it is insufficient to show that any perceived error would have made any material difference to the outcome of the appeal.

18. First, the findings that are challenged are contained in the judge's alternative findings relating to the 'stay scenario'. The grounds do not seek to challenge the judge's findings relating to the 'go scenario'. The judge found, with reference to the evidence, and with due sympathy for the situation in which the appellant's partner found herself, that it would not be unduly harsh for the family to continue their life together in Albania. The focus of that assessment was on the individual circumstances of this case, taking into account the fact that family support would be available in Albania, that both parents were able to work, that the appellant's partner and child could still visit and spend time in the UK, and that there was no persuasive evidence before her to suggest that the appellant's partner and child could not, in time, adapt to life in Albania.

19. At the hearing, Mr Halim argued that if there was doubt as to whether the judge was considering the correct legal framework, it would affect the findings relating to the 'go scenario' as well. However, none of findings relating to the 'go scenario' relied on any notional comparator, but were entirely focussed on the facts and evidence in this particular case. For this reason, we conclude that even if the first ground disclosed an error of law, it was not one that would have made any material difference to the outcome of the appeal because the appellant would need to show that both the 'stay' and 'go' scenarios were unduly harsh to succeed with reference to the exception contained in section 117C(5) NIAA 2002.

20. Second, it was argued that the judge did not cite the most up to date decision in *HA (Iraq) v SSHD* [2022] UKSC 22. When summarising the legal framework, the judge referred to the Court of Appeal decision in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176. We note that the judge made reference to a specific paragraph in the Court of Appeal decision, which outlined a general proposition that decision makers should take a structured approach to their assessment of Article 8 with reference to the statutory framework. It makes no difference that the judge cited the Court of Appeal decision because she was not citing the case for any particular proposition relating to the assessment of the 'unduly harsh' test.

21. It is not necessary for the purpose of this decision to analyse the decisions in *HA (Iraq)* in any detail, but we note that the essence of the Court of Appeal decision was upheld in the Supreme Court. In particular, the Court of Appeal rejected the notion that the language used in earlier cases created a 'notional comparator'. The Court of Appeal emphasised that it is the effect on the individual child that must be the focus of the assessment [55][157]. For these reasons, the fact that the judge referred to the more out of date decision does not, in terms of the general principles considered, make any material difference.

22. We accept that the wording used by the judge was similar to the wording used by Lord Carnworth in *KO (Nigeria) v SSHD* [2018] UKSC 53 [23]:

> ’23. On the other hand, the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B (6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C (1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. …’

23. It is important to note that the context in which this finding was made was whether the level of harshness required to show that deportation would be unduly harsh should include consideration of the seriousness of the parent’s offence, the Supreme Court found that it should not. When these comments were analysed by the Court of Appeal and Supreme Court in *HA (Iraq)* they were found not to introduce a notional comparator test. The wording simply reflected the elevated nature of the test, which must focus on the effect of deportation on the individual involved.

24. Although the judge’s wording was rather loose, and perhaps inadvisable if it risked a challenge of the kind brought in this appeal, we can see nothing in her surrounding findings to suggest that she did not consider the individual circumstances of the case in anything other than a careful and considered manner.

25. The judge made specific reference to the elevated nature of the threshold at [33]. She acknowledged that separation would be difficult for the appellant’s partner and child. The grounds do not point to any evidence that might have been before the First-tier Tribunal indicating any particular vulnerabilities or other compelling circumstances that might have suggested that the effect of deportation would give rise to an undue level of harshness. In our assessment it was open to the judge to find that the appellant’s partner was likely to be able to support the child adequately in his absence with the assistance of other close family members in the UK. It was also open to her to find that, while the absence of his father was not in the child’s best interests, he could continue to benefit from his father’s love and support through daily contact and visits.

26. We note that Mr Halim did not develop the other three grounds in oral submissions at the hearing. In light of this, we consider that we can deal with them in a relatively brief manner.

27. The second ground argued that the judge erred by taking into account the appellant’s partner’s knowledge of his immigration status in assessing whether the effect of deportation would be unduly harsh. In the circumstances of this case, we do not consider that this an impermissible weighing of the appellant’s offences in the assessment of whether the effects would be unduly harsh. In our assessment it was open to the judge to take into account the fact that, having entered into the relationship in the full knowledge of the precarious nature of the appellant’s circumstances in the UK, his partner could reasonably have expected some of the difficulties that they are now facing. We consider that these findings indicate that the judge was focussing on the partner’s own choices in assessing whether the effect of deportation would be unduly harsh and was not conducting an impermissible balancing exercise relative to the nature of the appellant’s offences. Nor is there any suggestion in the decision that his offences formed any

part of the assessment of whether the effect of deportation would be unduly harsh on the child.

28. The third ground makes a bare statement that the judge failed to consider the partner's evidence that she was concerned about managing her celiac disease if she relocated to Albania. Beyond that bare statement, the ground fails to identify any evidence to indicate that this would be a significant issue for the appellant's partner, nor does it particularise how or why this issue would have made any material difference to the outcome of the appeal.

29. Similarly, the fourth ground fails to particularise how or why an assertion that there are less favourable economic circumstances in Albania would have made any material difference to the outcome. The ground fails to particularise any background or other evidence to suggest that the appellant and his family would face circumstances that might engage the high threshold required to show that relocation as a family might be unduly harsh. It was open to the judge to find that the appellant continued to have family members in Albania who might be able to provide some support. Even if they could not provide complete support, it was open to the judge to find that there was no evidence to suggest that the appellant and his partner could not work to support the family.

30. For the reasons given above, we conclude that the First-tier Tribunal decision did not involve the making of an error on a point of law.

Post-script

31. Although it is not strictly relevant to the arguments raised in the grounds, there is an additional point that we consider is worth recording in this decision. The appellant entered the UK illegally and committed criminal offences at a time when he had no leave to remain. He was deported from the UK in 2018. He entered the UK illegally for a second time, only a year later. The judge found that the appellant and his partner established a family life in the UK in the full knowledge of this history.

32. An application to revoke a deportation order should normally be made from outside the UK. Nevertheless, the decision letter in this case considered whether it was appropriate to revoke the deportation order with reference to the relevant immigration rules. The respondent referred to the fact that the appellant entered in breach of a deportation order when considering whether there were 'very compelling circumstances' to outweigh the public interest. However, the decision letter made no reference to paragraph 399D of the immigration rules, which makes specific provision for the test to be applied in assessing Article 8 in cases involving a breach of a deportation order.

> '399D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances.'

33. Arguably, that rule outlines an even higher threshold than the one considered by the judge, which reflects the additional public interest considerations where a person, in addition to immigration and/or criminal offending, also breaches a deportation order.

Notice of Decision

The First-tier Tribunal decision did not involve the making of a material error of law.

The decision shall stand.

M.Canavan
Judge of the Upper Tribunal
Immigration and Asylum Chamber

21 October 2024