Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08413/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 December 2018	**On 06 February 2019**

Before

THE HONOURABLE MR JUSTICE SWIFT
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE PERKINS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR KAMBER SINAJ
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr J McGirr, Senior Home Office Presenting Officer
For the Respondent: Mr F Farhat, Counsel, instructed by Gulbenkian Andonian Solicitors (Suite 4.1)

DECISION AND REASONS

This is an appeal against a decision of the First-tier Tribunal sent to the parties on 8 September 2018. The First-tier Tribunal allowed Mr Sinaj's appeal against a decision of the Secretary of State taken on 14 March 2018. By that decision, the Secretary of State had refused to revoke a deportation order made in respect of Mr Sinaj on 4 December 2008. This appeal is the Secretary of State's appeal against that decision of the First-tier Tribunal.

Mr Sinaj's immigration history is summarised between paragraphs 2 and 12 of the decision of the First-tier Tribunal.

> "2. The Appellant's immigration history is lengthy. In summary he first entered the UK unlawfully in about 2000 and claimed asylum. His asylum claim was refused but on 30 November 2001 he was granted exceptional leave to remain until 18 January 2003.
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> 3. In July 2003 the Appellant's appeal against the refusal of his asylum claim was refused on asylum and human rights grounds and his appeal rights were exhausted on 14 August 2003.
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> 4. On 8 August 2007 the Appellant was convicted at Maidstone Crown Court of possession of an identity document belonging to someone else. He was sentenced to 11 months' imprisonment and deportation was recommended.
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> 5. On 8 November 2007 the Appellant was removed from the UK under the Facilitated Returns Scheme.
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> 6. On 11 August 2008 the Appellant attempted to enter the UK using a false name and on 26 August 2008 he was convicted at Luton Crown Court of possession of a false identity document. He was sentenced to 15 months' imprisonment and deportation was recommended.
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> 7. On 4 December 2008 the Respondent signed a deportation order and on 18 December 2008 the Appellant was removed to Albania.
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> 8. On 4 February 2011 or at some earlier date the Appellant returned to the UK unlawfully and in breach of the deportation order. He admitted that he had entered the UK in a lorry in August 2010. On 17 February 2011 the Appellant was again returned to Albania.
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> 9. At some time before 2015 the Appellant returned to the UK unlawfully. On 31 December 2014 he met Ms [MK] at a New Year's Eve party.
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> 10. In May 2015 Ms [K] purchased a flat and began living there with the Appellant. On 6 October 2016 he then returned voluntarily to Albania and in April 2017 he married Ms [K] in a civil certificate in Albania.
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> 11. The Appellant then applied for the deportation to be revoked on human rights grounds. He also applied for entry clearance as a spouse. The revocation application was made in the UK whereas the entry clearance application was made to the local Entry Clearance Officer.
>
> 12. On 14 March 2018 the application to revoke the deportation order was refused by the Respondent."

In this appeal the Secretary of State challenges the decision of the First-tier Tribunal on the basis (1) that the judge provided insufficient reasons for his decision; (2) that he took account of irrelevant considerations; and (3) that once the irrelevant considerations are removed from the picture the Judge reached a conclusion that was not reasonably open to him.

The deportation order was made following Mr Sinaj's conviction in August 2008 on a charge of possessing a false identity document. He was sentenced to fifteen months' imprisonment. The application to revoke the deportation order rested on the basis of a relationship formed between Mr. Sinaj and Ms [K]. That relationship started in 2015 when Mr Sinaj was in the United Kingdom unlawfully, in breach of the deportation order. Mr Sinaj and Ms [K] married in Albania in 2017. In July 2017 Mr Sinaj made his application for the deportation order to be revoked.

The correct approach in a case where a decision has been taken not to revoke a deportation order when revocation was requested on Article 8 grounds requires consideration of both the provisions of the Immigration Rules and those of Part 5A of the Nationality, Immigration and Asylum Act 2002.

In the Rules, the Secretary of State's own statement of practice as approved by Parliament, the material provisions are Paragraphs 390, 390A and 391. Paragraph 390 states that an application for revocation of a deportation order is to be considered in the light of all the circumstances including the grounds on which the order was made, the reasons advanced for revocation, the interests of the community, including the maintenance of an effective immigration control and the interests of the applicant, including any compassionate circumstances.

Paragraph 391 provides in cases where deportation follows a conviction and the conviction was for less than four years, that continuation of the deportation order *"will be the proper course"* unless ten years has passed since making the order except for cases where applying that approach would be contrary to the Human Rights Convention.

The reference to the Human Rights Convention leads back to paragraph 390A, which states:

> "Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors."

Paragraphs 398, 399 and 399A are the well-known paragraphs in the Rules under the heading "Deportation and Article 8".

Mr Sinaj's circumstances do fall within paragraph 398, specifically paragraph 398(b), because his deportation followed a criminal conviction and he had been sentenced to imprisonment for a period between twelve months and four years. However, neither paragraph 399 nor 399A applies in this case. Mr. Sinaj's circumstances do not fit any of Paragraphs 399(a) or 399A(a) – (c). Paragraph 399(b) concerns situations where the person deported is in a genuine and subsisting relationship with a UK national, but does not apply to Mr. Sinaj because the subsisting relationship between him and Ms [K] was formed when he was in the UK illegally (see Paragraph 399(b)(i)). Since neither Paragraph 399 or 399A applies, the operative paragraph is Paragraph 390A.

Under that Rule the public interest in maintaining the deportation would only be outweighed by other factors, says the Rule, *"in exceptional circumstances"*.

Next, the provisions of Part 5A of the 2002 Act. Those provisions apply whenever a court or Tribunal is required to consider an argument that in a decision made under the Immigration Act would interfere with Article 8 rights and require the Tribunal to *"have regard"* in cases concerning the deportation of foreign criminals to the considerations listed at section 117C.

Mr Sinaj is a foreign criminal as defined at section 117D(2). That being so, section 117C requires a Tribunal to have regard, first to the fact that deportation of foreign criminals is in the public interest (see subsection (1)), and next, to the fact that the more serious the offence committed by a foreign criminal the greater is the public interest in deportation of the criminal (see subsection (2)). Section 117C(3) then states this:

> "In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies."

For present purposes Exception 1 is not material. Exception 2 is relevant. Exception 2 is in subsection (5):

> "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."

Thus, the overall effect of section 117C is that the Tribunal must have regard to the matters at subsection (1) and subsection (2) and, in a case such as the present case, because subsection (3) applies, must also have regard to the fact that the public interest requires the person's deportation unless, the effect of the deportation would be "unduly harsh" on the partner.

Some might be tempted to conclude that the different ways in which the Rules and Part 5A of the 2002 Act seek to describe the same thing tends to confuse rather than clarify. However, that would be a counsel of despair. The better view is the one stated by Lord Reed in **Ali v Secretary of State for the Home Department [2016] 1 WLR 4799**, that the overall effect of these provisions is that in the context of the deportation decision, the only Article 8 claims that will succeed are those that are very strong indeed. In following this approach, the Tribunal must of course have regard to the criteria at Section 117C of the 2002 Act and must also give proper weight to an assessment by the Secretary of State of an Article 8 claim where the assessment has been made in accordance with the paragraphs in the Immigration Rules we have referred to already. The statutory language is important but the difference between the precise formulations used in the Acts and those used in the Rules is not in itself likely to be a matter of critical significance since both describe the same state of affairs.

We now turn to the present case and look first at the ground of appeal relating to the Tribunal's reasons. The reasons are set out from paragraph 64 of the decision. Paragraphs 69 to 74 considered the application of paragraph 390 of

the Immigration Rules. Next, at paragraph 75 of the decision, there is a statement that paragraphs 390A only applies where a person has not yet been deported and not where an application is made to revoke a deportation order. This statement is made, it is said, on the authority of the decision in this Tribunal in **Smith [2017] UKUT 166 (IAC)**. Having looked at the judgment in that case, it does not seem to us to be authority for the proposition relied on by the judge in this case. However, this is not a material point, since the decision did not turn on it.

From paragraph 81 the Tribunal considered Paragraphs 398, 399(b) and 399A and also of Sections 117A to D of the 2002 Act. At Paragraphs 88 to 89 the Tribunal concluded that neither paragraphs 399 nor 399A applied in the circumstances of the present case. From paragraph 90, there is consideration of the application of Paragraph 391 of the Immigration Rules and the human rights exception contained in that Paragraph to the usual position that where a sentence of imprisonment has been imposed that is for less than four years a deportation order would normally be maintained for a period of ten years. The Tribunal undertook a free-ranging consideration of whether the decision to maintain the deportation order in the face of Mr Sinaj's Article 8 rights was a justified decision. It appears that this was an exercise undertaken by the judge outside the Immigration Rules, see paragraph 97.

At paragraph 113 the judge directed himself by reference to Part 5A of the 2002 Act. Then follow what seem to me to be the critical paragraphs of the judgment, paragraphs 120 to 125.

> "120. Section 117C(4) does not apply but (5) is engaged in this case because of the relationship with Ms [K]. The words 'unduly harsh' need to be considered.
>
> 121. I must strike a fair and proper balance between the public interest and the private interests of the Appellant and Ms [K].
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> 122. The public interest is strong in this case and can only be outweighed by very compelling circumstances.
>
> 123. The two principal factors which weight in favour of the public interest are the breaches of the deportation order and the fact that the relationship with Ms [K] started when he was in the UK unlawfully.
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> 124. The factors which weigh in favour of the Appellant and Ms [K] are as follows:
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> (i) Their relationship, which has lasted more than 4 years and has endured even though the Appellant has been in Albania for 2 years.
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> (ii) The Appellant's voluntary return to Albania which is, I find, a factor which, wholly or at least in part, counters the earlier breaches of the deportation order.
>
> (iii) Ms [K]'s own personal circumstances.
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> (iv) The difficulties of family life being enjoyed in Albania.
>
> (v) The evidence that the Appellant has matured and changed.

(vi) The nature of the offence and the length of sentence.

(vii) The revocation of this order will not allow the Appellant to return to the UK but will allow the merits of his entry clearance appeal to be considered in the light of the public interest in the context of paragraph 320(11).

125. Notwithstanding the high threshold which must be overcome I find that the combined effect of these circumstances, which weigh strongly in favour of the Appellant and Ms [K], are of sufficient weight to reach the very high threshold required in this case."

The Secretary of State's submission is that on paragraph 124 does not explain with sufficient clarity which matters for example are material to Ms [K]'s own personal circumstances and which matters are material to the difficulties of family life being enjoyed in Albania (see paragraph 124 (iii) and (vi)).

We disagree with that that submission. Any judgment of the First-tier Tribunal must be looked at in the round. Earlier in the judgment, there is an extensive explanation of the circumstances which led Mr. Sinaj to make his application to revoke the deportation order. It is clear to us that the personal circumstances that are referred to include the following matters. First, Ms [K]'s employment in the United Kingdom; the Tribunal accepted that her employment would not readily be transferable were she to follow Mr Sinaj to live in Albania. Next, the fact that Ms [K] has some responsibility for assisting her elderly parents, who live close to her. Thirdly, there was evidence that Ms [K] and Mr Sinaj hope to undertake IVF fertility treatment and that were Mr Sinaj to leave the chances of that treatment succeeding in the United Kingdom would be reduced. It was also said (and the Tribunal accepted) that if Ms [K] were to follow Mr Sinaj to Albania, the chances of IVF treatment being available for her in Albania would be slim. Those matters are all readily ascertainable from the Tribunal's earlier reasoning and it seems to us that they fully explain the references at subparagraph (iii) and subparagraph (iv) of paragraph 124.

The next issue is whether the Tribunal confined itself to considering only relevant matters. It is clear that the matters referred to at paragraph 124(i), (iii) and (vi) are all matters capable of being relevant to an enquiry as to the application of Section 117C(5). However, we cannot see how the matters referred to at (ii), (v) and (vii) can be relevant to that enquiry. Section 117C(5) asks whether the effect of the deportation would be unduly harsh on, in this case, Ms [K]. The matters identified by the judge at (ii), (vi) and (vii) simply have no bearing on that enquiry.

Mr. Sinaj submitted that the consideration referred to at (v) could have some relevance to the section 117C(5) enquiry because it had been Ms [K]'s influence that had caused Mr Sinaj to mature and to change his approach, such that were the deportation order to be upheld, that would make the adverse impact on her particularly acute. We are not convinced by that submission. Even if this is a matter to which weight can be attached at all, the weight to be attached to it could only be very slim indeed. In any event, the submission in respect of sub-paragraph (v) leaves untouched the matters at subparagraphs (ii) and (vii). Overall, we are satisfied that in approaching the Section 117C(5)

enquiry, the judge did take into account irrelevant considerations, namely those at paragraph 124(ii), (vi) and (vii).

The Secretary of State's final ground of appeal is that once these irrelevant considerations are removed from the analysis, the conclusion reached by the judge was not one reasonably open to him on a proper application of the law.

When the judge took the decision that is now under appeal he did so without the benefit of the judgment of the Supreme Court in **KO (Nigeria) [2018] 1 WLR 5273**, a judgment handed down on 24 October 2018. The significance of that case is that the Supreme Court took the opportunity to set out its view on the approach that should be taken to the notion of unduly harsh, as used in section 117D of the 2002 Act. In particular, we note that in the course of his judgment Lord Carnwath approved the description of the notion of unduly harsh given by this Tribunal in the case of **MK (Sierra Leone) [2015] UKUT 223 (IAC)**. In that case, The Hon Mr Justice McCloskey, and Upper Tribunal Judge Perkins who sits as one member of the Tribunal today, stated the following in respect of the meaning of unduly harsh:

> "By way of self-direction, we are mindful that *'unduly harsh'* does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb '*unduly*' raises an already elevated standard still higher."

That approach, endorsed by the Supreme Court in **KO (Nigeria)**, indicates that in a case such as the present, section 117D(5) sets the bar very high indeed.

Turning to this case, and notwithstanding the submissions that were made on behalf of Mr Sinaj, we are unable to see, once the irrelevant considerations are stripped out of paragraph 124, how the remaining matters identified by the judge are sufficient as a matter of law to found a conclusion that the effects of Mr Sinaj's deportation on Ms [K] would be unduly harsh.

The matters that are relevant and which weigh in the balance relating to Ms [K]'s personal circumstances comprised the following. Firstly, her working life in the United Kingdom. Ms [K] has a skilled and well-paid job in IT. It is not a job that would be transferable were she to leave the United Kingdom to live in Albania. Second, there is reference in the decision to Ms [K]'s financial commitments. Yet, as we understand it, those primarily arise from a property purchased in May 2015 after her relationship with Mr Sinaj had commenced but of course at a time that Mr Sinaj's presence in the UK was unlawful. They must have been commitments taken on by reference to her own income and resources. If Ms [K] decided to leave the UK to live in Albania with Mr. Sinaj, it would be a matter for her whether to retain the property or sell it. Next, there is reliance on the assistance that she provides to her elderly parents. The evidence before the First-tier Tribunal was that Ms. [K] lives nearby her parents and assists them with certain day-to-day matters such as attending doctor's appointments. Lastly, two matters relating to fertility treatment: the likely success of such treatment were it to be undertaken in the United Kingdom

when Mr Sinaj was out of the United Kingdom; and the likely availability of such treatment for Ms [K] in Albania.

We accept that taken together, those matters are consistent with a conclusion that the effect on Ms. [K] of Mr Sinaj's continued absence from the United Kingdom by reason of the deportation order made in 2008, would be harsh. But those matters are no more harsh what might be described as the normal consequences of a deportation order when that order involves splitting a family. We are entirely satisfied that those matters, taken together, do not reach the level of undue harshness in the sense that has been described by this Tribunal in **MK (Sierra Leone)** and accepted by the Supreme Court in **KO (Nigeria)**.

For these reasons we consider that this appeal should be allowed. Once matters that are irrelevant to the section 117C enquiry are removed from paragraph 124 of the Tribunal's decision, the matters that remain are on a correct application of the law, incapable of supporting a conclusion that section 117C(5) applies in the circumstances of this case. It follows that the only possible lawful conclusion available is that the Secretary of State's decision to maintain the deportation order was the only lawful option available. It follows that the decision of the Secretary of State must be restored.

Finally, we note that any further application that Mr Sinaj might make to revoke the deportation order would be made after the expiry of the ten years period following the making of the 2008 order. Such an application would fall to be considered by reference to Paragraph 391A of the Immigration Rules. Different considerations would therefore apply to the determination of any such application. There can be no certainty as to the outcome of any further application, but were such an application to be made it would have to be considered on its own merits and without regard to the particular considerations that did apply when the Secretary of State reached his decision on the application that was the subject of the appeal before us today.

Notice of Decision

The Secretary of State's appeal is allowed. We substitute a decision dismissing Mr Sinaj's appeal against the Secretary of State's decision.

No anonymity direction is made.

Signed

Mr Justice Swift
Dated. **4 February 2019**