IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/12362/2017**

THE IMMIGRATION ACTS

Heard by Skype at Field House
On 18 December 2020
And in person on
5 May 2021

Decision & Reasons Promulgated
On 03 June 2021

Before

UPPER TRIBUNAL JUDGE RINTOUL
UPPER TRIBUNAL JUDGE BLUNDELL

Between

MR ALBAN VELAJ
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Thomann, instructed by the Government Legal Department
For the Respondent: Mr Georget, instructed by Malik & Malik Solicitors

DECISION AND REASONS

1. The Secretary of State appealed with permission against the decision of First-tier Tribunal Judge Ian Scott, promulgated on 18 July 2019, allowing Mr Velaj's appeal against the decision of the Secretary of State made on 2 October 2017 to refuse his human rights claim, the Secretary of State having made a deportation order against him. For the reasons set out below, that decision was set aside.

2. As the decision of the First-tier Tribunal has been set aside to be remade, we refer to Mr Velaj as the appellant and to the Secretary of State as the respondent as indeed they were in the First-tier Tribunal.

3. The appellant is a citizen of Kosovo who entered the United Kingdom in 1998 and claimed asylum. He was joined here by his wife, elder children and his mother. Two further children were born in the United Kingdom. They are all now British citizens; the appellant's application was refused in light of his criminal record at the time.

4. On 17 May 2011 the appellant was convicted of smuggling 3.97 kilograms of a class A drug (cocaine) into the United Kingdom and sentenced to twelve years' imprisonment. It was for that reason that the Secretary of State made the deportation order against him.

5. The appellant appealed under Section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") on human rights grounds with reference to Article 8 but at the appeal raised a new matter: that he had a derivative right of residence in the United Kingdom under the Immigration (European Economic Area) Regulations 2016 ("the EEA Regulations"). The Secretary of State consented to that matter being considered.

6. The judge heard evidence from the appellant, his wife and two elder daughters. In her evidence Mrs Velaj said [51], [52] that she would not go to Kosovo with the appellant as she could not leave his mother and the children in the United Kingdom.

7. The judge found that: -

   (i) a parent of a British Citizen child is entitled to a derivative right of residence when parental responsibility is shared with another person, if (Regulation 16(5)(c)) the child would be unable to reside in the United Kingdom if both primary carers left the United Kingdom for an indefinite period, even if the other carer/parent is a British citizen;

   (ii) the appellant shares equal parental responsibility for his son with the wife/mother and the son would be unable to reside in the United Kingdom or another EEA state if both the appellant and his wife left the United Kingdom for an indefinite period; and,

   (iii) accordingly, the appellant had a derivative right to reside in the United Kingdom under the 2016 Regulations;

   (iv) there was a right of appeal as the issue relating to Regulation 36(5) requiring a valid national identity card had been conceded by the Secretary of State [69] to [71];

   (v) Exception 3 set out in Section 33 of the UK Borders Act 2007 applied as the appellant had a derivative right to reside in the United Kingdom under the Regulations which give effect to the EU treaties [73 to 74];

   (vi) having had regard to Regulation 27 and Schedule 1 of the EEA Regulations he was not satisfied that the appellant represented a risk or danger to society [80] despite the conviction for a serious offence and lengthy prison sentence;

(vii) further, there are circumstances in this case such that there were very compelling circumstances sufficient to overcome the public interest in the appellant's deportation for the purposes of Section 117C(6) of the 2002 Act [90] given the hardship that had been caused to the appellant's wife and taking account also the best interests of his son.

8. The Secretary of State sought permission to appeal on the basis that the judge had erred in misinterpreting Regulation 16 which, she contended, would apply only if both carers intended to leave the United Kingdom, which was not the case. It was also averred that the judge had failed properly to explain how there were very compelling circumstances over and above those described in Exceptions 1 and 2 of Section 117C of the 2002 Act as, on the facts of this case, it could not even be shown that the "unduly harsh" test had been met.

9. On 19 August 2019 First-tier Tribunal Judge S P J Buchanan granted permission on all grounds.

Procedural History

10. The appeal was initially set down for hearing on 5 November 2019 but was adjourned to permit the Secretary of State to file amended grounds which was done on 17 December 2019. A subsequent hearing set down for 30 April 2020 was adjourned in light of COVID and although the Tribunal provisionally considered disposing the issue of error of law by way of written submissions, this was not possible, and the appeal was listed for oral hearing on 18 December 2020. At the end of that hearing we announced our decision that the decision of the First-tier Tribunal involved the making of an error of law, was to be set aside, and was to be remade on a date to be fixed. The appeal then re-convened on 5 May 2021.

Amended Grounds of Appeal

11. The Secretary of State averred in her amended grounds that:

(i) the First-tier Tribunal had no jurisdiction to consider an appeal under the EEA Regulations as there had been no decision under the Regulations, this error not being cured by the Presenting Officer's consent for the matter to be considered;

(ii) the First-tier Tribunal erred in considering the derivative right of residence strengthened the appellant's Article 8 claim it being applicable only to deportees who are unable to establish any otherwise available entitlement to remain, in this case under the Human Rights Convention;

(iii) it was for the appellant to show that the child would be compelled to leave the United Kingdom were he (the appellant) to be deported, the First-tier Tribunal's decision pre-empting the Secretary of State's decision and misconstruing the scope and purpose of Regulation 16;

(iv) the First-tier Tribunal erred in pre-empting the Secretary of State's decision as to whether, if there were a **Zambrano** right to reside, there were nonetheless grounds of public policy, public security and public health to justify deportation, reaching an erroneous conclusion on that issue;

(v) the First-tier Tribunal's conclusions that there were very compelling circumstances were inadequately reasoned and unsustainable.

Hearing on 18 December 2020

12. We were, to an extent, assisted by a skeleton argument served in advance although for the reasons we address below, these did not address several material issues and it was only as a result of our own directions and reading beforehand that material and relevant issues came to light.

13. That said, however, there was a significant narrowing of the issues in dispute which assisted the Tribunal. The Secretary of State did not pursue her amended ground (i) and it was agreed by both representatives that it would be sensible in hearing oral argument for us to consider ground (iii) first, it being agreed that if there was no derivative right that could be relied upon, then grounds (ii) and (iv) would not be relevant.

14. The thrust of Mr Thomann's submissions was that the scope of the derivative residence as explained by the CJEU in Zambrano [2011] EUECJ C-34/09 and subsequent cases including Chavez-Vilchez [2017] EUECJ C-133/15 as well as in the decisions of the domestic courts is such that the derivative right did not apply to circumstances here where one parent, a British citizen, had no intention of leaving the United Kingdom and thus there would be somebody to care for the British citizen child such that he would not be compelled to leave the United Kingdom or for that matter the EU. He submitted therefore that there were no rights under EU treaties which were engaged and that insofar as the Regulations went further would not create a treaty right.

15. Mr Thomann submitted further that although an issue might arise in the case of a mother being removed and the third country national being a very small child, that was not applicable here. He submitted that, further, Regulation 16 ought to be interpreted on a purposive basis such that it would conform to the express view of the Court of Justice.

16. Mr Georget conceded that, given the appellant's wife's evidence that she would not leave the United Kingdom, it would not be possible for him to show that, under the relevant case of the CJEU, he had a derivative right. He argued, however, that Regulation 16(5) went further than the case law, and that on the clear wording of the Regulation, greater rights had been granted than under European law and that the right arose from a permissible interpretation of the Regulations. Pressed on the point as to whether this would cause difficulties given the terms of the ground of appeal on EEA matters, that is that the decision in question is contrary to treaty rights, he submitted that any Tribunal considering that issue would have considered the Regulations as expressing that.

17. In reply, Mr Thomann submitted that the purpose of Regulation 16 as amended was to give effect to Chavez-Vilchez by the removal of the reference to an exempt person. He submitted, relying on Litster v Forth Dry Dock & Engineering Company Limited [1988] UKHL 10 that a purposive construction should be applied, even where, as

here, it was the state seeking to have the benefit of a narrower construction. Mr Georget disagreed with that.

18. Mr Thomann submitted that even if Mr Georget were correct, then on a proper construction of Regulation 16(5)(c), it could not be said that it had the effect contended by the appellant.

19. After taking time for consideration, we announced our decision that we found in favour of the Secretary of State on ground (iii) and that in consequence grounds (ii) and (iv) were no longer relevant.

20. We heard brief argument with regard to ground (v) and announced our decision that we were satisfied that the decision of the First-tier Tribunal ought to be set aside for the reasons to be given in writing.

The Law

21. In approaching how the EEA regulations are to be interpreted we note that at 11pm on 31 January 2020 ("exit day") the United Kingdom ceased to be a member of the European Union. During the "implementation period" that lasted from then until 11pm on 31 December 2020 ("IP completion day") EU law applied in the United Kingdom in general as it would do if the UK had been a member of the EU.

22. We note that the EEA Regulations were revoked on 31 December 2020 and that the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309) ("EEA Transitional Regs") preserve some of the 2016 Regulations as set out in Schedule 3.

23. As we are concerned with the law as it was at the date of the First-tier Tribunal's decision, we do not consider that these legislative changes are material; the issue is whether the FtT's decision was lawful as at the time it was made, that is, during the implementation period.

24. At the relevant time, reg. 16 of the EEA Regulations provided:

> '16 Derivative Right to Reside
>
> (1) A person has a derivative right to reside during any period in which the person—
>
> (a) is not an exempt person; and
>
> (b) satisfies each of the criteria in one or more of paragraphs (2) to (6).
>
> …
>
> (5) The criteria in this paragraph are that—
>
> (a) the person is the primary carer of a British citizen ("BC");
>
> (b) BC is residing in the United Kingdom; and
>
> (c) BC would be unable to reside in the United Kingdom or in another EEA State if **[both primary carers]** ~~the person~~ left the United Kingdom for an indefinite period.

…

(7) …

(c) an *"exempt person"* is a person—

(i) who has a right to reside under another provision of these Regulations;

(ii) who has the right of abode under section 2 of the 1971 Act[2];

(iii) to whom section 8 of the 1971 Act[3], or an order made under subsection (2) of that section, applies; or

(iv) who has indefinite leave to enter or remain in the United Kingdom (but see paragraph (7A)) .

(8) A person is the "primary carer" of another person ("AP") if—

(a) the person is a direct relative or a legal guardian of AP; and

(b) either—

(i) the person has primary responsibility for AP's care; or

(ii) shares equally the responsibility for AP's care with one other person [*who is not an exempt person*].

(9) In paragraph (2)(b)(iii), (4)(b) or (5)(c), if the role of primary carer is shared with another person in accordance with paragraph (8)(b)(ii), the words *"the person"* are to be read as *"both primary carers"*.

(10) Paragraph (9) does not apply if the person with whom care responsibility is shared acquired a derivative right to reside in the United Kingdom as a result of this regulation prior to the other person's assumption of equal care responsibility.'

25. The words "both primary carers" have been added to reg 16 (5) to reflect the effect of reg 16 (9) and the words in italics in (8) (b)(ii) were deleted by operation of the Immigration (EEA) (amendment) Regulations 2018 SI2018/801. Prior to that amendment, the appellant would not have been entitled to a derivative right of residence as his wife is an exempt person.

26. The explanatory memorandum to SI 2018/801 provides:

> 'Paragraph 10 of the Schedule to these Regulations amends the 2016 Regulations so as to give effect to the judgment of the CJEU in the case of C—133/15 Chavez-Vilchez and others. It does so by amending regulation 16(8)(b) of the 2016 Regulations to allow a person to be recognised as a "primary carer" if they are the sole carer or if they share equally the care with another person, regardless of whether that person is an "exempt person" within the meaning of regulation 16(7)(c).'

27. We recall that Mr Georget conceded on behalf of the appellant that he could not bring himself within the scope of the derivative right as set out in the case law of the CJEU. He submitted that the appellant falls within the terms of reg 16 (5) properly construed.

28. We consider that there is a significant issue arising from the nature of the ground of appeal provided for in the EEA Regulations. At the relevant time, regulation 36(1) provided that the provisions of the 2002 Act listed in Schedule 2 had effect for the

purposes of an appeal under the Regulations. Schedule 2 provided materially as follows:

> 'Schedule 2
>
> 1. The following provisions of, or made under, the 2002 Act have effect in relation to an appeal under these Regulations to the First-tier Tribunal as if it were an appeal against a decision of the Secretary of State under section 82(1) of the 2002 Act (right of appeal to the Tribunal)—
>
> > section 84 (grounds of appeal), as though the sole permitted grounds of appeal were that the decision breaches the appellant's rights under the EU Treaties in respect of entry to or residence in the United Kingdom ("an EU ground of appeal")'

29. We do not consider that this ground of appeal would permit an appeal to be allowed in a situation where, for example, the EEA Regulations had granted a right which was greater than those granted by the treaties, despite Mr Georget's submission to the contrary. That would go against the unambiguous wording of the ground of appeal and against its clear intent. If Parliament had wanted the ground of appeal to be whether the decision was contrary to the EEA regulations, then it would have said so.

30. That is not to say that meeting the requirements of the EEA Regulations if more extensive than the rights conferred by the Treaties is not relevant. We note that in OA and Others (human rights; 'new matter'; s.120) Nigeria [2019] UKUT 65 (IAC) the Upper Tribunal held at paragraphs [27] and [28]:

> "27. The significance of an appellant proving to a First-tier Tribunal judge that he or she meets the requirements of a particular immigration rule, so as to be entitled to be given leave to remain, lies in the fact that - provided Article 8 of the ECHR is engaged - the respondent will not be able to point to the importance of maintaining immigration controls as a factor weighing in favour of the respondent in the proportionality balance, so far as that factor relates to the particular immigration rule that the Tribunal has found to be satisfied.
>
> 28. Whether or not such a finding in favour of an appellant is likely to be determinative of the human rights appeal will depend upon whether the respondent has any additional reason, effectively overriding that particular rule, for saying that the effective operation of the respondent's immigration policy nevertheless outweighs the appellant's interest in remaining in this country. To take one simple example, an appellant who persuades the First-tier Tribunal that he meets the requirements of the Immigration Rules relating to entrepreneur migrants will not thereby succeed in his human rights appeal if the appellant has been found by the respondent (and the Tribunal agrees) that the appellant falls foul of one or more of the general grounds of refusal contained in Part 9 of the Rules; for example, because he made false representations in connection with a previous application for leave (paragraph 322(2))."

31. We consider that these principles would apply equally if all the requirements of the EEA Regulations were met.

32. It is not in dispute between the parties that the jurisprudence of the Court of Justice beginning in Zambrano and continued in Chavez-Vilchez and other cases flows from

an interpretation of Articles 20 and 21 of the EU treaties. That need not necessarily be a material issue given that any consideration of whether the requirements of Regulations are met or not would be a valid issue in assessing proportionality in any Article 8 exercise. That is because a right to remain would in those circumstances indicate where the Secretary of State considered the balance lay in public policy terms. We have therefore proceeded, out of an abundance of caution, to consider whether the EEA Regulations can be construed to include the appellant as he submits.

33. We agree with Mr Thomann that ordinarily, in considering a piece of legislation designed to implement European law, a purposive construction should be adopted as set out in Marleasing S.A v LA Commercial Internacional de Alimentacion S.A. [1992] 1 CMLR 305.

34. In British Gas Trading Ltd v Lock and Anor [2016] EWCA Civ 983 the Court of Appeal reviewed the case law on 'conforming interpretation' of EU and human rights law and considered the core principles outlined in Marleasing, Ghaidan v Godin-Mendoza [2004] UKHL 30, Vodafone 2 v Revenue and Customs Commissioners [2009] EWCA Civ 446 and Swift (trading as A Swift Move) v Robertson [2014] 1 WLFR 3438. The Court endorsed the approach taken in Vodafone 2 where the court approved the summary of the principles of conforming interpretation prepared by counsel for the HMRC.

> "37. …
>
> > "In summary, the obligation on the English courts to construe domestic legislation consistently with Community law obligations is both broad and far-reaching. In particular: (a) it is not constrained by conventional rules of construction (per Lord Oliver of Aylmerton in the *Pickstone* case, at p. 126B); it does not require ambiguity in the legislative language (per Lord Oliver in the *Pickstone* case, at p. 126B and Lord Nicholls of Birkenhead in *Ghaidan's* case, at para 32); (c) it is not an exercise in semantics or linguistics (per Lord Nicholls in *Ghaidan's* case, at paras 31 and 35; per Lord Steyn, at paras 48–49; per Lord Rodger of Earlsferry, at paras 110–115); (d) it permits departure from the strict and literal application of the words which the legislature has elected to use (per Lord Oliver in the *Litster* case, at p 577A; per Lord Nicholls in *Ghaidan's case,* at para 31); (e) it permits the implication of words necessary to comply with Community law obligations (per Lord Templeman in the *Pickstone* case, at pp 120H–121A; per Lord Oliver in the *Litster* case, at p 577A); and (f) the precise form of the words to be implied does not matter (per Lord Keith of Kinkel in the *Pickstone* case, at p 112D; per Lord Rodger in *Ghaidan's* case, at para 122; per Arden LJ in the *IDT Card Services* case, at para 114)
>
> …
>
> > "The only constraints on the broad and far-reaching nature of the interpretative obligation are that: (a) the meaning should 'go with the grain of the legislation' and be compatible with the underlying thrust of the legislation being construed': see per Lord Nicholls in *Ghaidan v. Godin-Medoza* [2004] 2 AC 557, para 53; Dyson LJ in *Revenue and Customs v. EB Central Services Ltd* [2008] STC 2209, para 81. An interpretation should not be adopted which is inconsistent with a fundamental or cardinal feature of

> the legislation since this would cross the boundary between interpretation and amendment (see per Lord Nicholls, at para 33, Lord Rodger, at paras 110–113 in *Ghaidan's* case; per Arden LJ in *R (IDT Card Services Ireland Ltd) v. Customs and Excise Comrs* [2006] STC 1252, paras 82 and 113); and (b) the exercise of the interpretative obligation cannot require the courts to make decisions for which they are not equipped or give rise to important practical repercussions which the court is not equipped to evaluate: see the *Ghaidan* case, per Lord Nicholls, at para 33; per Lord Rodger, at para 115; per Arden LJ in the *IDT Card Services* case, at para 113.'"]

35. But that is not so where implementing legislation goes beyond what is required by a Directive or to ensure compliance with rulings of the Court of Justice. In United States of America v Nolan [2015] UKSC 63 Lord Mance held at [14] as follows:

> "14 Taking the first point of construction, it is a cardinal principle of European and domestic law that domestic courts should construe domestic legislation intended to give effect to a European Directive so far as possible (or so far as they can do so without going against the "grain" of the domestic legislation) consistently with that Directive: *Marleasing SA v La Comercial Internacional de Alimentacion SA* (Case C-106/89) [1990] ECR I-4135, *Vodafone 2 v Revenue and Customs Comrs* [2009] EWCA Civ 446, [2010] Ch 77, paras 37-38 and *Swift v Robertson* [2014] UKSC 50, [2014] 1 WLR 3438, paras 20-21. But that means avoiding so far as possible a construction which would have the effect that domestic implementing legislation did not fully satisfy the United Kingdom's European obligations. Where a Directive offers a member state a choice, there can be no imperative to construe domestic legislation as having any particular effect, so long as it lies within the scope of the permitted. Where a Directive allows a member state to go further than the Directive requires, there is again no imperative to achieve a "conforming" interpretation. It may in a particular case be possible to infer that the domestic legislature did not, by a domestic formulation or reformulation, intend to go further in substance than the European requirement or minimum. *R (Risk Management Partners Ltd) v Brent London Borough Council* [2011] UKSC 7, [2011] 2 AC 34, considered below, is a case where the Supreme Court implied into apparently unqualified wording of domestic Regulations a limitation paralleling in scope that which had been implied by the Court of Justice into general wording of the Directive to which the Regulations were giving effect: see *Teckal Srl v Comune di Viano* (Case C-107/98) [1999] ECR I–8121 ("*Teckal*"). It concluded that the two had been intended to be effectively back-to-back. A reformulation may also have been aimed at using concepts or tools familiar in a domestic legal context, rather than altering the substantive scope or effect of the domestic measure from that at the European level. But that is as far as it goes."

36. We consider that that applies equally here, noting that Directive 2004/38 permits member states to grant greater rights. But the question that arises is whether it is possible to infer that the domestic legislation did intend to go further in substance than the European requirement or whether the intention was, instead, for the Regulations to be back-to-back with the jurisprudence of the CJEU.

37. In Nolan, at [23] Lord Mance also held:

> "23 In *Risk Management*, the indications were that the domestic measure was intended in the relevant respect to be no more than back-to-back with the European Directive. That cannot be said to be so in the present case. TULCRA contains no equivalent of article 1(2)(b) of the Directive. Instead, it contains specific and limited exceptions for Crown employment and employees and for certain others in public service. It is true that the remainder of the category of public workers comprised by article 1(2)(b) would have been relatively confined, comprising those engaged in the "exercise of public powers", rather than economic functions, as the Court of Justice indicated in *Scattolon v Ministero dell'Istruzione, dell'Università, e della Ricerca* (Case C-108/10) [2012] ICR 740, paras 43-44. But this remaining category is nonetheless significant. Contrary to the appellant's submission, its inclusion within the scope of TULCRA cannot have been mere oversight. The careful exclusion of several specified categories of public employee speaks for itself. The variation of the Directive scheme enables, and according to the Employment Appeal Tribunal (para 84) has in many cases enabled, cases to be brought by those representing workers in public authorities. There are also other respects in which provisions of TULCRA have given protection in the form of consultation obligations which extends or has in the past extended, clearly deliberately, beyond the European requirement. It is, as Underhill LJ observed in the Court of Appeal (para 24) well understandable that a Labour government should in 1975, with trade union encouragement, have decided to give the scheme an extended domestic application to public employees."

38. In some respects, this situation is comparable to that in Risk Management Partners Limited v Brent London Borough Council and Others [2011] UKSC 7 in that the Regulations in question were made to give effect to a Directive, in that case Directive 2004/18. And there is also in the background a decision of the CJEU, Teckal [1999] EUECJ C-107/98.

39. In Risk Management Lord Hope held at [24] to [25]:

> "24. It is true that section 2(2) of the European Communities Act 1972 is in wide terms. It does not confine any measures made under it to doing the minimum necessary to give effect to a Directive. But, if it is to be within the powers of the subsection, the measure has to arise out of or be related to an EU obligation. As Waller LJ said in *Oakley Inc v Animal Ltd (Secretary of State for Trade and Industry intervening)* [2006] Ch 337, para 39, the primary objective of any secondary legislation under section 2(2) must be to bring into force laws which, under the Treaties, the United Kingdom has agreed to make part of its laws. There is nothing in the Explanatory Memorandum to the Regulations that was prepared by the Office of Government Commerce and laid before Parliament to indicate that it was intended to depart from the jurisprudence of the court as to the scope of the Directive. In paras 7.2-7.4 of the Memorandum it was stated that the change to the legislation was necessary to implement the new public procurement Directive, that it clarified and modernised the previous texts and that the simpler and more consistent public sector text should reduce the burdens involved under the EU rules. If the *Teckal* exemption were to be held not to apply to the 2006 Regulations, it could only be because the purpose of the Regulations was to apply the public procurement rules to relationships that fell outside the

regime provided for by the Directive. But that would not be consistent with the Memorandum, and it would not be a permitted use of the power.

25. As for the meaning and effect of the 2006 Regulations, I think that it would be wrong to apply a literal approach to the words and phrases used in it, such as in the definitions of "public contract" and "public service contract". A purposive approach should be adopted. As Lord Diplock in *Kammins Ballrooms Co Ltd v Zenith Investments (Torquay) Ltd* [1971] AC 850, 881 indicated, this means that regard must be had to the context in which the Regulations were made, to their subject matter and to their purpose. Would it be inconsistent with the achievement of that purpose if the *Teckal* exemption were not to be held to apply to them? Was this an exemption to which Parliament must have intended them to be subject? Having regard to the background of EU law against which the Regulations were made, the definitions in the Regulations can be taken to express the same idea as those in the Directive. Thus something which amounts to a contract in domestic law can nevertheless be held, without doing undue violence to the words of the Regulations, not to be a relevant contract for the purpose of the public procurement rules."

40. We remind ourselves that in Chavez-Vilchez, the CJEU concluded:

"69. As regards the second factor, the Court has stated that it is the relationship of dependency between the Union citizen who is a minor and the third country national who is refused a right of residence that is liable to jeopardise the effectiveness of Union citizenship, since it is that dependency that would lead to the Union citizen being obliged, in practice, to leave not only the territory of the Member State of which he is a national but also that of the European Union as a whole, as a consequence of such a refusal (see, to that effect, judgments of 8 March 2011, *Ruiz Zambrano*, C-34/09, EU:C:2011:124, paragraphs 43 and 45; of 15 November 2011, *Dereci and Others*, C-256/11, EU:C:2011:734, paragraphs 65 to 67; and of 6 December 2012, *O and Others*, C-356/11 and C-357/11, EU:C:2012:776, paragraph 56).

70 In this case, in order to assess the risk that a particular child, who is a Union citizen, might be compelled to leave the territory of the European Union and thereby be deprived of the genuine enjoyment of the substance of the rights conferred on him by Article 20 TFEU if the child's third-country national parent were to be refused a right of residence in the Member State concerned, it is important to determine, in each case at issue in the main proceedings, which parent is the primary carer of the child and whether there is in fact a relationship of dependency between the child and the third-country national parent. As part of that assessment, the competent authorities must take account of the right to respect for family life, as stated in Article 7 of the Charter of Fundamental Rights of the European Union, that article requiring to be read in conjunction with the obligation to take into consideration the best interests of the child, recognised in Article 24(2) of that charter.

71 For the purposes of such an assessment, the fact that the other parent, a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would be compelled to leave the territory of the European Union if a right of residence were refused to that third-country national. In reaching such a

conclusion, account must be taken, in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium.

…

> "Article 20 TFEU must be interpreted as meaning that for the purposes of assessing whether a child who is a citizen of the European Union would be compelled to leave the territory of the European Union as a whole and thereby deprived of the genuine enjoyment of the substance of the rights conferred on him by that article if the child's third-country national parent were refused a right of residence in the Member State concerned, the fact that the other parent, who is a Union citizen, is actually able and willing to assume sole responsibility for the primary day-to-day care of the child is a relevant factor, but it is not in itself a sufficient ground for a conclusion that there is not, between the third-country national parent and the child, such a relationship of dependency that the child would indeed be so compelled were there to be such a refusal of a right of residence. Such an assessment must take into account, in the best interests of the child concerned, all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for the child's equilibrium.""

41. As was noted in Patel v SSHD [2019] UKSC 59 at [30]:

> "30… The overarching question is whether the son would be compelled to leave by reason of his relationship of dependency with his father. In answering that question, the court is required to take account, "in the best interests of the child concerned, of all the specific circumstances, including the age of the child, the child's physical and emotional development, the extent of his emotional ties both to the Union citizen parent and to the third-country national parent, and the risks which separation from the latter might entail for that child's equilibrium" (*Chavez-Vilchez*, para 71). The test of compulsion is thus a practical test to be applied to the actual facts and not to a theoretical set of facts. As explained in para 28 of this judgment, on the FTT's findings, the son would be compelled to leave with his father, who was his primary carer. That was sufficient compulsion for the purposes of the *Zambrano* test. There is an obvious difference between this situation of compulsion on the child and impermissible reliance on the right to respect for family life or on the desirability of keeping the family together as a ground for obtaining a derivative residence card. It follows that the Court of Appeal was wrong in this case to bring the question of the mother's choice into the assessment of compulsion."

42. Drawing these strands together, we deduce the following principles:

(1) in considering a piece of legislation designed to implement European law, a purposive construction should be adopted as set out in Marleasing S.A v LA Commercial Internacional de Alimentacion S.A.. [1992] 1 CMLR 305 and applying the principles set out in In British Gas Trading Ltd v Lock and Anor [2016] EWCA Civ 983at [38];

(2) where implementing legislation goes beyond what is required by a Directive or to ensure compliance with rulings of the Court of Justice, there is no imperative to achieve a "conforming" interpretation but a careful analysis must be undertaken to determine if it was intended that the implementing legislation was to go beyond what flows from the Directive; in any event, the same means of construction set out in (1) must apply;

(3) On that basis, in construing reg. 16 (5) of the EEA Regulations, a purposive approach must be followed, bearing in mind also that the question of whether a child would be compelled to leave is a practical test to be applied to the actual facts and not to a theoretical set of facts (Patel v SSHD) [2019] UKSC 59 at [30] (applying Chavez-Vilchez [2017] EUECJ C-133/15). That is a necessary corollary of the use of "unable" in reg. 16(5).

43. We note that as in Risk Management, the EEA Regulations are made, as stated in the preamble, to be made pursuant to powers under section 2(2) of the 1972 Act. We consider that in all the circumstances, a purposive interpretation must be adopted. As here, there was an explanatory memorandum which sets out the purpose of the relevant provisions and amendment and states that the intention is to give effect to the jurisprudence of the CJEU.

44. We consider also that what the jurisprudence requires is a careful analysis of whether a child would be compelled to leave the United Kingdom; "unable to reside" is a question that requires a nuanced analysis of inability, not as Mr Georget submits, a simple analysis of a hypothetical question.

45. Further, we bear in mind that we are considering delegated legislation. We bear in mind that the legal meaning of an enactment is the meaning that conveys the legislative intention. The focus must be on the text which is the primary source for its meaning. The initial wording of Regulation 16 was clear. It did not apply in circumstances such as these; it is only with the removal of the words "who is not an exempt person" that it has the effect that the appellant now contends it has.

46. Prior to the amendment, a derivative right would in these circumstances not arise where there were two parents who shared care where one of them had a right to reside under the Regulations or had a right of abode under the Immigration Act 1971 or had indefinite leave to remain. The effect of the amendment, if the appellant's interpretation is correct, is to expand considerably the cases of person on whom rights would be conferred because the right arises by operation of law; the issue of a derivative right card is merely confirmatory of that status.

47. The interpretation contended for would, on that basis, be contrary to intent and effect of Section 117B(6) and Section 117C(5) of the 2002 Act. That is because the derivative right would come into existence at the point dependency of the child came into existence. That is because there are limited circumstances in which, were both parents to leave the United Kingdom, that a child would be able to reside in the United Kingdom.

48. Finally, we note the use of the word "unable" is part of the test to be applied, even if a purposive approach were not taken. That, as is evident from Patel, is a question to

be answered after a detailed consideration which was not undertaken by the First-tier Tribunal. Thus, the key issue of inability to reside in the United Kingdom requires detailed consideration and a causal link with the departure of both carers.

49. For these reasons, we conclude that reg 16 (5) cannot be construed in the manner contended by the appellant, that is, on a theoretical assumption of both parents leaving the United Kingdom.

50. Accordingly, for these reasons, we are satisfied that the judge misinterpreted the Regulations in concluding that the appellant had a derivative right.

51. As an aside, as noted above, the EEA Regulations were revoked on 31 December 2020 as part of a large number of changes brought in at the same time, primarily by the Immigration and Social Security Co-ordination (EU Withdrawal) Act 2020 (Consequential, Saving, Transitional and Transitory Provisions) (EU Exit) Regulations (SI 2020/1309) ("EEA Transitional Regs") and the Immigration, Nationality and Asylum (EU Exit) Regulations (SI 2019/745). Schedule 3 of the EEA Transitional Regs sets out those parts of the EEA Regulations preserved for immigration (but not social security) purposes under the EEA Transitional Regulations, and it is of note the reg.16 is omitted from those provisions.

52. It follows from the finding that there is no derivative right that grounds (ii) and (iv) are academic; if there is a derivative right, the errors about which they complain are not material.

53. Had we, however, been asked to consider them in detail, we would have concluded that ground (ii) is not made out. A derivative right crystallises at the point of dependency; that much is clear from Sanneh [2015] EWCA Civ 49; [2015] 2 CMLR 27 (per Arden LJ). Further, it is clear from the binding decision in Dereci that it is only after consideration of a Zambrano right that regard should then be paid to considerations under Article 8 of the Human Rights Convention (or for that matter Article 7 of the Charter of Fundamental Rights and Freedoms).

54. Further, with respect to ground 3, the issue with regard to Zambrano is whether the British citizen child would in fact be compelled to leave the territory of the European Union as a whole thereby deprived of genuine enjoyment of the rights of citizenship. That was clearly not found.

55. We turn then to ground 5. Given our findings in respect of the derivative right, we conclude that any findings by the First-tier Tribunal were, insofar as they related to Article 8, predicated on the assumption of there being a derivative right. Further, in any event, there is simply an insufficient basis for demonstrating that either exclusion 1 or exclusion 2 was made out or that there were, balancing the public interest, very compelling reasons such that deportation should not be proceeded with. Even in the light of recent Court of Appeal jurisprudence the tests set out in exceptions 1 and 2 are still high, all the more so where, as here, the sentence was for twelve years' imprisonment. Accordingly, we consider that ground 5 is made out.

56. For these reasons, we set aside the decision of the First-tier Tribunal to be re-made as it was necessary to hear evidence again from the appellant and his family and to have, if required updated evidence in respect of any medical problems that may exist.

Re-making the Appeal

57. The hearing reconvened before us on 5 May 2021. Both parties accepted that the material issues are related to a consideration of Article 8 Human Rights Convention and are agreed as to the relevant law.

58. Section 117C of the 2002 Act provides as follows:

> **117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) 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.
>
> (4) 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.
>
> (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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Paragraph 398 of the Immigration Rules replicates the framework.

59. Both parties were agreed that in the case of individuals who have been sentenced to a period of imprisonment of four years or more or if neither Exception is to be met, the test is one of "very compelling circumstances, over and above those described in Exceptions 1 and 2".

60. We accept that "over and above the Exceptions" does not exclude or restrict the analysis to factors relevant to the issues dealt with in the Exceptions and we adopt

the approach endorsed by Jackson LJ in NA (Pakistan) v SSHD [2016] EWCA Civ 662 at [37]:

> 37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6).

61. We observe also the comments made by the Upper Tribunal in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) at [16] and [20]:

> 16. By contrast, the issue of whether "there are very compelling circumstances, over and above those described in Exceptions 1 and 2" is not in any sense a hard-edged question. On the contrary, it calls for a wide-ranging evaluative exercise. As NA (Pakistan) holds, that exercise is required, in the case of all foreign criminals, in order to ensure that Part 5A of the 2002 Act produces, in each such case, a result that is compatible with the United Kingdom's obligations under Article 8 of the ECHR.
>
> …
>
> 20. For these reasons, despite Ms Patyna's elegant submissions, we find the effect of section 117C is that a court or tribunal, in determining whether there are very compelling circumstances, as required by subsection (6), must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other relevant public interest considerations. Nothing in KO (Nigeria) demands a contrary conclusion.

62. We accept also that that decision confirms the propositions put forward by Mr Thomann that:

(i) in determining the public interest, regard is to be had to what is said in Section 117C(2); namely, that the more serious the offence, the greater is the public interest in deportation (MS at [47]);

(ii) by making the seriousness of the offence the touchstone for determining the strength of the public interest in deportation, parliament, in enacting Section 117C(2), must have intended courts and Tribunals to have regard to more than the mere question of whether the particular foreign criminal, if allowed to remain in the United Kingdom, would pose a risk to United Kingdom society(MS at [50]);

(iii) an element of the general public interest is the deterrent effect upon foreign citizens "of understanding that a serious offence will normally precipitate their deportation [might] be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to reoffend" (MS at [69]).

63. With regards to the extent to which rehabilitation is to be taken into account we have applied the principles set out in HA (Iraq) v SSHD [2020] EWCA Civ 1176 at [132] to [141].

64. At the hearing on 5 May 2021, we heard evidence from the appellant, the appellant's wife and their two daughters. The appellant's mother was present but did not give evidence.

65. It is common ground that the findings of fact made by the First-tier Tribunal are preserved. The judge noted [16] that it had been accepted that the family experienced problems during the appellant's imprisonment as follows:-

    (a) There was conflict between Tarzana and her mother which resulted in Tarzana being barred from the family home, being taken into care the care of the local authority and living apart from the rest of the family in a hostel. It was noted, however, that Tarzana was now an adult, able to make her own decisions and live her own life. She could choose to follow the appellant to Kosovo or maintain contact with him there by modern means of communication.

    (b) Tanja struggled emotionally while the appellant was absent from the family home in prison. She was expelled from school, continued to have behavioural problems at her next school and later dropped out of her course at college. She did, however, manage to obtain four GCSEs, including mathematics and English (both at C). She would soon be an adult (and is now) and these qualifications would assist her in seeking employment.

    (c) Matthew also struggled emotionally in the appellant's absence. Although he was able to maintain good behaviour and performance at school, they were concerned that this might not last if the appellant were to be deported.

    ...

    (d) The appellant's wife was diagnosed with depression and was prescribed medication.

    (e) The appellant's mother also receives medication for depression as well as hypertension and was noted to have suffered a stroke.

66. The judge also found:-

    (i) that the appellant's expression of remorse and his account of pursuing rehabilitation with assistance for the sake of his family to be credible and genuine [79(b)];

    (ii) that there was evidence the appellant had been co-operative and of good behaviour in prison and had not reoffended since his release on 2 June 2017;

    (iii) that there was no reason to think that prison had not had the intended rehabilitative effect on the appellant and he had strong incentives not to reoffend [79(d) to (e)];

    (iv) The appellant's mother is paralysed down one side and now requires constant care. Her more recent shocking ordeal, when she was attacked and injured by burglars, has left her extremely anxious and vulnerable. There is clearly very

strong dependence on the care provided by the appellant and his wife. It is equally clear that she cannot be expected to relocate. The appellant's removal and exclusion from the UK would effectively mean a complete and permanent separation of mother and son. A professional carer (at the public expense) could not possibly replace the emotional support provided by the appellant, and his mother is understandably scared of anyone she does not know. The impact of his exclusion on her and their relationship would be profound [83. (a)].

(v) The appellant's wife is innocent of all wrongdoing but has suffered as a result of the appellant's offending. His absence in prison led to depression, anxiety and serious difficulties for her in caring not only for her children but also for her mother-in-law. The appellant's exclusion from the UK would mean that she would have little choice but to stay in the UK and bear the same burdens again. She would in effect be separated indefinitely from her husband of 25 years and would be left to carry all the family responsibilities on her own once again [83. (b)].

(vi) It is clearly in the best interests of the appellant's children to have both their parents in the UK and to continue their relationship with their father. The impact of his absence while in prison was clear and was significant for all three children. Matthew is still a child, but all three of them are very close to their father and there is a strong family and private life. Occasional visits (if possible) to see their father in Kosovo, together with electronic communication, could not possibly be a sufficient replacement for personal contact. Having lost their father once already at, crucial stages of their lives, they would lose him again in the event of his removal and exclusion. Like their mother, they are completely innocent in the matter [83. (c)].

(vii) The appellant has established a private life and has integrated into the UK. He arrived here at the age of 19 and, notwithstanding his period of imprisonment, he has spent virtually all his adult life in this country. I accept that he has developed meaningful social and cultural ties in that time [83. (d)].

(viii) Although the appellant can speak Albanian, he knows nobody in Kosovo and would be returning there as a complete outsider now, with nothing from which to establish himself [83. (e)].

67. Those conclusions were, we recall, made on 26 July 2019, nearly two years ago and we accept that changes have occurred since them. We accept from the oral evidence that the appellant has a close relationship with his son and with his mother for whom he is the principal carer. She lives a short distance from family but we accept that she forms part of the same family unit given her dependency on them. We accept also that the appellant has a close relationship with his son and that his daughter, Tarzana, is able to help out looking after the mother for short periods when the appellant is unable to do so. We accept also that he intends to seek work if permitted to stay, as he said he would in cross-examination and that he has qualifications as a carpenter. We accept that he has high blood pressure for which he receives medication. We accept also, as Mr Georget submitted, that the appellant's wife's level of depression has improved and that she has been able, since the appellant was released, to open a café. The hours are currently restricted but will extend into the

evenings as the restrictions imposed by the COVID lockdown change. We accept also that her daughter, Tarzana, helps at the café.

68. We find that it would be difficult, if not impossible, for the appellant's wife to keep the café going as a viable business if she were also to have to care for the appellant's mother to the extent of the care currently provided by the appellant.

69. We do not, however, accept Mrs Velaj's evidence that she could not visit the appellant in Kosovo or elsewhere. Her answers when asked that she did not know the country and that she would not be able to leave her mother-in-law even for a short visit are difficult to accept.

70. We consider it appropriate to start our analysis with Exception 2. In doing so, we note that the deportation of the appellant impacts also on his mother and that in turn, that impact has an effect on the situation of his wife and of his children.

71. We accept that the appellant's wife would not go to live in Kosovo nor do we consider that it would be reasonable to expect her to do so. She has now developed a life in the United Kingdom, she is a British citizen and has now started her own business. She left Kosovo in very difficult circumstances at a young age and would find it difficult to return.

72. We accept that her circumstances would be affected were she to have to give up work in the café owing to having to care for the appellant's mother. We accept her evidence that it would not be economically viable for her to employ somebody else to run the café, nor do we expect that her daughter, Tarzana, would be able to do so on her behalf. We note Mr Georget's submission that the appellant's wife was severely affected on the last occasion but we consider that the situation she faces now was different. Her daughters are now adults and reasonably well settled, Tanja now being in a relationship with a partner and living away from the family home. The son is now 16 and reasonably well settled at school. The situation is different from 2019 and, we are not satisfied that the effect of deportation on the appellant's wife's mental health would be such as would in and of itself make deportation unduly harsh upon her.

73. The extent to which she would be compelled to give up her café which we accept would be difficult depends on the extent to which she alone would need to meet the caring needs of the mother-in-law currently met by the appellant.

74. As Mr Thomann submitted, there is no assessment from any doctor as to the necessary care that the mother-in-law requires although we do accept that she does require a carer given the award to her of DLA. We note from the material before us that the appellant's mother had a stroke and that she is in receipt of disability living allowance. We note also the evidence that following her stroke she was bedridden and has to be fed, bathed, changed and dressed. That was previously done by the appellant's wife and is now done by the appellant. We accept also that she is anxious as a result of the attack on her, a burglary in which she was stabbed, and we have no reason to doubt that she does not like being on her own and requires assurance to the extent that a member of the family has to be there overnight with her. We do not,

however, have any medical evidence in relation to the mother-in-law from, for example, her GP of anything more recent than 12 April 2019. That letter states only as follows:-

> "She unfortunately suffered a stroke in Jan 2017 which has left her paralysed on the left side and unable to mobilise independently. She needs support with all her activities of daily living including feeding, washing, moving around, etc.
>
> Her main support is her son and daughter-in-law who provide care for all her daily activities as above and also take her to appointments at the surgery, gym, hospital, etc.
>
> In September 2018 she was burgled and assaulted at home which has left her traumatised and often anxious/scared. Her family are supporting her with this."

75. Having found that the appellant does provide most of the care for his mother every day, we note also his evidence that if his appeal were to be allowed, he would seek employment. He does not provide any explanation as to who would then care for his mother and that position is inconsistent either with his wife not being in a position to give up her café to look after the mother-in-law or in Social Services being able to provide for the mother which leads us to conclude that this aspect of the appeal has been exaggerated We do, however, accept the evidence from the appellant and his wife that she is mistrustful of strangers, this being confirmed by the medical evidence and is understandable given what has happened to her and the nature of her disability.

76. We are not satisfied that the appellant's wife would need to give up the café, as we are not satisfied that the family would not pull together, or that they would not receive assistance from Social Services to care for the mother, given that the appellant has said that he would look for and presumably take, work. That would inevitably diminish the care he gives her.

77. Although she is mistrustful of strangers, it is reasonable to expect the Appellant's mother to come to grips with receiving care from people outside the family unit in the way that many other elderly and infirm people are required to accept. It is legitimate to assume, in the absence of evidence to the contrary, that social services will discharge its obligations to the appellant's mother: BL (Jamaica) v SSHD [2016] EWCA Civ 357. There will be a transitional period in which care arrangements will need to undergo radical revision. That will be unsettling for the appellant's mother and for the family more widely. But it is not shown that those adjustments will have the 'knock-on' consequences contended for by Mr Georget. The appellant's wife will not have to give up the café. She and Tarzana will not find themselves out of work as a result, and there will not be a serious financial impact on the family.

78. We accept that it would not be possible for the appellant to maintain any meaningful relationship with his mother given her disability and given also the evidence in the social worker report that she is unable to fly. That is for health reasons. We accept also that that would, inevitably, cause her distress which would impact on the appellant's wife and his son as well as the older children. We consider that it is most

likely to affect the wife given that it is likely the caring responsibilities would once again fall to her.

79. We accept that the appellant and his son are very close and that as the son says, the appellant is the glue that keeps the family together. We accept that they have to an extent made up for the six lost years when the appellant was in prison and that it is a critical time for the appellant's son as he is facing exams and support of the father would be important to his future.

80. In assessing the effect on the son, we bear in mind that there has to be an individuated case specific assessment of him as required by HA (Iraq).

81. The son is now 16 and is approaching the end of his time at school. We accept that he needs guidance and support of a father which he is receiving on a daily basis, and whilst we accept that occasional visits and electronic communication would not replace the bond, it nonetheless given his age could maintain it to a significant degree. We accept that the son was damaged by the separation from his father and we accept that he may be affected also by the effect of deportation of his father on his mother, grandmother and sisters. But his sisters are now adults and one of them has moved away from home.

82. Viewing all his circumstances and taking matters in the round, and making the necessary individuated assessment, we are not satisfied that the effect on the son would, although harsh, be unduly harsh given the high threshold involved.

83. Similarly, even assuming that the appellant's wife would have to give up her business, and that there would be a significant reduction in their household's income, this is due as much to the mother's refusal to have support from outside the family as anything else. She is not compelled, except perhaps emotionally and morally, to look after her mother-in-law and again, taking all of these factors into account we are not satisfied that the effect of deportation on the appellant's wife would be unduly harsh.

84. Turning then to the appellant's private life, we accept that the appellant has lived in the United Kingdom since 19, and we accept that he has to an extent integrated into life in the United Kingdom. We accept also that he left Kosovo in traumatic circumstances and that the country to which he would be returning is very different from that which he left. ity. The appellant was sentenced to twelve years' imprisonment, an indicator of the seriousness of his crime. Further, as is evident from the sentencing remarks of the judge, we note that he was convicted of smuggling 3.97 kilos of cocaine into the United Kingdom. The sentencing judge noted that he was involved in the planning and that he had done this for financial gain. As the judge noted:-

> "Class A drugs as has often been said, are a curse. They cause untold misery to those who have become addicted to them and to the families and loved ones of addicts. And, of course, they are at the root of a great deal of crime, often violent crimes.

85. We consider that a conviction for a crime of this nature is such that the appellant has extinguished his social and integrative ties to the United Kingdom. Further, we do not accept that there would be obstacles to the appellant reintegrating into life in Kosovo which could not with a degree of difficulty be overcome. He would on arrival, we accept, be an outsider, but he speaks the language and he has skills including qualifications in carpentry. It would, no doubt, be difficult to reintegrate but that is not a sufficient basis on which it is said that there are very significant obstacles such that the relevant test is met. We accept that he has no close family ties to Kosovo but equally we are not satisfied that he would find it impossible to re-establish himself to the extent that he could be seen as an insider. This is not comparable to a situation in which someone left a country at a very young age.

86. We turn next to an assessment of the public interest. We consider that the public interest in deporting this appellant is very strong indeed, not just because of the protection from offending but in the wider terms of deterrence and in the public confidence somebody given leave here should be deported if they commit a crime of such gravity. We accept that the appellant has not been convicted of any crimes since the index offence but that is not in our view any strong indication that he has become rehabilitated or indeed that anything other than a marginal amount of weight should be attached to that. The offence he committed was one that involved preplanning for gain and we find nowhere in his evidence any proper or sufficient explanation for why he did so. We therefore attach little weight to the fact that he has not been convicted in the time since the index conviction. We accept that he regrets what he did and some little weight can be attached to that.

87. In favour of the appellant we do note that the effect on his son, and wife, will be significant and harsh although, for the reasons we have given above, they do not amount to undue harshness. We accept also that there will be a significant impact on the appellant's mother who will inevitably be distressed at him being removed. That that will have the effect of severing their relationship and we accept that that is a relationship which amounts to family life given the degree of dependency.

88. We do not accept that the effect on the daughters will be so severe given that they are both now adults and Tanja has now formed a relationship and lives with her partner, albeit that she remains close to the family.

89. On any view there will be a significant and adverse impact on the close family but the children are now older and will be able to an extent to assist their mother emotionally and practically and to provide her real support and assistance. The appellant will be returning to Kosovo as a relatively young man with skills which he would appear to be able to transfer.

90. Taking the effects of deportation of the appellant cumulatively and how they will impact on the family unit as a whole, we have no doubt that the effects will be harsh. But in this case the gravity of the offending is of an order of an entirely different magnitude from the four-year cut-off. Indeed, the sentence is of three times that duration reflecting the gravity of the offending which in turn increases the public interest in deportation as does the nature of the crime – the importation of significant quantities of Class A drugs.

91. In conclusion, although we accept that the effects of deportation in this case will be harsh on the family and indeed distressing, we consider that given the gravity of the appellant's offending that it is nonetheless proportionate.

92. Accordingly, for these reasons, we dismiss the appeal on all grounds.

Notice of decision

1. The decision of the First-tier Tribunal involved the making of an error of law and we set it aside

2. We remake the appeal by dismissing it on all grounds.

Signed Date 1 June 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul