Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/15923/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
By Skype for Business	
On 7 May 2021	**On 15 June 2021**

Before

UPPER TRIBUNAL JUDGE OWENS

Between

AV
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant:	Ms Christie, Counsel, instructed by Arlington Crown Solicitors
For the Respondent:	Mr Whitwell, Senior Home Office Presenting Officer, instructed by the GLD

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Housego sent on 30 January 2021 dismissing the appellant's appeal against a decision made on 13 September 2013 to refuse his human rights claim and deport him from

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the UK. Permission to appeal was granted by Upper Tribunal Judge Sheridan on 20 January 2021 on the basis that it is arguable that the First-tier Tribunal fell into error by assessing 'undue harshness' in a way which was cautioned against in HA (Iraq) v SSHD [2020] EWCA Civ 1176. Permission was granted on all grounds.

2. The hearing was held remotely and neither party objected to the hearing being held in this manner. Both parties participated by Skype for Business. I am satisfied that a face-to-face hearing could not be held because it was not practicable due to the current COVID-19 situation and that all of the issues could be determined fairly by way of a remote hearing. Neither party complained of any unfairness during the hearing.

Anonymity

3. I maintain the anonymity direction in order to protect the identity of the appellant's son in this appeal.

Background

4. The appellant is a citizen of Albania born in 1977. He has a complex immigration history. He entered the UK clandestinely on 6 October 2000 and initially fraudulently claimed asylum as a Serbian national. The claim was refused, and his appeal dismissed. His appeal rights against that decision were eventually exhausted in September 2002.

5. The appellant's wife entered the UK illegally in 2003 with his daughter J who was born in Albania on 2 October 2000. A son, A was born in the UK on 10 September 2008. In 2009 the family applied for leave to remain in the UK.

6. On 1 October 2010 the appellant was convicted of an offence of blackmail at Blackfriars Crown Court and sentenced to 3 year's imprisonment. As a result of this conviction, on 17 November 2010, the Secretary of State served on him a notice of intention to deport. In 2011 the appellant admitted that he was Albanian. The appellant's wife and children claimed asylum in 2011. Their claims were refused, and their appeals were dismissed on 15 August 2011.

7. The appellant's wife lodged further submissions in respect of asylum and Article 3 and 8 ECHR on medical grounds. On 16 August 2012 the appellant's wife made a further human rights application.

8. A Deportation Order was made on 16 November 2012 but withdrawn in light of the wife's further submissions. A second notice of intention to deport was served on 16 July 2013. The appellant appealed against this, but the appeal was withdrawn pending a hearing of an appeal in respect of his daughter J on medical grounds. There was further ensuing litigation.

9. On 20 January 2014 the respondent issued a new deportation decision and refusal of the appellant's second asylum claim which was based on a blood feud in Albania. The appellant appealed against this decision, but the decision was withdrawn by the respondent because the appellant had produced evidence that he was Albanian and in order to consider his wife and children's immigration position.

10. On 23 July 2015, a decision was taken to deport the appellant and remove the appellant's wife and two children from the UK. On 18 March 2016 the respondent refused applications to revoke the deportation order. Appeals against those decisions were dismissed on 20 December 2016. The judge decided that the presumption pursuant to s72 Nationality, Immigration and Asylum Act 2002 did not apply to the appellant but that his deportation was proportionate. On 31 July 2018, the appellant's daughter made an application on the basis of her family and private life in the UK. On 14 November 2018, the family made a fresh claim.

11. On 27 November 2018 the appellant's son was registered as a British citizen. The appellant's daughter was granted leave to remain on 13 September 2019 under the ten-year route. It was also accepted that the appellant's wife has a derivative right of residence as the primary carer of her son.

12. The appellant's application was refused on 13 September 2019 by way of a decision to refuse a human rights claim.

The decision of the First-tier Tribunal

13. The appellant, his wife and daughter all gave oral evidence.

14. The judge set out in detail the appellant's immigration history and then summarised the reasons for refusal as well as the grounds of appeal. From [6] to [33] the judge sets out the law in respect of deportation. The judge points to the fact that the appellant is a foreign criminal who falls into the medium category.

15. The judge noted that the appellant did not advance a protection claim, and in any event the starting point was the previous determination of First-tier Tribunal Judge Cooper from 2016 who found that the appellant did not have a well-founded fear of persecution in Albania. The judge pointed to the fact that the appellant does not have an Article 3 ECHR medical claim.

16. The judge found that it would be reasonable for the appellant's son to go to Albania. He is a dual Albanian/British national and his grandparents live in Durres. He noted that in the previous decision the judge decided that it would not be unduly harsh for the appellant's son and daughter to return to Albania and he found that there had not been any significant change since then.

17. The judge found was that as a British citizen the appellant's son can return to the UK in the future and it is more reasonable to expect him to return to Albania given that he is now British. The judge found that since it would be reasonable for the son to go to Albania, the appellant cannot meet the "unduly harsh" test and the decision does not breach the duty under s55 Borders, Citizenship and Immigration Act 2009 for the same reason. The appellant cannot meet either Exception under ss 117C (5) of the Nationality, Immigration and Asylum Act 2002.

18. The judge found that family life does not exist between the appellant's daughter and the appellant. Having found that the appellant did not meet the Exceptions, the judge found that there were no exceptional features to the case and that the public interest requires deportation. The judge found that family life was not engaged because the family can relocate together to Albania and if it were, deportation would be proportionate in all the circumstances.

The position of the appellant

19. The position of the appellant is that he has resided in the UK for nearly 20 years. His wife and daughter have been in the UK for nearly 17 years and his son was born in the UK and is British. It is in his son's best interests to remain in the UK with both parents. It would be unduly harsh for him to go to Albania and unduly harsh for him to remain in the UK without his father. The appellant has only one conviction for an offence which took place more than 11 years ago and although serious, there were some mitigating features because it was committed against his employer who had not paid him. There is significant evidence that the appellant does not represent a risk of reoffending and is not a risk to the public. There are compelling circumstances which mean that deportation is not in the public interest.

Grounds of appeal

20. The grounds of the appeal were elaborated in the application for permission to appeal to the Upper Tribunal and again in the skeleton argument in which they were addressed in a different order. I deal with the grounds as set out in the grounds of appeal.

Ground 1

21. The judge has misdirected himself in respect of the "unduly harsh" test. The judge adopted the previous judge's decision on 'unduly harsh' which was based on the test in MM (Uganda) [2016] EWCA Civ 617, the reasoning in which was overturned in KO (Nigeria) [2018] 1 WLR 5273 and more recently in HA. The judge's starting point was therefore wrong in law. First-tier Tribunal Judge Cooper took into account the appellant's immigration history and offending in the assessment of unduly harsh and this error has filtered through to the judge's current findings in respect of unduly harsh. Further the judge erred in finding that there were no material factual changes between 2016 to

2020 which would cause him to depart from the earlier judge's findings. This was perverse in circumstances where there were radical and material differences in that the appellant's family now all had status in the UK.

Ground 2

22. The judge failed to apply the principles in HA. The judge considered that there would be an 'ordinary' level of harshness which is applicable to all children whose parents are being deported and was manifestly looking for an additional degree of harshness or something exceptional or rare which would take the case out of the ordinary. The judge has misapplied the law in this respect. It is acknowledged that the judge did not have the benefit of this judgement when he made the decision.

Ground 3

23. The judge erred by proceeding on the basis that the family could return together to Albania with the appellant when their evidence was that they did not consider this to be in the best interests of the children and that the appellant's wife and children would remain in the UK if the appellant were to be deported. The judge failed to weigh up the best interests of the appellant's son and to factor this into the assessment of unduly harsh. His British nationality is a weighty factor. Elsewhere in the decision the judge appears to acknowledge that if this were not a deportation appeal, the appeal would succeed. The judge has failed to consider the alternative scenario that the family would remain in the UK without the appellant. The judge has failed to analyse whether it would be a disproportionate breach of Article 8 ECHR to separate the family.

Ground 4

24. The judge erred in his approach to very compelling circumstances. There is a failure to structure the analysis. The judge appears to confuse the test of "unduly harsh" with "very compelling circumstances" and does not give sufficient weight to relevant factors such as the absence of risk of the appellant re-offending. The judge confuses paragraph 399A of the immigration rules and the "very compelling circumstances" exercise. Further the judge finds that family life is not engaged in any event because the family can return to Albania together.

Rule 24 response.

25. The respondent opposes the appellant's appeal. It is submitted that the judge directed himself appropriately. When stating that the circumstances are little different from 2016, the judge is clearly referring to the appellant and his wife only in respect of very significant obstacles.

26. The judge was rationally entitled to conclude that there was no change of circumstances because the effect of deportation was not unduly harsh. The judge found it would be reasonable for the child to return to Albania. The judge has not been bound by the conclusions of the earlier decision.

27. The judge has directed himself appropriately. HA does not lower the threshold of unduly harsh. Since the judge found that it would be reasonable for the son to move to Albania, the judge must have carried out the best interests assessment. Having found that it was not unduly harsh for the child to leave, there was no onus on the judge to consider the alternative scenario. It is also argued that the judge has not mixed up or conflated the tests when conducting the proportionality exercise.

28. It is asserted that the grounds are a disagreement with the weight that the judge has given to various factors.

Discussion and Analysis

29. I am satisfied that the judge used First-tier Tribunal Judge Cooper's 2016 finding that it would not be unduly harsh for the appellant's son to relocate to Albania as his starting point. He states this explicitly at [76];

> "I take note of paragraph 116 of the determination of 20 December 2016 which expressly found that it was not unduly harsh for the appellant's son and daughter to go to Albania with their parents."

30. I am also satisfied that First-tier Tribunal Judge Cooper's evaluation of whether it was unduly harsh for the children to relocate to Albania with their parents explicitly took into account the appellant's immigration history and offending behaviour. I am in agreement that further guidance on the meaning of the test has been given since 2016 and that an evaluation of whether a factual scenario is unduly harsh will be now looked at in the light of the best interests of the child without reference to the parent's offending behaviour or adverse immigration history. In accordance with Devaseelan [2002] UKAIT 702, subsequent changes in the law can always be taken into consideration. On this basis, the judge should have carried out a fresh unduly harsh assessment based on the current legal position. The judge erred in taking the findings in the 2016 as a starting point without taking into consideration the current meaning of the test.

31. Further the judge also states in the same paragraph;

> "I do not consider that there has been any significant change of circumstances in the 3 years since such as to come to a different conclusion today."

32. In my view this approach is perverse. In December 216, none of the family members had any status in the UK and the judge in the first appeal when finding that it was not unduly harsh for the children to relocate to Albania gave

weight at [115] to the fact that none of the family members were British. By January 2020, the appellant's son had been naturalised as a British citizen, and his daughter had been granted leave to remain in the UK on a route to permanent settlement. His wife has also been granted status. Further his son was now aged 11 rather than 8 which is a considerable age difference, and his daughter was by then an adult studying at university. The factual circumstances were manifestly different from those at the earlier appeal and the finding that there has not been any significant change of circumstances is not sustainable. I am also satisfied that contrary to the rule 24 response the finding that there has been no significant change of circumstances does not refer to the appellant and his wife but to the children.

33. Mr Whitwell submitted that this error was not material because having found that it was "reasonable" for the child to return, the "unduly harsh" test could not be met in any event.

34. My view is that the judge's finding at [60], that it is "reasonable" for the child to go to Albania is unsustainable. Firstly, when making this finding the judge does not carry out a "best interests" consideration. It is not sufficient for the judge to refer to s55 which he does at [13] and [67]; the judge must also demonstrate that he has applied the principles and carried out the assessment. The judge manifestly has not taken into account all of the relevant factors. The judge's approach to British nationality for instance runs contrary to the guidance given by Lady Hale at [29] to [32] of ZH(Tanzania) v SSHD [2011] 2AC where she emphasises the importance of nationality which is confirmed in HA. The judge's conclusion at [77] that it is "more reasonable" for the child to relocate to Albania because he is British as he will have the right to return to Britain in the future fails to acknowledge the loss to him of the benefits of his citizenship and of growing up in his own society and culture and is in my view fundamentally flawed. Further, when the judge comments that Durres is a "pleasant place" he seems to be importing some of his own knowledge into this assessment. I firmly reject Mr Whitwell's argument that I must infer from the judge's finding that it is reasonable for the child to go to Albania that the best interests exercise has been carried out because it is inherent in that finding. From reading the decision as a whole, I am satisfied that the judge has not addressed his mind to the best interests of the child as a separate and important consideration.

35. In any event, this is a deportation appeal and it is not clear why the judge has taken into account the "reasonableness" of relocation in any event. He refers to the test of reasonableness at [60], [67] and [70]. Further at [64] the judge appears to contradict himself by stating;

> "While a human rights appeal, absent the conviction, would doubtless succeed with a child of 10 both in the UK and a British citizen as a result, that is not the case where there is a mandatory deportation order".

36. The judge's reasoning is manifestly irrational. At [77] he finds that it is reasonable for the child to leave and at [64] he accepts it is not. It is apparent that when considering the issue of reasonableness, he has imported the father's conviction into the assessment which is contrary to the principles in KO. The approach to reasonableness is clearly flawed and Mr Whitwell's submission that since the judge has found it "reasonable" for the child to relocate it must not be "unduly harsh" is not made out.

37. The actual test is whether it is unduly harsh for the child to relocate to Albania with his family. I am satisfied that the failure to consider the best interests of the child is imported into the assessment of whether it would be unduly harsh for the appellant's son to relocate to Albania. There is no consideration of the child's best interests. There is little consideration given to the impact on his education, the child's own wishes and feeling and the importance of the child's nationality. There is little consideration that his elder sister is at university in the UK and will not travel to Albania, that his mother intends to stay in the UK or of the real-world scenario in which the child find himself. What is required in line with HA is a detailed assessment of the child's individual circumstances to evaluate his best interests which in this appeal would include the fact that the child has lived in the UK all of his life, is British and has lived with his older sibling and parents in a family unit for the vast majority of his life.

38. Mr Whitwell argued that the judge has in reality taken into account all of the relevant factors and rationally concluded that it is not unduly harsh for the appellant's son to relocate to Albania, taking into account his nationality, knowledge of Albanian, stage of education and close relation with his family and that the judge has applied the correct test. I am satisfied however that there are factors the judge failed to take into account including the importance of the child's nationality for the reasons set out above and I address the issue of whether the judge has applied the correct legal test below.

39. Ms Christie submitted that the judge's approach to the question of whether it would be unduly harsh for the appellant's son to move to Albania is flawed because the judge has misapplied the law. Mr Whitwell's submission is that the judge has correctly applied the undue harsh test.

40. I recognise that current proper elucidation of the test of "unduly harsh" differs from that at the time of the hearing, and that the judge cannot be blamed for this, but it is plain from reading the decision as a whole that the judge is looking for some exceptional feature in relation to undue harshness which will take the appeal out of the ordinary. At [23] he states that he is looking for something;

> "which makes it harder on this particular child than on children in this situation generally".

41. It is manifest from [60], when considering what is said by the social worker in respect of the son, that the judge is looking for something above the ordinary level of harshness. The judge comments that the report's conclusions;

> "… are generic and so typical of the situation when a father is removed from his family. That is to say it is harsh on the child but that it is not unduly harsh without some specific reason being given and none is: the report would be the same for any child who is close to his father in the same situation".

42. At [61] the judge refers to the present case as being the 'usual' level of father/son affection and finally at [78] the judge states;

> "while undoubtedly harsh on the appellant's son, it is the sort of circumstance seen in many a deportation case".

43. This is precisely the sort of approach criticised by the Court of appeal in HA at [56], where it is emphasised that there is no baseline or ordinary level of harshness and that there is no reason in principle why cases of undue harshness may not occur quite commonly.

44. In summary, I have found that the judge's approach to the unduly harsh test is flawed because it is based on the previous judge's starting point when the proper meaning of the test had not been clarified and fails to take into consideration the factual changes including the age of the child and the importance of his nationality when concluding that there is no need to depart from that starting point.

45. I am also satisfied that the judge has failed to carry out the unduly harsh exercise by taking into account the best interests of the child based on his individual circumstances and that the judge has misapplied the law by searching for something 'out of the ordinary'.

46. I find that the judge's approach as to whether it is "unduly harsh" for the appellant to return to Albania with his parents is so flawed that it is unsustainable. This error is material because had the judge carried out the proper best interests exercise for himself taking into account the child's current individual circumstances and applied the law correctly the judge may have come to a different conclusion on whether it was unduly harsh for the child to return to Albania with his father.

47. Mr Whitwell attempted to persuade me that on the evidence before the judge the only possible finding was that it was not unduly harsh for the child to return to Albania, but I am not persuaded by his argument for the reasons set out above.

48. As Mr Whitwell acknowledges the judge has not made any findings on the 'stay' scenario where the appellant returns to Albania leaving his son and family behind because he was not satisfied that the 'go' scenario was met and

there was therefore no need to consider the alternative scenario. I am satisfied that without a lawful consideration of the 'go' scenario and in the absence of findings on the 'stay' scenario it is not possible to determine whether Exception 1 would have been met.

49. Since there is an error in the approach to the Exceptions, this must by implication mean that the consideration of whether there are any 'very compelling' circumstances" over and above the Exceptions is also flawed and there is no need for me to consider the arguments in respect of the test of 'very compelling circumstances" on this basis.

50. I am satisfied that the decision is flawed to the extent that the appellant did not have a fair hearing and I do not preserve any factual findings of the First-tier Tribunal.

Decision:

51. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

52. I set aside the decision of the First-tier Tribunal and all of the findings of the First-tier Tribunal.

53. I remit the appeal to the first-tier Tribunal for a de novo hearing before a judge other than First-tier Tribunal Judge Housego.

Signed *R J Owens* 28 May 2021

Upper Tribunal Judge Owens