IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005759

First-tier Tribunal No: DA/00231/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

2nd February 2024

Before

UPPER TRIBUNAL JUDGE BLUNDELL

Between

NERITAN KOLLUDRA
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Parminder Saini, instructed by Duncan Lewis Solicitors
For the Respondent: Tony Melvin, Senior Presenting Officer

Heard at Field House on 9 January 2024

DECISION AND REASONS

1. The appellant appeals with the permission of First-tier Tribunal Judge Easterman against the decision of First-tier Tribunal Judge J Robertson. By a decision which was issued on 25 October 2022, Judge Robertson dismissed the appellant's appeal against the respondent's decision to deport him from the United Kingdom under the Immigration (EEA) Regulations 2016.

Background

2. The appellant is an Albanian national who was born on 2 June 1976. He entered the UK illegally in 1998 and claimed asylum using a false name and nationality. His claim was refused and his subsequent appeal was dismissed. He returned to Albania voluntarily in 2005. He subsequently demonstrated to

the Secretary of State's satisfaction that he had a right to reside in the UK as the spouse of a Lithuanian national and was granted a residence card as such.

3. The appellant has been convicted of various offences in the UK. The respondent first sought to deport him from the United Kingdom as a result of his criminality in 2011. He appealed, however, and his appeal against the decision to make a deportation order was successful. He then sought and was granted a permanent residence card as the spouse of an EEA national in 2011.

4. On 7 December 2019, the appellant was sentenced to 14 years and 4 months imprisonment for offences of conspiracy/possessing a Class A drug with intent to supply and concealing (etc) criminal property. The appellant was the head of an Albanian organised crime group based in Peterborough which was involved in the supply of cocaine on a wholesale basis.

5. On 7 June 2021, following the usual exchanges, the Secretary of State made a second deportation decision against the appellant. The Secretary of State considered that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom; that his deportation was warranted on serious grounds of public policy or public security; and that deportation would be a proportionate course in all the circumstances.

6. At [3] of her decision, the respondent explained why she was considering the appellant's deportation despite the fact that he had years of his custodial sentence left to serve:

> Deportation is being considered at this stage as Her Majesty's Prison & Probation Service (HMPPS) have identified you as a person who may be suitable for enforced transfer to Albania to serve the remainder of your prison sentence there. Consideration of such a transfer (which will be under the Additional Protocol to the Council of Europe Convention on the transfer of Sentenced Persons) can only commence once a deportation order has been made and all rights of appeal in relation to that deportation decision have been exhausted. As a separate and necessarily subsequent process, and one that is solely a matter for HMPPS, considerations of and decisions on transfer cannot feed into the Home Office's decision to deport or appeals against that decision. If HMPPS decides that transfer is appropriate, you will have an opportunity to challenge that decision by way of Judicial Review. Should a transfer not be pursued, you will serve the remainder of your prison sentence in the United Kingdom and will be able to make further representations to the Home Office as to why you should not be deported from the United Kingdom upon conclusion of the custodial element of the sentence.

The Appeal to the First-tier Tribunal

7. The appellant appealed against the respondent's decision and his appeal was heard by Judge J Robertson ("the judge"), sitting in Nottingham on 2

September 2022. The appellant was represented by Mr David Lemer of counsel. The respondent was represented by a Presenting Officer (not Mr Melvin). The judge heard oral evidence from the appellant and his wife before hearing submissions from the advocates and reserving her decision.

8. In her reserved decision, the judge set out a concise summary of the background and the parties' cases before turning to her findings at [9]. At [11], she administered a self-direction which echoed [3] of the respondent's letter, stating that it was not 'the role of the tribunal or the Home Office to decide where a prisoner serves their sentence.' At [12], the judge noted that it was accepted on all sides that the appellant had acquired the right to reside permanently in the UK. At [13], she gave herself an impeccable self-direction on the terms of regulation 27(5) of the 2016 Regulations.

9. The judge analysed the appellant's offending history at [14]-[15]. At [16], she explained why she considered the OASys report to be flawed and gave it little weight insofar as it assessed the appellant as representing a low risk of reoffending. For reasons the judge gave at [18]-[21], she concluded that the appellant represented a genuine, present and sufficiently serious threat to the fundamental interests of the UK.

10. For reasons she gave at [22]-[29], the judge concluded that the appellant's deportation would be proportionate. Given the centrality of that assessment to the appeal before me, I will set it out in full:

> [22] In respect of proportionality, I have considered the Appellant's age, state of health, family and economic situation, his length of residence in the United Kingdom, his social and cultural integration into the United Kingdom and the extent of his links with his country of origin. The Appellant is a man now aged 40 years old. The evidence before me does not support a finding that he currently has any significant health problems or disabilities. He has worked in the past and has the capacity to work to support himself and his family, using skills he has acquired in the UK.
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> [23] The Appellant gave evidence that he maintains contact with his mother and siblings and that the family has visited Albania regularly, staying at his brother's home where his sister and mother live. His wife also has a relationship with them and is able to speak a little Albanian. He has not therefore cut ties with his family or his country and would be able to integrate without difficulty on return. He spent his formative years there and would have family support on return.
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> [24] Overall, I find that there are no very significant obstacles to the Appellant's reintegration into life in Albania on return.
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> [25] It is not disputed that the Appellant has 3 children all of whom are British citizens and are settled in education in the UK. The oldest child is autistic with ADHD and has an EHCP. It is also not disputed that the Appellant has a genuine and subsisting relationship with his children and with his wife.

> [26] Clearly the Appellant's return to Albania will impact his wife and children. As British citizens there is no compulsion for the children to travel to Albania, and it is a matter for the family to decide whether or not to remain in the UK. Should they remain in the UK the Appellant's wife has successfully cared for the children since the Appellant's incarceration whilst running her own business and could continue to do so. Although she has claimed to struggle, her position is no different to many other single parents. There is nothing before me to suggest that she has any health problems or that support has been denied her from the school, NHS or social services. She also has family in the UK, as does the Appellant who could provide additional support. Contact with the Appellant could be maintained via telephone as now and via other modern means of communication.
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> [27] Although I accept that the deportation of the Appellant will impact the family and that it would be in the children's best interests to remain as a family unit in the UK, I find this to be outweighed by the serious risk of reoffending and the resulting risk to the public. Accordingly, I find the deportation of the Appellant to be proportionate.
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> [28] I have considered the impact of deportation upon the Appellant's rehabilitation. I have no details of rehabilitative work being undertaken which would be interrupted. I find no reason why the Appellant could not continue to work towards rehabilitation in Albania. I have nothing before me to suggest that the services available there are materially different from the services available in this country.
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> [29] Having had regard to all of these matters and to all of the circumstances of the case, I am satisfied that the requirements of the regulations are met, that there are grounds of public policy, and that deportation is a proportionate response to the Appellant's conduct. Deportation is conducive to the public good and in the public interest given the Appellants conviction and sentence to 14 years imprisonment.

11. The judge gave brief reasons at [30]-[32] for finding against the appellant on Article 8 ECHR grounds. It followed, therefore, that she dismissed the appeal on the grounds which were available to the appellant.

The Appeal to the Upper Tribunal

12. The appellant's grounds of appeal were settled by Mr Lemer. There is a single point, which is that the judge failed to consider the proportionality of the appellant's deportation to Albania *during the course of his sentence*. The judge was said to have failed to come to grips with certain matters which would arise if, as the respondent intended, the appellant should be deported to serve the remainder of his sentence in Albania. Judge Easterman considered the point to be arguable and granted permission accordingly.

13. The Secretary of State duly served a response to the grounds of appeal under rule 24 of the Procedure Rules. The author of that response (Mr Wain) submitted that the judge had considered all relevant factors relating to proportionality and that the grounds represented in substance nothing more than a disagreement with the judge's decision.

14. In his oral submissions before me, Mr Saini submitted that it was clear from [3] of the respondent's decision that consideration would be given to the appellant's transfer to Albania in the event that his appeal was dismissed. The proper point in time to consider the proportionality of his deportation was therefore at the date of hearing, and the necessary comparison was between the appellant's circumstances in prison in the UK and those which would obtain in prison in Albania.

15. It was accepted on all sides that it was not for the FtT to consider whether the appellant might lawfully be transferred; as the respondent had observed, that was a decision yet to be taken by different department of state. However, the appellant's deportation to complete his sentence in Albania brought with it a number of considerations which were set out at [21] of Mr Lemer's skeleton argument before the FtT. The judge had failed to come to grips with those submissions. The judge had seemingly accepted that the appellant's children currently visit him in prison but had not considered whether that could continue. Nor had she considered whether the twice daily telephone contact which the appellant currently enjoys could continue in Albania. Nor had she considered the point made about the appellant's (then) imminent transfer to a Category D prison and his ability to spend time with his family in the UK. Even if he was transferred on a 'like for like' basis, and was permitted to spend time on day release in Albania, his children would be in the UK and that would be of little value to the family. Restivo (EEA - prisoner transfer) [2016] UKUT 449(IAC); [2017] Imm AR 188 was of no assistance in these regards.

16. For the Secretary of State, Mr Melvin relied on the rule 24 response and submitted that the judge had evidently considered all relevant matters. It was not for the judge to consider 'stay and go scenarios' under the 2016 Regulations and she had been entitled to conclude that the appellant's deportation was a proportionate course. The appellant's grounds ultimately represented a disagreement with the outcome.

17. Mr Saini did not wish to reply but he assisted me with the question of relief. He invited me to remit the appeal to be heard afresh in the FtT. I noted that there were unchallenged findings of fact. He stated that his instructions were to seek remittal de novo.

18. I reserved all aspects of my decision at the conclusion of the submissions.

Analysis

SSHD v Restivo

19. The only reported decision on the relationship between deportation and prisoner transfer agreements is that of the Upper Tribunal in Restivo (EEA –

prisoner transfer) [2016] UKUT 449 (IAC). Having been convicted of appalling offences, the Italian appellant in that case had been sentenced to life imprisonment. The trial judge (Burnett J, as he then was) had imposed a whole life term but that was subsequently varied by the Court of Appeal to a minimum term of imprisonment of 40 years. The respondent made a decision to deport Restivo to Italy when he had more than three decades of his sentence remaining. The intention – as in this case – was that he should serve the remainder of his sentence in his country of nationality.

20. On appeal, the First-tier Tribunal held that the appellant did not represent a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom because he was in prison. It also concluded that the decision to make a deportation order was 'premature' because the Italian authorities had not agreed to the appellant's transfer and because the appellant's appeal against an Italian conviction (also for murder) had not been finally determined. The FtT also concluded that the appellant's deportation would be contrary to Article 3 and 8 ECHR because of the conditions in Italian prisons.

21. The Upper Tribunal held that the FtT had erred in reaching each of those conclusions.

22. The FtT had erred in taking account of the fact that the appellant's risk was managed whilst he was in prison: [24]. (That holding was very recently endorsed by the Court of Appeal in SSHD v AA (Poland) [2024] EWCA Civ 18, at [54]-[55], per Warby LJ, with whom Baker and Laing LJJ agreed.)

23. The FtT had erred in misunderstanding the necessary sequence of events as regards deportation and transfer. Far from being 'premature', a deportation decision was a necessary pre-condition for the transfer of a prisoner, without his consent, under Article 6(2)(b) of the Council Framework Decision 2008/909/JHA: [12]-[17]. The existence of the appeal against the Italian conviction was no basis at all for considering that the Secretary of State could not lawfully proceed to make a deportation decision: [18]-[19].

24. At [25]-[31], the Upper Tribunal examined the FtT's conclusions under the ECHR. It concluded that there was 'no arrangement in place for the applicant to serve his sentence in Italy' and that the FtT had erred in basing their assessment on such a hypothesis. At [29], the Upper Tribunal held that the proper approach was that 'any assessment of the existence of article 3 risk is one to be carried out at a future date as part of the transfer request mechanism.' In the same paragraph, the Upper Tribunal held that the FtT had wrongly conflated 'issues arising from the making of the deportation order, which were in play, with the position in which the respondent may find himself if a decision were subsequently made for his transfer to Italy'. At [31], the Upper Tribunal held that the FtT's error in relation to Article 3 vitiated its assessment of Article 8, since the latter was predicated entirely on the former.

Prisoner Transfer Between Albania and the United Kingdom

25. Domestic provision is made for the transfer of prisoners into and out of the United Kingdom by the Repatriation of Prisoners Act 1984. Section 1 of that

Act makes provision for the issue of a warrant for transfer and refers, at s1(1)(a), to the United Kingdom being a party to international arrangements providing for such transfers.

26. The principal international arrangement which was considered in Restivo was the European Union Transfer Framework Decision Agreement, which allowed for the compulsory transfer of EU prisoners. As a result of the United Kingdom's withdrawal from the European Union, it is no longer a member of the Framework Decision.

27. The United Kingdom has therefore reverted to using the 1983 Council of Europe Convention on the Transfer of Sentenced Persons to transfer EU prisoners (ETS No. 112). The UK ratified and then entered into the Convention on 1 August 1985. It allows for the transfer of sentenced persons if they express an interest to be moved from the sentencing State to the receiving State (voluntary transfer).

28. The UK also ratified the Additional protocol to the Convention of Europe on the Transfer of Sentenced persons (ETS No. 167) on 1 November 2009. It supplemented the 1983 Convention by allowing States to agree to the transfer of a sentenced person without the consent of that person. It was the Additional Protocol which was cited by the Secretary of State in [3] of the decision under appeal, as reproduced above.

29. In respect of Albania, there is also the Agreement between the United Kingdom of Great Britain and Northern Ireland and the Republic of Ireland and the Republic of Albania on the Transfer of Sentenced Persons, signed in London on 26 July 2021 and in force from May 2022 (and therefore after the Secretary of State's decision in this case). A new agreement was reached on 24 May 2023 but does not appear to be in force yet.

30. As with the framework which was analysed in Restivo, the Agreement permits transfer 'with the consent of the sentenced person or without the sentenced person's consent where an order for deportation, expulsion or removal is in place': Article 2(3) refers, as does Article 3(b). In respect of an Albanian prisoner who does not wish to be transferred, the existence of a deportation order is therefore a necessary pre-condition to the making of a transfer order.

31. Other aspects of the Agreement are worthy of note. Article 4 makes detailed provision for the Procedures for Transfer, including the information which is to be provided by the transferring and receiving states. Article 8(2) provides that a potential transferee must: (a) be informed of the substance of the Agreement; (b) have the terms of the transfer explained in writing in his own language; and (c) be given an opportunity to submit representations to the transferring state before it gives its written agreement to the terms of the transfer. Article 9 addresses the Treatment of Sentenced Persons and requires each state party to treat transferees in accordance with applicable international human rights obligations 'particularly regarding the right to life and the prohibition against torture and cruel, inhuman or degrading treatment or punishment.'

The European Convention on Human Rights

32. In the United Kingdom, warrants for transfer are issued by 'the relevant Minister', who is the Secretary of State for Justice. In deciding whether to make an order for transfer, the Secretary of State for Justice must not act in a way which is incompatible with a person's rights under the ECHR. So much is obviously clear from section 6 of the Human Rights Act 1998 and from the decision of Dyson LJ (as he then was) in R (Shaheen) v Secretary of State for Justice [2008] EWHC 1195 (Admin).

33. A transferee might therefore raise their rights under the ECHR in representations made to the Secretary of State for Justice when they are notified – as of right – that their transfer is in contemplation. The Secretary of State for Justice would be obliged to reach a conclusion on any such representations and there would be a right to challenge any adverse decision by way of an application for judicial review, as happened in R (Shaheen) v Secretary of State for Justice.

34. Given the avenues of recourse which would be available to a potential transferee, and given that the timing and terms of any transfer cannot be known in the course of an appeal such as this, it would be premature for the FtT to consider arguments under the ECHR, whether in relation to Article 3 ECHR or Article 8 ECHR. Any such assessment would be impermissibly proleptic, to borrow a term from another sphere.

The Immigration (EEA) Regulations) 2016

35. In a case such as the present, however, where the Immigration (EEA) Regulations 2016 continue to apply, the Tribunal is obliged by regulation 27(5)(a) to consider whether the decision to make a deportation order complies with the principle of proportionality. In considering that question, the Tribunal is required to have regard to the matters set out in regulation 27(6), including 'the age, state of health, family and economic situation of P, P's length of residence in the United Kingdom, P's social and cultural integration into the United Kingdom and the extent of P's links with P's country of origin'. The content of that assessment has been considered in numerous authorities and necessarily encompasses an assessment of the putative circumstances in the receiving state, including for example the relative prospects of rehabilitation: Dumliauskas & Ors v SSHD [2015] EWCA Civ 145; [2015] Imm AR 773.

The FtT's Assessment in This Appeal

36. Any such assessment must be based on evidence, and not mere speculation, however. Two of the submissions made by Mr Lemer to the FtT in this case fell clearly into the latter category. Concern was expressed at [21] of Mr Lemer's skeleton argument that the appellant might not be able to continue frequent telephone contact with his wife and children in the event that he was transferred to prison in Albania. The appellant and his wife expressed similar concerns in their statements before the FtT. But there was no evidence to support any such concerns, and no proper basis upon which the judge could have concluded that the appellant's telephone contact with his family would have been jeopardised by his relocation.

37. It was also submitted by Mr Lemer, again echoing what was said in the statements made by the appellant and his wife, that the appellant might be eligible for transfer to a Category D prison in December 2022, and that such a transfer would enable him to spend time at home with his family, up to five days per month. There was no other evidence in support that, however, whether from the prison or otherwise, and it would have been erroneous for the judge to attach weight to this submission. Mr Saini said at the hearing before me that the appellant had indeed been recategorised and had been able to spend time with his family since December 2022 but that change was not one which could properly have been anticipated on the evidence before the judge and my assessment of whether she erred in law must be undertaken on the evidence which was available to her.

38. What was certain on the facts as presented to the FtT was that deporting the appellant to Albania would have a serious effect on his ability to see his family. There was evidence before the judge to show that the appellant's wife and his three children had been visiting him in prison once a month, and more frequently than that before the pandemic. There was no suggestion on the part of the Secretary of State that the appellant's wife and children should relocate to Albania in order to be with him (or near him) in that country. Any such contention would have been surprising at best, given the ages and nationalities of the children and the fact that the appellant's oldest child has a formal diagnosis of Autistic Spectrum Disorder and Attention Deficit Hyperactivity Disorder, for which he receives additional assistance at school pursuant to a long-standing Education, Health and Care Plan.

39. It is clear that the judge was alive to the 'real world' consequences of deportation in this case. She carefully analysed the ability of the appellant's wife to cope in his absence. She took account of the appellant's ability to retain contact with the family by telephone. Having considered the consequences for the appellant and the family, the judge concluded that the appellant's deportation would be a proportionate course under regulation 27(5)(a). Given the serious offence committed by the appellant and the judge's conclusion that he continued to represent a genuine, present and sufficiently serious threat to the fundamental interests of the United Kingdom, that conclusion was plainly open to her as a matter of law.

40. I do not accept the submission made in the grounds of appeal and developed orally by Mr Saini that something more was required of the judge. On the evidence before her, she knew very little about the circumstances which would confront the appellant in the event that he was transferred to Albania to serve the remainder of his sentence. What she did grapple with was the certainty that deportation would separate the appellant from his wife and children, and she was entitled to conclude that such a separation would be proportionate on the facts of this case.

41. In the circumstances, the appellant has failed to make out the single ground of appeal against the decision of the First-tier Tribunal and his appeal is dismissed.

Notice of Decision

The appellant’s appeal is dismissed.

Mark Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

1 February 2024