IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Extempore

Case No: UI-2022-006661

First-tier Tribunal No: HU/03112/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 19 of November 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

MARK CANI
(NO ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr P Thoree, Solicitor, Thoree & Co Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 23 September 2024

DECISION AND REASONS

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge O'Garro ("the judge"), promulgated on 21 April 2022, dismissing his appeal against a decision by the respondent to refuse his human rights claim and maintaining a deportation order made against him on 15 November 2005.

2. The appellant has a long immigration history which is set out at paragraph 2 of Judge O'Garro's decision. In summary, he was convicted in

2005 and was served with a notice of liability to be deported at that point. He was later removed in 2006 but at some point after February 2007 re-entered the United Kingdom and made an application for leave to remain in 2011. That application was refused, various other applications were made and he was eventually removed again from the United Kingdom.

3. The appellant's case is that his removal on this occasion is disproportionate and that his removal would have an unduly harsh effect on his children and on his partner and that thus the exception set out in Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") is met. On that basis the decision to deport him is disproportionate and the appeal should be allowed.

4. The Secretary of State did not accept that, considered that it would not be unduly harsh for the children to live with the appellant in Albania if their mother wished to do so, nor would it be unduly harsh for them to remain in the United Kingdom with their mother if she chose not to move there; nor was it accepted that there were obstacles to the appellant's integration into Albanian society again to continue his private life there. The appellant submitted that the length of time he had spent here, albeit illegally, and the delays that had taken place were matters which properly ought to be taken into account in assessing his decision.

5. The judge had before her an appeal bundle. She also had a decision by First-tier Tribunal Judge Beg in the appellant's previous appeal dated 2 November 2016.

6. The appellant's partner and two of his children gave evidence adopting their witness statements and submissions were then made.

7. The judge set out the relevant law from paragraph 20 onwards of her decision including the statutory framework applicable to Article 8 cases and Section 117C of the 2002 Act in full.

8. The judge directed herself that the starting point was the decision of Judge Beg from 2 November 2016 and having directed herself in line with Hesham Ali [2016] UKSC 60 concluded that Exception 2 within Section 117C(5) was not met.

9. Having directed herself as to the relevant test set out from KO (Nigeria) 2018 UKSC 53 the judge noted that: the appellant's children appeared to be fit and well; there was no evidence they were suffering from any ill health; and, she had been told they missed their father following his removal. The judge concluded on the basis of the evidence before her that it would not be unduly harsh for the appellant's children to remain in the United Kingdom and whilst accepting that deportation of the appellant would involve a degree of harshness for his children it did not reach the relevant high standard. The judge then also found that Exception 2 was not made in respect of the appellant's partner and she then addressed herself as to whether there were very compelling circumstances over and above the exceptions at paragraphs 58 onwards of her decision. She

concluded that this was not so noting the appellant had relatives in Albania and proceeded to dismiss the appeal.

10. The appellant sought permission to appeal on several grounds. First, that the judge had erred in failing to address Section 117B (4) of the 2002 Act. Second, that the judge had failed properly to take into account the delays in this matter in assessing undue harshness. Third, that the judge had failed to address attempts the appellant had made to regularise his position. It is averred also as a fourth ground that the judge had failed properly to consider the effect on the appellant's children. For reasons which are not entirely clear the renewed application was not put before the Upper Tribunal until 2024 when for the reasons set out in the decision issued on 15 July 2024, Upper Tribunal Judge Kebede granted permission on all grounds. She did however note that although Judge O'Garro might have been in error when considering the weight to be given to the appellant's family life pursuant to Section 117B(4) of the 2002 Act it may well ultimately be the case that there is no material error in that respect.

11. We heard submissions from both representatives, Mr Thoree relying primarily on his grounds, Ms Ahmed relying on a late serviced Rule 24 response which we did accept into the case on the basis that it was in the interests of justice to do so primarily as it is in effect a skeleton argument which sets out the Secretary of State's points in response and Mr Thoree made no objection to that and was able to respond to the points raised.

12. In approaching the grounds, we bear in mind that this is an appeal from a Specialist Tribunal. We bear in mind in particular what the Court of Appeal said in Volpi v Volpi [2022] EWCA Civ 464 and in Ullah [2024] EWCA Civ 201 about the circumstances in which an appellate tribunal should or should approach a decision carried made by a lower Tribunal. We bear in mind also that this is a case to which it is not in doubt that Section 117C of the 2002 Act applies and that the threshold for establishing undue harshness is very high as confirmed most recently by the Supreme Court in HA (Iraq) [2022] UKSC 20.

13. We turn first to ground 1. We accept that the judge does not appear to have properly directed herself with respect to Section 117B (4) of the 2002 Act. We accept as Mr Thoree submitted that this does not apply where, as is the case here, the issue is family life with children under the age of 18 but for the reasons which we will give we do not consider that this error was material. The reasons for that are that primarily it has to be borne in mind that what Section 117B and Section 117C do is to set out how the balancing exercise in respect of Article 8 is to be carried out and sets out in effect that if the Exceptions 1 and 2 in Section 117C are met then that answers the issue as to whether removal is proportionate or not. Second, in this case it is clear that the judge did consider carefully the position of the children. She went on to carry out a detailed examination pursuant to Section 117C as to their situation but as Mr Thoree accepted there was little or no evidence as to the situation of the children, there was no psychological report and in the circumstances we consider that the judge

was entitled to conclude that Exception 2 was not made out. Given that this is a deportation case the failure expressly to address section 117B (4) is not capable of making a material difference given the judges careful consideration of the children when considering Exception 2.

14. Dealing with the remaining grounds we do not accept that there is a sufficient basis to demonstrate that the matters raised in grounds 2 and 3 were properly put before the judge but in any event it is clear that she was aware both of the issues about delay and the length of time it had taken for applications to be processed. There is some merit in the Secretary of State's submission to the extent that these were matters put forward by the appellant and he did re-enter the United Kingdom in breach of a deportation order. Further, it is difficult to see how the matters raised in grounds 2 and 3 are capable of affecting the decision as to whether something was unduly harsh or not. When pressed on this Mr Thoree addressed us on the effect that there would be on the children and that the common-sense approach should be taken but we bear in mind the very high threshold involved.

15. It is simply not the case that a judge could, properly directed as to the law, conclude that the fact that children were likely to be distressed as they undoubtedly were, is capable of reaching the level necessary and it would in the circumstances be difficult to identify how that was different on these facts from any other deportation decision. Further, we do note that these matters were considered by the judge when she properly considered whether the appellant had shown compelling circumstances over and beyond the exceptions which are met. We accept that matters such as delay and to regularise an immigration status could in principle fall within the rubric of a consideration of very compelling circumstances over and above Exceptions 1 or 2 but we do not accept that on the facts of this case that the circumstances reach anywhere near that level either singly, or cumulatively and equally to be taken into account would be the fact that the appellant entered in breach of a deportation order.

16. Dealing finally with the fourth ground we consider that this is not anything really beyond an attempt to re-argue the case. We do not accept that the effect on the appellant's children was not properly considered for the reasons we have already given.

17. Accordingly for these reasons we consider that the decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold it.

Signed Date:

Jeremy K H Rintoul
Judge of the Upper Tribunal