IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004003

First-tier Tribunal No: EA/50090/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 11th of June 2024

Before

UPPER TRIBUNAL JUDGE HANSON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EDA
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms Young, a Senior Home Office Presenting Officer.
For the Respondent: In person.

Heard at Phoenix House (Bradford) on 8 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the above Respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the above respondent, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with permission a decision of First-tier Tribunal Judge Cox ('the Judge'), promulgated following a hearing at Bradford on 7 July 2023, in which the Judge allowed EDA's appeal against the refusal of his human rights claim, relied upon by him as an exception to his deportation from the

United Kingdom, and in a section 120 notice that the decision was also in breach of his rights under the EU Treaty and EU Withdrawal Agreement.

2. EDA is a citizen of South Africa born on 3 February 1979. He was granted indefinite leave to remain in the UK under the EU Settlement Scheme (EUSS) on 18 June 2021.
3. On 24 May 2022 EDA was convicted of assault occasioning actual bodily harm and wounding/inflicting grievous bodily harm and sentenced to 12 months imprisonment and 8 months imprisonment to run consecutive, giving a total of 20 months imprisonment.
4. On 30 June 2022 EDA was issued with a decision to deport him from the United Kingdom. On 24 January 2023, after consideration of representations made in response to the decision to deport, the Secretary of State signed the deportation order and refused EDA's human rights claim.
5. The Judge sets out agreed facts between [10 – 22] of the decision under challenge. Within those the Judge notes at [12] that the Appellant and his wife met in 2005, married in 2009, and have a daughter, E, born in 2006 who until his conviction was home schooled by EDA.
6. In relation to the offence the Judge writes at [16 – 21]:

> 16. The incident occurred on 10 January 2022. The judge described the incident in the following terms:
>
> On 10 January of this year you behaved like a crazed animal. You attacked, brutally, viciously, your wife and your daughter. It was a continuing attack about the house, dragging them both around by the hair, punching them, putting your hands on their necks, biting your wife all over her body, punching. Fortunately, your daughter managed to escape and she raised the alarm and the police came and you were still attacking your wife when the police arrived. It was a terrifying ordeal and, if the police hadn't have arrived, I wonder what would have happened (377)
>
> 17. The Sentencing Judge noted that the Appellant's wife and daughter had forgiven him and wanted him back home with them. The Judge told the Appellant:
>
> But as far as I am concerned, this attack was so vicious that the public would be outraged if you did not receive an immediate prison sentence and I don't consider - whatever the public might think - that it is appropriate to pass a suspended sentence for such an attack. I will temper it to the best I can.
>
> The Count 1 was an A3 offence which is a range of one to three years after a trial. The assault occasioning actual bodily harm is an A2, nine months to two and a half years. You pleaded guilty at the earliest opportunity.
>
> As far as the s.20 of the Offences Against the Person Act is concerned, bearing in mind as I do what your victims have said, I will reduce it to a trial figure of two. That reduces it to sixteen months for a plea and I'm reducing it to twelve months for totality and the conditions inside.
>
> As far as the attack on your daughter is concerned, although it's all part and parcel of one event, it's an attack on a separate individual and must be met with a consecutive sentence and I start at a trial figure of eighteen. I reduce that for your plea to twelve and I reduce it to eight months consecutive for totality and the conditions inside making a sentence of twenty months.
>
> 18. In February 2022, the Appellant's mother who had been living in Ireland, moved to Scarborough to be closer to the Appellant.

19. As a result of the offence, E was referred to social services and was registered under s17 of the Children's Act. She began receiving support from North Yorkshire emotional health and resilience pillar in April 2022 and was referred to Futureworks NY in Scarborough. In October 2022 she began working with her key worker, David Selby.
20. Whilst the Appellant was serving his sentence, E helped her mother run the family hotel business.
21. The Appellant completed his sentence on 12 November 2022 and was detained under immigration powers until December 2022, when he was released on bail. He initially moved to an Approved Premises in York. Then he resided at CAS3 accommodation in Scarborough, before completing a structured move back home (see the probation letter, dated 16/3/2023 (38)).

7. The Judge notes the OASys identifies a risk of harm to EDA's wife and daughter but no assessed risk of serious harm to the general public. The Judge notes there was an assessed risk of serious harm to any potential intimate partner should EDA form a new relationship and that the assessed risk would be greater if he was under the influence of alcohol and not complying with his medication. The Judge refers to the probation officer noting EDA stating he had not drunk alcohol since his release, with no evidence this was not true [22].
8. As EDA was sentenced to more than 12 months imprisonment for crimes committed after 31 December 2020 the Judge accepted it was the domestic law that was applicable, as set out in section 117 B and 117 C of the Nationality, Immigration and Asylum Act 2002, in conjunction with part 398 – 399 of the Immigration Rules [23]. This comment is in response to EDA asserting he has rights under EU law.
9. The Judge sets out the issues requiring determination between [29 – 34], and having considered both the documentary and oral evidence sets out his findings of fact from [45], which can be summarised in the following terms:

    a. Both EDA and his wife were found to be credible witnesses [45].
    b. It is accepted EDA has a genuine subsisting relationship with his wife and daughter who the Judge found, despite the horrific nature of the incident, was a strong family unit and that to his wife and daughters credit they have forgiven EDA [46].
    c. That EDA also has a private life that engages Article 8 [47].
    d. The consequences of the decision under challenge and EDA's removal from the United Kingdom would engage Article 8. The Judge was also satisfied the decision was in accordance with the law [48].
    e. The key issue was whether EDA's deportation will be unduly harsh on his daughter E [52].
    f. E was 16 years of age at the date of the hearing with EDA having played a key part in her development and upbringing including her homeschooling [53].
    g. Although the Secretary of State indicated in the refusal and review that E's mother will be able to provide homeschooling in her father's absence, the Judge found the evidence being far from clear as E's schooling suffered in her father's absence, social services recognised that E's schooling had been impacted, and arranged for her to receive support from Future Works which commenced in October 2022. The Judge notes E will continue to receive that support in the UK if EDA is deported [54].
    h. E's tutor had stated EDA's deportation would have a detrimental impact upon E's education [55].
    i. The Judge expresses concern as to whether EDA will be able to continue to make a financial contribution to ensure E's welfare in light of the high

unemployment rate in South Africa, it not being likely EDA would obtain employment commensurate with his practical experience immediately, especially as he has a criminal conviction [56].

j. EDA's wife was able to continue the family hotel business in his absence but only because E helped out and they reduce the hotel's capacity by 50% [57]. If EDA is deported and the family remain in the UK, E would not be able to continue her education and help her mother to run the business and would have to choose one or the other [58].
k. EDA provides E with significant emotional support. The Judge attaches significant weight to the opinion of the Ms Steel, the Specialist Nurse within the local Children's Safeguarding Team [59].
l. That having applied the relevant test the Judge found it will be unduly harsh for E to remain in the UK if EDA was deported for the reasons set out at [64 – 67].
m. Applying section 117 C the Judge was satisfied Exception 2 applies with the public interest not requiring EDA's deportation [68].
n. On balance the decision amounts to an unnecessary and disproportionate interference with EDA and his family's family life in the UK outweigh the legitimate aim of protecting the economic well-being of the country and for the prevention of crime and disorder [69].
o. The decision is incompatible with EDA's human rights. The appeal is allowed [70].

10. The Secretary of State sought permission to appeal which was initially refused by another judge of the First-tier Tribunal but granted by Upper Tribunal Judge Macleman on 27 November 2023, the operative part of the grant being in the following terms:

> 1. In the FtT, Judge G Cox allowed this appeal against deportation, and Judge Dainty refused permission to appeal to the UT.
> 2. The case turned on whether the effect of the appellant's departure from the UK on his daughter (aged 16 at the time of the hearing) would be unduly harsh.
> 3. The tribunal invoked the "elevated threshold", but ground 2 qualifies for debate on whether it adequately reasoned how that threshold was crossed.
> 4. I doubt if ground 1 is pertinent, but do not exclude it.

Discussion and analysis

11. Ground 2 reads:

> Making a material misdirection of law – 'Unduly harsh test'
>
> 8. It is acknowledged that the appellant has a genuine and subsisting relationship with his wife and daughter and appear to be a 'very strong family unit' [46] and [60]. It is also recognised that if the appellant is deported difficult choices will need to be made and that inevitably this will impact the whole family unit emotionally.
> 9. However, it is submitted that in applying the elevated threshold, the FTTJ has failed to adequately reason how the consequences of the appellant's deportation would be so 'severe' or 'bleak' and would result in unduly harsh consequences to the appellant's daughter who has been registered under s17 of the Children's Act resulting from her father's offence. She is being supported by social services and presently a key worker at Futureworks, who are all acting in her best interests and keeping her protected.
> 10. Furthermore, the appellant's daughter would also continue to have the support of her mother and grandmother in the UK.

> 11. In the alternative, the FTTJ has failed to consider the somewhat controlled family environment of home schooling and managing a hotel without any external help. There are options available to enlist alternative resources for the appellant's spouse to continue to run the hotel, employing staff being one option and consider alternative methods for the appellant's daughter to continue her education.

12. One of the facts clearly taken into account by the Judge when assessing the impact of deportation was that the victims of the offending, EDA's wife and daughter, had forgiven him and that they had reformed their family unit. In SM (Zimbabwe) v Secretary of State for the Home Department [2021] EWAC Civ 1566 - the Tribunals below were found to have erred in failing to recognise the weight to be attached to the rehabilitation of a "very particular type", namely that a strong family life now existed with the victim of the original crime (A's stepson).
13. AT [64-67] the Judge wrote (duly anonymised):

> 64. Having applied the elevated threshold, I am nonetheless satisfied that it would be unduly harsh for E to remain in the UK if the Appellant was deported. In my judgement the tipping factors are firstly, the very close relationship that the Appellant has with E. During the Appellant's imprisonment, E would have appreciated that his absence was for a limited period, nevertheless, the evidence demonstrates that E struggled to cope in his absence. I am in no doubt that an enforced separation for an indeterminate period is likely to have a profound impact on E's anxiety and her mental health generally.
> 65. Secondly, if the Appellant is deported, then E would be left to have to make an unenviable choice. I find that she will not be able to continue her education and help her mother run the family business. As such, at the point of the Appellant's deportation, E will have to either put her future education to one side or watch her mother struggle to run the family business. I appreciate that E is mature for her age, nevertheless, in my judgement asking a child to make such a decision is unreasonable and is, at the very least, contrary to her best interests.
> 66. I am fortified in my view, by the fact that the Appellant's wife could not envisage remaining in the UK, if the Appellant was deported. I accept this evidence. L became very emotional at this point of the hearing and it is clearly something she has thought long and hard about. The fact that she would be prepared to uproot both herself and E and give up on the business, so as to ensure that the family unit can remain together is highly significant. Especially, as the respondent acknowledged that expecting either of them to go to South Africa with the Appellant would be unduly harsh. In my judgement, the fact that L has reached that decision demonstrates that she thinks the impact of the proposed separation from the Appellant would be untenable.
> 67. In conclusion, I find that the Appellant's deportation would be unduly harsh on E.

14. In her submission's Miss Young accepted that the Judge had referred to the elevated threshold and purported to deal with the undue harsh test but that the issue was the application of the facts as found by the Judge to the test. It was submitted the Judge did not set out how the test was satisfied or how the facts as found impacted upon the test or show that deportation will be unduly harsh. It was submitted that the reasons set out by the Judge were not enough and there was no adequate explanation for how the findings crossed the necessary threshold.
15. Guidance has been provided by the Court of Appeal to those considering an appeal of another judge in Volpi v Volpi [2022] EWCA Civ 462 at [2] and Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 at [26].

16. The Judge was clearly aware of the relevant legal test, the weight to be given to the public interest in deporting those who have been convicted, and the additional element that it could be argued was present in this appeal namely that offence involved a severe incident of domestic violence against EDA's wife and daughter, both of whom attended the error of law hearing to support him.
17. The Judge's findings of fact have not been shown to be plainly wrong in relation to the circumstances of this family unit. It is settled law that it does not matter whether another judge may or may not have made the same decision. The test as always is whether the decision under appeal is one that no reasonable judge could have reached.
18. It is not made out the Judge filed to consider the evidence as a whole as part of his consideration. The weight to be given to that evidence was a matter for the Judge.
19. As noted by Lord Justice Green in Ullah, when it comes to the reasons given by the First-tier Tribunal, the Upper Tribunal should exercise judicial restraint and not assume that the First-tier Tribunal misdirected itself just because not every step in its reasoning was fully set out. The authority for this proposition being R (Jones) v First-tier Tribunal and Criminal Injuries Compensation Authority [2013] UKSC 19 at [25].
20. A reader of the determination is able to understand the Judges core finding that the impact upon the family unit, particularly E, is sufficient to cross the threshold identified by the Judge. Even if the wording is not to the satisfaction of the author of the Grounds seeking permission to appeal, the basis on which the Judge reached his decision on the relevant issues can be set out directly or by inference. Judge's sitting in the First-tier Tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them, with no need for them to refer to the law specifically unless it is clear from the language that they failed to do so, see AA (Nigeria) v Secretary of State for the Home Department [2020] EWCA Civ 1296 at [34]. It is not made out the Judge was unaware of or failed to apply relevant authorities.
21. It is also important to consider the guidance provided by the Supreme Court in MM (Lebanon) v Secretary of State for the Home Department [2017] UKSC 10 at [107] that it is the nature of assessment that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case. The mere fact that one Tribunal has reached what might appear to be an unusually generous view of the facts does not mean that it is made an error of law. The fact Secretary of State believes the Judge has reached an unduly generous conclusion based on a claim that his reasoning is inadequate in establishing how the facts as found have been applied to the legal test, has not been shown to establish material legal error when reading the determination as a whole, which clearly shows why the Judge came to this decision.
22. The findings of this very experienced Judge are adequate. That is the test. They need not be perfect. I find the Secretary State fails to establish material legal error in the Judge's finding deportation will be unduly harsh.
23. Ground 1 asserts inadequate reasoning in relation to the proportionality test but that does not establish legal error in light of the failure of the challenge to the Judge's finding in relation to undue harshness. The Judge took all the relevant factors into account, found an exception to deportation applied, and gives adequate reasons for why deportation would be disproportionate.
24. Although the Grounds make comment in relation to possibility of alternative arrangements for the running of the family hotel, it is not made out these were points that were raised before the Judge by the Secretary of State's representative or are viable.

25. In any event, when reading the determination as a whole, it cannot be said that the Judges overall conclusion as to the application of an exception to deportation or the proportionality of the decision has been shown to be rationally objectionable.

Notice of Decision

26. No legal error material to the decision of the Judge has been made out. The determination shall stand.

C J Hanson

Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 June 2024