IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000706
First-tier Tribunal No:
HU/54668/2023
LH/05847/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 April 2024

Before

Upper Tribunal Judge O'CALLAGHAN
Deputy Upper Tribunal Judge MANUELL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR HEKTOR CELAJ
(NO ANONYMITY DIRECTION)

Respondent

Heard at Field House
On 12 April 2024

Representation:
For the Appellant: Ms S McKenzie, Senior Home Office Presenting Officer
For the Respondent: Ms S Alvarez, Counsel
(instructed by Abid Aslam SMA Solicitors)

DECISION AND REASONS

1. Permission to appeal was granted to the Secretary of State for the Home Department by First-tier Tribunal Judge Hollings-Tennant on 27 February 2024 against the decision to allow the Respondent's appeal on human rights grounds against his deportation made by First-tier Tribunal Judge Sweet in a decision and reasons dated 6 January 2024.

2. The Respondent is a national of Albania. He claimed that he arrived in the United Kingdom in 2002, illegally. His asylum claim was refused. He returned to Albania in 2006, where he married Ms Irena Rudelyte ("Ms Rudelyte"), a Lithuanian national. He was granted an EEA family member visa and returned to the United Kingdom with his wife. Eventually he achieved permanent residence. He was granted Indefinite Leave to Remain under the EUSS on 14 September 2020.

3. In May 2013 he was cautioned for the possession of an offensive weapon in a public place. On 25 February 2014 he was convicted of battery of his wife. On 10 June 2016 he was sentenced to 4 months imprisonment with an £80 victim surcharge.

4. On 6 December 2021 and 4 March 2022 the Respondent was convicted of possession with intent to supply a Class A drug (cocaine). On 4 March 2022 he was sentenced to 30 months imprisonment for the acquisition/use/possession of criminal property. The Respondent was also sentenced to 2 months imprisonment concurrently for using a motor vehicle on a road or public place without insurance. His driving record was endorsed with 6 penalty points.

5. Upon receiving notice of intention to deport him, the Respondent made representations to the Secretary of State. The deportation decision was made on 9 March 2022 and the Respondent appealed on 1 April 2023.

6. Judge Sweet noted that the Respondent remained married to Ms Rudylete, who was working part-time. The couple had two sons, respectively born on 9 October 2010 and 5 September 2016, both with settled status under the EUSS. The family had maintained contact with the Respondent during his incarceration. There was a "particularly close bond" between the Respondent and his younger son. There was evidence that the Respondent had a close relationship with all his family members. The Respondent looked after the children while Ms Rudylete was at work, but counsel for the Respondent accepted that alternative child care arrangements were possible.

7. Judge Sweet found (see [20] of his decision and reasons) that the Respondent met Exception 2 of section 117C(5) of the Nationality, Immigration and Asylum Act 2002. He had a genuine and subsisting relationship with a qualifying child and the effect of the Respondent's deportation on his children would be unduly harsh, considering their best

interests. Alternatively, there were very compelling circumstances why the Respondent should not be deported.

8. When granting permission to appeal, Judge Hollings-Tennant considered that the Judge erred in law by failing to give adequate reasons for finding that the Respondent's deportation would be unduly harsh on the children involved and conflated this with the issue of their best interests. Whilst the Judge made reference to the relevant statutory framework under section 117C of the 2002 Act and cited HA (Iraq) [2022] UKSC 22, it was not clear whether he properly applied guidance contained therein as to the 'unduly harsh' test to be applied. The Judge made no reference to the self-direction set out in MK (Sierra Leone) [2015] UKUT 223. Further, there was scant reasoning (contained in three paragraphs) as to why the Judge considered the 'unduly harsh' threshold was met in this case so as to bring the Respondent within the scope of the exception set out in section 117C(5) of the 2002 Act nor does he explain why he also concluded there are very compelling circumstances. It was at least arguable that the Judge's reasoning was inadequate.

9. As there appeared to the panel to be obvious force in the grant, we invited Ms Alvarez to respond to the grant of permission to appeal before hearing from Ms McKenzie. We are grateful to counsel for her concise and well-directed approach. Ms Alvarez submitted that the concessions made by Secretary of State, noted by the Judge, had significantly narrowed the scope of the appeal. The Judge had set out the issues, which he had then discussed. It was important that this was an appeal where it was agreed on both sides that the family could not move to Albania with the Respondent.

10. In dialogue with the panel, Ms Alvarez was unable to indicate any part of the decision where Judge Sweet had explained how the "unduly harsh" test was met on the facts found. Nor could Ms Alvarez show the panel how the "significant attachment" the Judge found between the Respondent and his younger son was in any way different from the significant attachment that most children have for their parents. Ms Alvarez nevertheless submitted that the decision was adequate when read as a whole, and that Secretary of State's appeal should be dismissed.

11. It was not necessary for the panel call on Ms McKenzie.

12. The panel indicated at the close of submissions that it found Judge Sweet's decision was deficient and failed to provide

intelligible reasons. Indeed, the Tribunal was unable to discover any sustainable reasons at all. The basis on which the Judge found that there were very compelling circumstances was not identified. The evidence served on the Respondent's behalf in the original appeal was not extensive but it was not examined by the Judge in any depth. There was, for example, no mention at all of the detailed, 48 page OASys Assessment, which was obviously directly relevant to a number of issues, including the future risk to the public of re-offending.

13. Although the Judge cited HA (Iraq) [2022] UKSC 22, he did not show how he applied that guidance. As to undue harshness, it is well established that the ordinary consequences of deportation will be harsh and thus would be expected in most cases. It was inevitable that the deportation decision would have a negative effect for the Respondent's family. Yet the Judge failed to show how the consequences for the Respondent's children and partner were more than the natural consequences of separation and were not unusual. The best interests of the Respondent's children were conflated with undue harshness. There was, for example, no evidence identified which would have prevented the Respondent from returning to Albania and working there, helping support his family and remaining in contact with them by modern means. There was nothing identified in the Judge's decision which would have prevented family visits to Albania, where the probability was that relatives of the Respondent were living.

14. In SSHD v AJ (Angola) and Another [2014] EWCA Civ 1636, Sales LJ at [49] identified the category of case where an error of law was not material as one where "it is clear that on the materials before the Tribunal any rational Tribunal must have come to the same conclusion". That is a high threshold and can by no means be met here. It cannot be said that it is clear that on the materials before the Judge any rational tribunal must have come to the same conclusion as he did. The unduly harsh consequences of separation (as opposed to the expected consequences) were not sufficiently identified, if at all. It follows that the Judge's decision must be set aside in its entirety and remade. No findings are preserved. The scope of the appeal remains as previously defined.

15. It was agreed by both parties that the original appeal should be remitted to the First-tier Tribunal in the event that Judge Sweet's decision was set aside. The panel agrees that the Respondent should not be denied a proper hearing with a reasoned judgment in the First-tier Tribunal.

DECISION

The Secretary of State's appeal to the Upper Tribunal is allowed

The decision of Judge Sweet dated 6 January 2024 is set aside. No findings are preserved.

The original Appellant's appeal is to be reheard in the First-tier Tribunal at Taylor House by any judge except First-tier Tribunal Judge Sweet

Signed **R J Manuell** **Dated** 17 April 2024

Deputy Upper Tribunal Judge Manuell