IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001142

First-Tier Tribunal No: HU/55773/2023
LH/05554/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 20th May 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY
DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

SECETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

XHONI LEKA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Terrell, Senior Home Office Presenting Officer
For the Respondent: Mr M Muphy, of Counsel, instructed by Kilby Solicitors

Heard at Field House on 7 May 2024

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Albania. He arrived in the UK unlawfully in November 2013. He applied in January 2019 for an EEA residence card as a durable partner and was refused. He made a second application on the same basis in February 2019, which was also refused. He made a human rights application which was refused and certified in March 2019, but at that time his EEA residence card was reconsidered and

granted for five years. On 7th September 2020 the claimant was convicted of possession with intent to supply of class B drugs and given a sentence of 40 months' imprisonment. On 2nd October 2020 he was served with notice of liability to deportation under the EEA Regulations. He responded with human rights representations, but on 23rd December 2021 the Secretary of State served the claimant with a decision to make a deportation order. The claimant then made a further human rights claim and an EUSS application, both of which were refused in a decision dated 14th April 2024. His appeal against this decision was allowed by First-Tier Tribunal Judge Mace after a hearing on 7th February 2024 on human rights grounds.

2. Permission to appeal was granted by Judge of the First-Tier Tribunal SPJ Buchanan on 14th March 2024 on the basis that it was arguable that the First-Tier judge had erred in law as arguably there was insufficient reasoning and findings on material matters in relation to both the stay and go scenarios in the unduly harsh test particularly as there was arguably little reasoning as to why it would be unduly harsh to the claimant's four year old daughter for him to be removed, and arguably there was no reference to evidence about other male family members who had supported the family in the past. Secondly, it was arguable that there was a failure to consider if "enhanced" harshness found at paragraph 58 equated to undue harshness with respect to the go scenario.

3. The matter came before us to determine whether the First-Tier Tribunal had erred in law, and if so to decide if any such error was material and thus whether the decision should be set aside.

Submissions – Error of Law

4. In the grounds of appeal and in oral submissions by Mr Terrell, it is argued, in short summary, firstly that the First-Tier Tribunal erred in law by failing to provide adequate reasons and making a legal misdirection in relation to the stay scenario when applying exception 2 to deportation as set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002. The First-Tier Tribunal refers to serious harm being caused to the claimant's oldest daughter but there is no evidence from an independent social worker, social services or a psychologist to support this, and there are many single parent families in the UK so this cannot be assumed to amount to unduly harshness. There was evidence that the claimant's partner had friends who help her whilst he was in prison and also there would be help from local authorities and in the form of benefits. The finding at paragraphs 45 to 46 of the decision, that the daughter would have no male role model fails to take into account that there are two cousins living in the UK who, according to evidence given at the Tribunal, are close to the family, although Mr Terrell accepted that the evidence recorded was more of a close relationship with the claimant himself. Mr Terrell focused submissions

on paragraph 65 of the decision and argued that the finding of serious harm to the claimant's daughter was not reasoned.

5. Secondly, it is argued, that the First-Tier Tribunal erred in law by failing to provide adequate reasons and misdirecting itself in relation to the "go" scenario given that the claimant's partner had said that she would relocate to Albania in evidence to continue her family life. It is argued that life in Albania would not be severe or bleak, and the claimants' eldest child was at an adaptable age and her British citizenship was not a trump card.

6. Mr Terrell accepted, in response to a question from the Panel, that the First-Tier Tribunal had directed itself legally correctly in the decision to the definition of unduly harsh.

7. We did not need to call on Mr Murphy at the end of Mr Terrell's submissions as we found that an error of law had not been made out in the grounds. We informed the parties of this, but did not give an oral judgement, and instead our reasoning is set out below.

Conclusions – Error of Law

8. The First-Tier Tribunal directs itself correctly to the definition of undue harshness at paragraphs 43- 44, 59 and 67 of the decision, and makes it clear that it is an elevated test which goes beyond mere undesirability, and that this involves a particularised consideration in relation to the particular child or partner. We find that the First-Tier Tribunal was careful to distinguish the normal negative consequences of deportation of the claimant whilst his wife and children remained in the UK, for instance as set out at paragraphs 62 and 63 of the decision, where it is found that that the consequences for the claimant's wife and younger child would be distressing and negative but did not amount to undue harshness.

9. We find that the conclusions at paragraphs 65-66 of the decision outline how the claimant's daughter's best interests, the particularly close relationship the claimant's daughter has with the claimant, the central role he plays in providing her with financial and emotional security and a stable and loving home suffice as reasoning that the stay scenario would be unduly harsh. We find that it is not a requirement for there to independent expert evidence on this point, particularly in a case where there was extensive accepted evidence regarding the family life relationship from a number of witnesses, and that it was open to the First-Tier Tribunal to find that removal of the claimant would cause his daughter serious harm for all of the reasons given. The evidence with respect to the claimant's cousins, as set out at paragraphs 45 and 46 of the decision, was that they were close to the claimant not that they were or were in a position to be male role models to the claimant's daughter, and so it was open to the First-Tier Tribunal to find that the

claimant's daughter would also be left without a male role model, and that this was a further factor in making the stay scenario unduly harsh.

10. We find that adequate reasons are given at paragraph 58 of the decision for finding that it would be unduly harsh to the claimant's daughter in the go scenario relating to her mother's (the claimant's wife's) lack of Albanian language and her never having lived there (as she is a Czech citizen born in the Czech republic) and the lack of family members to assist with integration in Albania, along with the loss of the claimant's daughters rights to live in her country of nationality, namely the UK. We do not find it relevant whether the claimant's wife gave evidence that she would ultimately go to Albania if he were deported: the question that had to be answered was the hypothetical one: if the family go with the claimant to Albania, if he were deported, would that be unduly harsh to the claimant's daughter? We find that the First-Tier Tribunal have understood the question, properly directed itself as to the relevant test and given a reasoned decision that it would be unduly harsh.

11. We find that whilst the decision of the First-Tier Tribunal might be viewed as generous it is entirely lawful. The correct test was applied and reasons were given as to why both the stay and go scenarios would be unduly harsh to the claimant's daughter, and as a result that the claimant was entitled to succeed in his Article 8 ECHR appeal as the public interest was outweighed.

Decision:

1. The making of the decision of the First-Tier Tribunal did not involve the making of an error on a point of law.

2. We uphold the decision of the First-Tier Tribunal allowing the appeal on human rights grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

13th May 2024