Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-006482
First-tier Tribunal: HU/51762/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
Heard on 3 May 2023	**On 4 June 2023**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

AA
(Anonymity order made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms A Smith, counsel
For the Respondent: Mr E Terrell, Home Office Presenting Officer

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family is granted anonymity.

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

DECISION AND REASONS

The Appellant

1. The appellant is a citizen of Albania born on 13 January 1988. He appeals against a decision of Judge of the First-tier Tribunal SJ Clarke dated 27 February 2022 which dismissed the appellant's appeal against a decision of the respondent dated 22 April 2021. That decision was to refuse a human rights claim and to refuse to revoke a deportation order. The Appellant had applied on 20 June 2019 for leave to remain based upon his family and private life with his partner R and their two children, J and D. It was the refusal of that application which gave rise to the present proceedings.

2. The Appellant entered the United Kingdom illegally in 2006 using a false Lithuanian passport. He came to the attention of the police in October 2013 and was subsequently convicted of possession and use of a false instrument (a false identity) on 23 December 2013 and sentenced to 12 months' imprisonment. Deportation proceedings were commenced on 28 February 2014 which the Appellant did not oppose. He was deported to Albania on 21 March 2014 under the Facilitated Return Scheme. In breach of the deportation order the appellant re-entered the United Kingdom illegally in May 2018.

The Appellants' Case

3. The appellant's case was that it was not possible for his partner and the couple's children to go back to Albania with him as his partner was a recognised refugee due to having been a victim of trafficking. Furthermore the effect upon the partner's mental health and on the welfare of the children would be unduly harsh. The appellant played a significant part in the upbringing of the children and the family who would not be able to cope if he was not there. Although not relevant for the purposes of our error of law hearing, we were told that the appellant's partner is now pregnant with the couple's third child and she, J and D have been granted British citizenship.

The Decision at First Instance

4. In a relatively brief determination the judge found at [9] that the best interests of the children J and D were to remain in the family unit with their parents and maintain the status quo. The judge quoted extracts from an expert report prepared by a social worker Ms Bartlett, noting, at [13] that the report said the partner "could" face difficulties in the appellant's absence rather than "would". The judge did find however that the Appellant was a central father figure and role model for the children and a long distance relationship could not replace the care they presently receive from the Appellant. The refugee status of the children and their mother prevented them from living in Albania with the Appellant. The appellant's partner would become a single parent with her own mental health and physical health issues. However, the children could have access to help and

assistance should the need arise. The appellant's deportation would be harsh upon them, "and at best unduly harsh," but their situation was not very compelling.

5. The judge used a balance sheet approach to determine the proportionality of the decision, noting at [14] that on the public interest side of the balance sheet was the Appellant's criminal conviction from 8 years ago for which the Appellant received a 12 months' custodial sentence. The Appellant had further broken immigration laws by returning in breach of his deportation order and without entry clearance. The partner's situation was compelling but the judge did not find her situation to be very compelling. The judge described the appellant's offence as being at the bottom of the scale of seriousness (the appellant had used a false instrument), which reduced the public interest, nevertheless that interest remained. The situation of the mother and children was not very compelling given they could remain in the UK as a family unit of three, the partner could access assistance from any necessary branch of UK services as required. The judge concluded that the removal of the Appellant was proportionate when considering the factors on both sides of the balance sheet. She dismissed the appeal.

The Onward Appeal

6. The appellant appealed against this decision on five grounds settled by counsel who had appeared at first instance and who appeared before us. The first ground was that the determination did not give adequate reasons, was "surprisingly brief" and did not contain a legal framework. There was no reference to any of the applicable law, such as the Immigration Rules and s117C of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act), or to any case law in relation to deportation or Article 8.

7. The second ground was that there was no proper assessment and/or consideration of the children's best interests. There was no reference to Section 55 of the Borders, Citizenship & Immigration Act 2009 (the 2009 Act) which obliges the respondent to safeguard and promote the best interests of children in the UK. The third ground was that the Judge failed to adequately take into account that the appellant only had one conviction in her assessment of where the public interest lay and/or whether there were very compelling circumstance in this case. The fourth ground was that the judge failed to engage with the expert evidence and/or provide any or adequate reasons for rejecting it. In answer to the judge's criticism that the expert had referred to the use of the word "could" rather than "would" the grounds submitted that an expert who states definitively that something will happen is likely to be criticised by decision makers. The fifth ground argued that the judge had failed to take into account the expert evidence given about the support which the appellant provided to his partner, or the impact his deportation would have on the partner's mental health and ability to care for their two children. The partner was not currently taking medication or receiving treatment for her mental health because of the support she receives from the appellant.

8. Permission to appeal was granted on 5 May 2022 by the First-tier Tribunal Judge who stated: “All the grounds contain arguable merit and I also note that the Judge appears (at [13]) to have made a finding that it would be unduly harsh for the children to be separated from their father, though it is not entirely clear whether that is what the Judge meant.”

9. The respondent issued a Rule 24 response to the grant of permission stating she opposed the appellant’s appeal. Whilst the judge did not set out the legal framework or refer to any specific caselaw the criticism in the grounds amounted to no more than one of ‘style’ over ‘substance’. The judge clearly considered the evidence against the appropriate ‘very compelling circumstances’ test contained in section 117C(6). As at the date of hearing (10.2.2021) neither the children nor the partner of the Appellant met the definition of ‘qualifying’ contained in s117D(1) of the Act. Exception 2 at section 117C(5)) was not engaged. The judge’s references to ‘very compelling’ could be seen throughout. She had regard to the opposing views on the evidence and was entitled, for the reasons she gave to conclude the Appellant had failed to discharge the burden of proof to the high threshold. There was nothing close to being irrational or perverse in her reasoning and the grounds were a mere disagreement.

The Hearing Before Us

10. In consequence of the grant of permission the matter came before us to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then we would make directions on the rehearing of the appeal. If not the decision at first instance would stand.

11. Counsel for the appellant relied on her grounds arguing that the judge had failed to apply the correct legal principles and reasons. The judge's findings were in no more than five paragraphs. The judge had not referred to the principles applicable in deportation cases which was an error of law in itself. There was no best interests assessment. In relation to ground three the judge had failed to address the risk of reoffending. The appellant only had one conviction. The Tribunal was required to look at the nature of the offence and the length of time since it had occurred. No action had been taken by the respondent in relation to the appellant’s illegal entry. He had been in United Kingdom for three years by the time the hearing came before the judge in 2021. The offence itself did not involve sex, drugs or violent offending.

12. In relation to ground four, the judge had not engaged with the analysis in the report or say why she rejected it. The social worker’s evidence could not be dismissed because of the use of the word “could”. The judge’s use of the phrase “unduly harsh” to describe the outcome for the children contradicted her conclusions. In relation to ground five the judge had failed to take into account the social worker’s report about the support given by the appellant to his family. The partner’s oral evidence was consistent with her witness statement and the social worker’s report. She was able to cope now but she

had emotional support from the appellant. That was capable of being a very compelling circumstance.

13. In reply the presenting officer indicated that Court of Appeal authority was to the effect that it was not a question of setting out lists of authorities, or "marking the homework" but rather whether the judge had correctly applied the law. At [5] of the determination the judge had set out the principle that the appellant needed to show namely very compelling circumstances. The determination was said to be short but the appellant's bundle was only 48 pages plus the expert's report. The appellant was not making lengthy submissions on the law, the issue was a narrow one from a legal point of view. The judge had focused on the important issues. In relation to the complaint contained in ground 2, the judge had made a finding of the children's best interests. As to ground 3, [14] of the determination was perfectly adequate. The appellant could well understand what the judge thought about his offending. Breach of a deportation order was something the judge could attach weight to. The appellant had committed a criminal offence by the use of false documents.

14. In relation to the use of the word "could" rather than "would" by the expert, there was not much a judge could do with that. The expert was saying this could happen and was putting future developments at no higher than a possibility. Whilst the determination was short there was no legal error and it should be upheld.

15. Finally and in conclusion, counsel acknowledged that the judge does not need to set out all of the law, that was not the appellant's argument. What the judge should do was set out the legal principles and then apply them. The judge needed to address all the evidence submitted and the arguments made on the appellant's behalf. The issues were not over complex however the legal principles were. It was not enough for the judge to say she had done the balance sheet she must be seen to have actually done it. As to the use of "could" rather than "would" by the expert, it should be noted that the expert did also use the word "would" on occasions. Her expertise was not criticised by the judge or the presenting officer. It was an error to dismiss her conclusions on the basis of the use of "could" rather than "would".

16. There was nothing wrong with the expert's conclusions. The judge quoted sections of the report but then appeared at [13] to reject the report but not on a reasoned basis. The partner had said in her evidence she felt a bit better and there was a link between her relative emotional stability now and the support she received from the appellant. The appellant wished to make an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008 as both his partner and the children had applied to register as British citizens and were qualified persons. The partner was now pregnant. Whilst that did not impact on the hearing today in relation to whether there were material errors of law, it would be relevant if the determination was set aside and the matter re-heard. The appeal itself had been heard in 2021 and it was not clear why it had taken so long to come to court. If the determination was set aside the appeal could be remitted to the First-tier as

the parties would require the use of a court interpreter and there was further factual evidence to be given. At the conclusion of submissions we indicated to the parties that we reserved our decision on all matters.

Discussion and Findings

17. Section 117C(6) of the 2002 Act sets out the test to be applied in deportation appeals where the Exceptions (1 and 2) in section 117C do not apply as here, that is that the public interest requires the deportation of a foreign national offender unless there are very compelling circumstances over and above those described in Exceptions 1 and 2 which outweigh the public interest. It is abundantly clear from the determination in this case and the frequent use of and reference to the very compelling test that the judge was aware of this test and applied it. The exceptions to deportation set out in section 117C were not relevant at the date of the hearing before the judge which is the date we are concerned with. The argument that the appellant's dependents are now qualifying persons is not therefore a matter for us to take further in this determination. The important point is that the judge was aware of and applied the "very compelling circumstances" test.

18. All parties at first instance were agreed that the test in this case was whether the appellant could show very compelling circumstances which would outweigh the public interest. What is therefore missing in this determination is a description by the judge of how the very compelling test comes to be applicable. If there had been some dispute in the case as to whether the test was one of very compelling circumstances that criticism might have some force but as the presenting officer correctly submitted to us the issue in this case was a narrow one and an explanation for the loser as to why they had lost would not have been assisted by a detailed recitation of statute or case law.

19. The conclusion of the judge after conducting the balance sheet exercise as advocated in the case of Hesham Ali [2016] UKSC 60 was that the appellant could not so show. The public interest in his deportation outweighed the circumstances he relied upon. The judge set out the facts concisely but accurately. She was fully aware of the contents of the report of the independent social worker setting out relevant parts in the determination. At [9] under the heading "my findings of fact and conclusions" the judge stated what were the best interests of the children. We do not accept the argument that in saying this the judge was paraphrasing the report of the independent social worker. The wording of the determination is quite clear, this was the judge's conclusion based on the evidence she had heard about the situation of the family. There was no need for the judge to cite section 55 of the Borders, Citizenship and Immigration Act 2009 in a situation where all parties agreed that provision applied and that it meant the judge had to make a finding as to what the best interests of the children were.

20. The judge was well aware of the appellant's offending. The appellant had used a false document when entering the United Kingdom originally and had shown a further contempt for immigration law and rules by returning to the

United Kingdom at the time when the deportation order against him was still in force. The appellant's case was not that he was returning to the United Kingdom to rejoin his partner, his evidence was that he did not know that she was in the United Kingdom, he only made contact with her after he had arrived. There was no reasonable explanation given by the appellant to the judge as to why he had so flagrantly breached his deportation order. The judge's conclusion in those circumstances that the public interest required the appellant's deportation was understandable.

21. In the grounds of onward appeal the judge was criticised for not being aware that the correct approach to be taken to the 'public interest' when carrying out the balancing exercise "is to recognise that the public interest in the deportation of foreign criminals has a moveable rather than fixed quality" (Akinyemi v The Secretary of State for the Home Department [2019] EWCA Civ 2098). This criticism is misconceived as it ignores [16] of the determination where the judge states in terms that the offence was at the bottom of the scale of seriousness, and this can and does reduce the public interest. The judge did not cite Akinyemi but she demonstrated that she was aware of the approach to be taken to the public interest.

22. As we have already noted the judge was also aware of the contents of the expert evidence and quoted passages from it but it was clear from the determination which parts were quotations and which parts were the views of the judge. We have already given one example in relation to the judge's findings on the best interests of the children. There was no merit in this criticism as there was no merit in the criticism that the judge did not demonstrate a knowledge of the correct legal principles in the case.

23. The judge was entitled to point out that the expert had used the phrase "could" which necessarily meant that there was an element of speculation about what might happen in the future to the partner in the event of the appellant's deportation. The burden of proof of showing very compelling circumstances rested upon the appellant and merely referring to what might happen did not assist the judge in the task she had to perform as to whether there were very compelling circumstances. The judge pointed out that there were support facilities which would be available to the appellant's partner. It was a matter for the judge as to what weight should be placed on the availability of the support facilities and their effect. The disagreement with the judge's findings on this point are merely that, a disagreement. They do not show an error of law. Details of how the partner might access the support available to her was not a matter for the judge.

24. As has been commented upon this was a brief determination but it covered all material aspects that it was meant to cover and the judge gave sufficient reasons to justify her findings. The grounds of onward appeal are merely an attempt to re-argue the case, they do not demonstrate any material error of law on the judge's part. We therefore dismiss the onward appeal in this case.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error of law and we uphold the decision to dismiss the Appellant's appeal. Appellant's appeal dismissed.

An anonymity order was made in the First-tier and we see no reason to set that aside.

Signed this 22 day of May 2023
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Judge Woodcraft
Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

As the appeal was dismissed there can be no fee award.

Signed this 22 day of May 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge