IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002035
First-tier Tribunal No:
HU/60093/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 15 August 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE MEAH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARDIT BINAJ
(No anonymity order made)

Respondent

Representation:
For the Appellant: Ms H Gilmour, Senior Home Office Presenting Officer
For the Respondent: Mr B Lams, instructed by Oaks Solicitors

Heard at Field House on 2 August 2024

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department against the decision of the First-tier Tribunal allowing Mr Binaj's appeal against the respondent's decision to refuse his human rights claim and to refuse to revoke a deportation order previously made against him.

2. For the purposes of this decision, we shall hereinafter refer to the Secretary of State as the respondent and Mr Binaj as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal.

3. The appellant is a citizen of Albania, born on 22 January 1992. He claims to have entered the UK illegally by lorry in 2014. He was encountered on 14 December 2015 when the police wanted to speak to him in relation to a non-residential burglary and

he was arrested and taken to the police station. He was served with removal papers. On 4 February 2016 he was convicted of burglary and he was subsequently sentenced to 30 months' imprisonment, to be served concurrently with another sentence of 6 months for burglary arising from another conviction. On 21 March 2016 he was convicted of theft and sentenced to 18 weeks' imprisonment. On 14 April 2016 a decision was made to deport him and on 14 June 2016 a stage 2 deportation decision was made against him and he became the subject of a deportation order. He signed a disclaimer stating that he wished to leave the UK and on 25 August 2016 he was deported to Albania.

4. The appellant re-entered the UK on 27 January 2017 in breach of the deportation order. On 28 June 2021 he lodged an application under the EU Settlement Scheme. On 23 October 2021 he married Diana Bolgova, a Lithuanian national who had settled status under the EUSS. On 20 February 2023 the respondent issued a liability to removal notice and the appellant responded by making an Article 8 human rights claim based upon his family life with his wife and his son who was born on 15 September 2020. The appellant's application under the EUSS was refused on 28 July 2023. An appeal was lodged against that decision, but was subsequently withdrawn.

5. The appellant's human rights claim was refused in a decision of 1 August 2023. The respondent accepted that the appellant's son was a British citizen and that he had a genuine and subsisting relationship with his son. The respondent did not accept that it would be unduly harsh for the appellant's son to live in Albania or to remain in the UK when he was deported. The respondent accepted that the appellant had a genuine and subsisting relationship with his wife, who was not British, but did not accept that it would be unduly harsh for her to live in Albania or to remain in the UK when he was deported. It was therefore not accepted that he met the family life exception to deportation as set out at paragraph 13.2.6 of the immigration rules. The respondent noted that the appellant had not been lawfully resident in the UK for most of his life and did not accept that he was socially and culturally integrated in the UK or that there would be very significant obstacles to his integration in Albania. It was therefore not accepted that he met the private life exception to deportation as set out at paragraph 13.2.3 of the immigration rules. The respondent did not consider there to be any very compelling circumstances which outweighed the public interest in the appellant's deportation and considered that his deportation would not breach Article 8 of the ECHR. The respondent found there to be no compelling or exceptional grounds on which to revoke the deportation order and therefore maintained the order.

6. The appellant appealed against that decision. His appeal came before First-tier Tribunal Judge Khan on 15 February 2024. The appellant only relied upon the family life exception to deportation, Exception 2 in section 117C(5) of the Nationality, Immigration and Asylum Act 2002. The judge heard from the appellant and his wife and two brothers. She noted that he had served only six months of his sentence before being removed to Albania as part of an early release scheme and that he claimed that he had wanted to return to Albania because his grandmother was very ill at the time and subsequently passed away. His evidence was that he returned illegally to the UK because he could not tolerate being separated from his partner and he resumed his relationship with her on his return. He claimed to be the primary carer of his son as he was unable to work. The judge did not accept the appellant's claim to have returned to Albania because his grandmother was ill but found that he had returned there to avoid serving his prison sentence. She considered that the appellant had deliberately waited until his son was born before making his application in 2021 as he had believed that that would increase his chances of remaining in the UK. The judge considered that the appellant had been less than frank in his evidence about being the primary carer of his son because of evidence that he was working in a restaurant.

7. The judge recorded the evidence of Ms Bolgova, that she had found out in December 2022 that her mother, who had died when she was 11 years of age, had had a violent death, a matter of which she was previously unaware. As a result of that and other stressors, such as her grandmother's illness, her aunt's husband's suicide and her son's health scare in 2022, she was on anti-depressants and attending bereavement counselling and was in a difficult emotional state and needed the support of her husband to cope. The judge had regard to a report from an independent social worker and family psychotherapist dated 24 January 2024 which referred to Ms Bolgova as having severe generalised anxiety and depressive symptoms, as being at risk of a mental disorder developing if she did not attend to her mental health, and as being at high risk of PTSD. The report referred to Ms Bolgova's fragile mental health and to the fact that a move to Albania would be detrimental to her mental health.

8. The judge found that the appellant's son's best interests were to remain in the UK with both his parents. She accepted that Ms Bolgova had the health problems claimed and that she was receiving bereavement counselling, although she did not accept that she was on anti-depressants. The judge accepted that Ms Bolgova may struggle to get appropriate treatment for her mental health issues in Albania and that she needed appropriate treatment. She accepted that it would be unduly harsh for her to relocate to Albania. She also accepted that it would be unduly harsh for the appellant's son to live in Albania. The judge did not accept that it would be unduly harsh on Ms Bolgova for her to stay in the UK whilst the appellant was deported, but she accepted that it would be unduly harsh on their son. She accordingly found that the test in Exception 2 had been met in relation to the appellant's son. The judge said that, given her findings in that regard, she did not need to go on to consider the issue of very compelling circumstances. With regard to section 117B she noted that the appellant did not speak English and that he was working illegally here but she did not find that sufficient to undermine his family life and the findings made in that regard. The judge accordingly allowed the appeal on Article 8 grounds, in a decision promulgated on 18 March 2024.

9. The Secretary of State sought permission to appeal the decision on two grounds: firstly, that the judge had given inadequate reasons for her finding that the unduly harsh test had been met, and that the unduly harsh test had not been met; and secondly, that the judge had failed to apply and properly consider section 117C in the overall assessment of Article 8 and had failed to give proper regard to the public interest.

10. Permission was granted in the First-tier Tribunal. Mr Lams filed a rule 24 response opposing the appeal. The matter then came before us.

Hearing and Submissions

11. Ms Gilmour submitted that the second ground was the strongest and that the judge failed to give any consideration to the public interest in section 117C. With regard to the first ground, she submitted that the judge had made contradictory findings by recognising the limitations of the independent social worker's report yet accepting that the appellant's wife had mental health problems based on that report. She submitted that the basis of the judge's findings were not made out on the evidence. That was a significant part of her findings and therefore the error was material. Ms Gilmour accepted that if ground one was not made out, the second ground would fall away.

12. Mr Lams submitted that there had been no misdirection in law in regard to the first ground and that the judge had correctly directed herself and noted the elevated threshold to meet the 'unduly harsh' test. Mr Lams submitted that the grounds were

essentially an irrationality challenge, but the judge's decision was not irrational, even if another judge may have reached a different conclusion. The respondent had not attacked any of the judge's findings in the grounds. The judge had not misdirected herself and had reached sustainable conclusions.

13. In response, Ms Gilmour submitted that the Secretary of State was not making a perversity/ rationality challenge, but the challenge was the absence of adequate reasons.

Analysis

14. It is important to distinguish between what appears to be a rather generous decision which may well have been decided differently by another judge, and one which is legally flawed. Mr Lams argues that the Secretary of State's grounds of appeal are simply a disagreement with the judge's decision and that, whilst another judge may have decided the case differently, there are no material errors in the judge's decision, whereas the Secretary of State argues that it is legally flawed. We find ourselves in agreement with Mr Lams and conclude that this case falls within the first category. In addition we observe that the grounds are poorly pleaded. We agree with Mr Lams that the first ground, for the most part, takes the form of a skeleton argument or submissions rather than a legally based challenge and it is no doubt for that reason that Ms Gilmour accepted that the first ground was not the strongest of the two grounds.

15. The assertion is made by the Secretary of State in the first ground that the judge's reasoning failed to establish the elevated threshold for the 'unduly harsh' test on the evidence presented. We do not consider that to be the case. The judge correctly directed herself on the relevant test and specifically noted that it was a demanding test, referring to the relevant caselaw, at [50] and [51] of her decision. Indeed the grounds, at [2], recognised that. It is also the case that the judge not only correctly directed herself but it is also evident that she specifically applied the relevant criteria when making a clear distinction between 'harsh' and 'unduly harsh' for the purposes of the test at [55] in her consideration of the 'stay' scenario for the appellant's wife, finding that the appellant's deportation would be 'harsh' but not 'unduly harsh' on her.

16. Having correctly directed herself on the relevant test, it was then for the judge to assess the evidence and reach an informed decision on the impact of the appellant's deportation on his wife and child. Mr Lams relied, at [5] of his grounds, on [44] of HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22, to that effect: "*having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it*."

17. That was precisely what the judge did. She undertook a full and careful assessment of all the evidence from [27] to [47], making findings in the appellant's favour as well as against him, finding his wife to be a credible witness and giving weight to the evidence of the appellant's two brothers. From [40] to [47] the judge addressed the evidence relating to the appellant's wife and child, having particular regard to the expert report from the independent social worker and family psychotherapist and considering the assessment of Ms Bolgova's mental health. The judge then went on, from [48], to place the evidence and her findings on the evidence in the context of the relevant test in Exception 2. In so far as the grounds, at [6], suggest that the judge took the best interests of the appellant's child as being

determinative of the outcome, that is clearly not the case. Rather, that was one of various matters she took into consideration and it is clear, from her summary of the respondent's case at [19], that she was well aware of the weight to be given to that matter.

18. At [52] to [54] the judge gave detailed reasons, with specific reference to the evidence, for concluding that it would be unduly harsh for the appellant's wife and son to relocate to Albania. The extent of the respondent's challenge to that conclusion, at [5] of the grounds, is a statement that "*there are no significant difficulties in the family re-locating to Albania that cannot be overcome with time and with the support of the appellant's family there*". Clearly that is nothing more than a disagreement with the judge's conclusions and an attempt to re-state the respondent's case rather than a properly formulated legal challenge. No error of law is identified and no error of law is made out.

19. At [55] the judge gave reasons for concluding that it would be harsh, but not unduly harsh, on the appellant's wife, in the 'stay' scenario, as mentioned above, and then at [56] the judge gave her reasons for concluding that the appellant's deportation would be unduly harsh on his son. In so far as the respondent challenges the judge's findings on the 'stay' scenario, the grounds completely overlook that distinction made by the judge and the different findings for Ms Bolgova and for her son. The grounds assert that there was an inadequacy of reasoning by the judge in making her findings. However in our view that is not the case. Rather, as above, the respondent's grounds are little more than an expression of disagreement with the judge's reasoning. At [56] the judge took into account a variety of factors which led her to conclude that the appellant's deportation would be unduly harsh on his son, including the opinion of the independent social worker as to the significantly adverse impact that his deportation would have on his wife and son, the detrimental impact on their mental health, his role in the care and upbringing of his son, and the fact that his son would be left with one parent who was not functioning to a satisfactory level. The judge considered, and gave reasons for rejecting, the mitigating factors of the family support in the UK from other family members. There is accordingly no merit in a challenge based upon inadequacy of reasoning: rather the respondent simply disagrees with what the judge made of the evidence.

20. As for Ms Gilmour's submissions at the hearing, the extent of her challenge in relation to the first ground was that the judge had made contradictory findings at [52] in regard to Ms Bolgova's mental health. She submitted that the judge had noted that the independent social worker's report did not take account of Ms Bolgova's medical records and that the judge had referred to the limitations of the independent social worker's report, but yet she had gone on to accept that Ms Bolgova had mental health problems. She submitted that, as a result of such a contradiction, the judge's findings were not made out on the basis of the evidence. However, that was not a matter raised in the grounds. The grounds did not take issue with the judge's assessment of the expert report. Indeed the weight the judge accorded to the expert report was a matter for her. In any event we do not agree that the judge's findings were contradictory. At [52] the judge was simply observing that the expert report was not prepared with sight of Ms Bolgova's medical records. The judge emphasised that she had factored that into her assessment. Having had the benefit of observing and hearing from Ms Bolgova, whom she found to be a credible witness, and having herself viewed a letter from Ms Bolgova's GP (at [47]), and taken account of the views of the independent social worker, subject to the noted limitations, it seems to us that the judge was perfectly entitled to accept that Ms Bolgova had mental health issues and to give weight to those issues when assessing the 'unduly harsh' issue.

21. In the circumstances we find no merit in the first ground. Ms Gilmour properly accepted that the second ground fell away if the first ground was not made out, given that the appellant's ability to meet an exception to deportation was determinative of the appeal. The grounds are therefore not made out. The judge's decision is a full and comprehensive one, with careful consideration being given to all relevant issues. The judge undertook a careful analysis of the evidence and applied the relevant legal provisions. She provided full and cogent reasons for the findings made and she reached a decision which was properly open to her on the basis of the evidence before her, albeit one that may have been made differently by another judge. The grounds do not identify any material error of law in the judge's decision.

22. Accordingly we dismiss the Secretary of State's appeal and uphold the judge's decision.

Notice of Decision

23. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The Secretary of State's appeal is dismissed and Judge Khan's decision to allow the appellant's appeal stands.

Signed: S Kebede
Upper Tribunal Judge Kebede

Judge of the Upper Tribunal
Immigration and Asylum Chamber

6 August 2024