Upper Tribunal
(Immigration and Asylum Chamber) Appeal no: **DA 00937-12**

THE IMMIGRATION ACTS

At **Field House** Decision signed: **26.06.2013**

on **16.05.2013 & 01.08.2013** sent out: **27.06.2013**

Before:

Upper Tribunal Judge
John FREEMAN

Between:

Judimir SHAZIVARI

appellant

and

Secretary of State for the Home Department

respondent

Representation:

For the appellant: (on 16 May) *Kezia Tobin* (counsel instructed by Oaks);
(on 21 June) Mr Kash Behbahani (solicitor, Oaks)
For the respondent: (on 16 May) Mr Tom Wilding; (on 21 June) Mr Ian Jarvis

DETERMINATION & REASONS

This is an appeal, by the respondent to the original appeal, against the decision of the First-tier Tribunal (Judge Maurice Cohen and a lay member), sitting at Kingston on 25 January, to allow a deportation appeal by a citizen of Albania. The appellant illegally entered this country and falsely, as he now admits, claimed asylum, as an inhabitant of Kosovo in 1999: his appeal against refusal of that was finally dismissed on 21 February 2001, but the Home Office went on considering representations on his behalf till 2009.

2. Also in 2009, on 23 June the appellant was fined for possession of class 'A' drugs; on 23 August his son Rey Malko Shazivari was born, to Adisa Malko, now a British citizen, and 35. Not long after that, the appellant was

caught in possession of criminal property to the value of just under £23,000, and what the sentencing judge described as "significant amounts of cocaine": after about eight months in custody on remand, and following a trial, he was convicted and on 25 May 2010 sentenced to six years' imprisonment. A deportation order automatically followed, served after some further inquiries on 26 October 2012. The panel allowed the appellant's appeal under article 8 of the Human Rights Convention, on the strength of his family life. Earlier this year, he was passed fit for release by HM Prison Service, but kept in immigration detention till bailed in April by a first-tier judge whose reasons for doing so are not before me.

3. **Error of law** The Home Office applied for and were given permission to appeal on several grounds, the first of which involved what they said was the panel's failure to give adequate consideration to the legitimate aim of prevention of crime, which even strong family reasons might not outweigh: see *JO (Uganda) and JT (Ivory Coast)* [2010] EWCA Civ 10. I invited Miss Tobin to show me how they had properly considered that, and she referred me to a number of passages in the panel's decision, first at paragraphs 2 and 4, setting out the fact of the appellant's conviction and the Home Office's argument on it; then *passim*, referring in general terms to the need to maintain "effective law and order".

4. In my view this was not enough: this was a very serious crime, with a sentence many times longer than required to bring about automatic deportation. The panel needed to show that they had themselves taken into consideration that there was a correspondingly strong public interest in the appellant's removal: then if, as they decided, there were even stronger family reasons against it, they could balance the two properly against each other. As it was, they did not show that they had properly considered the public interest side of the case, and that was an error of law which requires a fresh hearing.

5. Only two other points on the grounds needed mentioning at that stage: first, the panel were clearly wrong to describe the appellant as having come here as a minor in 1999, when even on the date of birth they gave he was 24. Second, the permission judge was quite right to discourage the Home Office from relying on paragraph 398 *et seq.* of the Immigration Rules; and they could not expect to be heard on that point, unless not only *MF* but *Izuazu* (Article 8 – new rules) [2013] UKUT (IAC) 45 had meanwhile been overruled by the Court of Appeal.

6. Miss Tobin asked that the panel's positive findings should be preserved for the re-hearing I directed: in a case of this kind, those of any importance concerned not the appellant's credibility as such, but what they thought about the strength of his family life, on the basis of the view they had of him with his son in court. While their views on that are certainly something to be taken into account, this will be a fresh hearing for the decision to be re-made, and in the end that decision will be for me to take on my own view of all the evidence, after the necessary balancing exercise.

7. **Fresh hearing** Mr Behbahani began by renewing the application for an adjournment, previously refused by another judge, so that he could

instruct an independent social worker to report on the present situation of the appellant and his family. However when I said I had seen the appellant with Rey at the error of law hearing, and took the view that they clearly had a genuine warm relationship, Mr Behbahani sensibly withdrew the application.

8. **History** Both the appellant and Miss Malko gave oral evidence before me: I shall call her by her personal name, Adisa, from now on, as this case is very much about the two of them, Rey and their second child, still *en ventre sa mère* but due in February, as a family, on the one side; and the public interest on the other. The appellant and Adisa are both from the south of Albania, but first got to know each other over here, in 1999, when she too arrived and made a false asylum claim as a Kosovan. From then till 2005 they were together in this country; but then their relationship broke down. In 2006 Adisa's mother suffered a stroke in Albania, and she decided to make a voluntary assisted return to be with her.

9. While Adisa was back in Albania, her mother introduced her to the family of Naim Hajdini, and a marriage was arranged between them. They must have met at some stage, because on 29 November 2006, despite her immigration history, she was given a visa to enter this country as his fiancée, which she did on 2 December. Two years' leave to remain followed in March 2007, with indefinite leave to remain on 26 March 2009. By this time, however, she and the appellant had met again, towards the end of 2008; but just before Christmas Naim found out they were having an affair: nevertheless she and Naim got back together, till in April 2009 Adisa let the appellant know she was carrying his child. She had known from the start that he had no right to be in this country, apart from the application he was pursuing.

10. Adisa herself agreed in evidence that she must have been aware rather earlier of this pregnancy, which came to term in August, though she said her condition had had to be confirmed by a blood test taken by her GP. She accepted that she would have been aware of it by the end of March, when she got indefinite leave to remain as Naim's wife, though she said the two of them were still trying to save their marriage: "he kind of accepted me being pregnant, but by the end of May that was it". So in June 2009 Adisa and the appellant moved back in together.

11. **Offences** At this stage Adisa says the appellant was still gambling and taking drugs: on 25 June 2009 he was fined, as already mentioned, for possession of cocaine, and on 22 September caught in possession of the large quantity of the drug, and the £23,000 in cash which led to his conviction and 6 years' sentence the following May. The appellant still denies any involvement with class 'A' drugs beyond simple possession. His explanation is this: he had moved house with Adisa, mainly to avoid his old gambling and using haunts, just before Rey was born on 23 August 2009, and they had given a party to celebrate that.

12. When the appellant had gone out to meet a friend who didn't know the way to his new flat, he received a call from his dealer and was arrested by

police with a lump of cocaine on him. To his surprise, these officers turned out to be not ordinary Metropolitan Police, but from the Serious Organised Crimes Agency [SOCA], and they found £23,000 in his flat. The appellant's explanation for this was that he had won it betting, and he not only had the slips to prove it, but was able to call the manageress of the betting shop to support that. As I pointed out to the appellant, and he accepted, that version of events must have been disbelieved by the jury, who found him guilty of possession of criminal property: the money was confiscated, and he went on to serve his sentence, without any appeal in those proceedings.

13. **Imprisonment** What appears to be a partial copy of a sentence plan dates back to September 2010. Later the appellant's suitability for release on licence was considered, and there is a slightly indistinct faxed extract from the usual Offender Assessment System [OASys] form, dated 23 November 2012. It is very clearly not the whole form, because it contains only the page with the 'Summary Sheet – Risk of serious harm', and not the assessment of the risk of re-offending, which is an important part of the document as a whole. It is the responsibility of both sides in a case of this kind to put a complete OASys form before the Tribunal, and the unexplained submission of a partial one, when both sides had had all the time given by a second appeal to prepare their cases, is not acceptable. I drew this to both sides' attention: realistically neither asked for an adjournment, which I should have refused, both in the public interest and in the family's.

14. So far as the form goes, 'Lifestyle and associates', drug and alcohol misuse, as well as 'thinking and behaviour' and 'attitudes' are all given as 'Linked to reoffending'; but only drug misuse is given as 'Linked to risk'. The risk of the appellant's causing serious harm is given as low to all categories, whether in prison or at large. The form is followed by a reference from a prison officer, dated 23 January 2013, describing the appellant as very well-behaved and polite, both to officers and prisoners. The reference mentions that he "… does sometimes have to be chased to do his job", which on the whole increases my confidence in the rest of what is said.

15. There are also certificates from various courses the appellant did in prison, including one on drugs, lasting most of January 2010; but, as the sentencing judge said, his own misuse of drugs was "entirely incidental" to the very serious offences of which he had been convicted: "The reality was that you were … supplying drugs to fund … a relatively luxurious lifestyle". A drink course report suggests the appellant has been trying to overcome that problem too. Before the appellant's release on 3 April 2013, e-mails from UKBA confirmed that his home address with Adisa was suitable for him to go to. The final piece of evidence from an official source about the appellant's progress to which I was referred was a letter from his 'Offender Manager' at the London Probation Trust, dated 11 June, confirming that since his release he had complied with all supervision and licence requirements.

16. **Present situation** The appellant, Adisa and Rey have all been living together in her flat since 3 April: she works from home as a free-lance web-site designer, and says she supports all three of them. The appellant helps her round the house, especially by taking Rey to the park when she needs peace and quiet to work: they play football together, and Rey rides his scooter. Other parents she knows from a playground where they both take Rey have told her how proud he is of his father. He is a happy child: although Adisa speaks to him in Albanian, he always answers in English, and has surprised her with the words he knows: for example, one day when a friend of hers wanted to prevent him scooting through the park, he complained "Stop protecting me!" In my view, as things stand, they are a very happy family, and I don't think that will change with the arrival of the new baby in February.

17. **Future** Adisa says, quite understandably, that she will stay in this country whatever happens. She couldn't do her IT work in Albania, and her only relation who is close to her there, following the death of her mother six months ago is an aunt, not at all well herself. Adisa does have uncles in Albania too, but isn't at all close to them: they have their own families to look after, and couldn't help her if she went back. What Adisa likes about this country is all the benefits it offers: not income support, which she doesn't approve of at all, but the education and the NHS. The appellant for his part has parents still living in Albania; they would take him in, but are on pensions themselves, and have told him there are no jobs to be had.

18. **Law** This is a very much pronounced-on field, though the principles have been perfectly clear since the UK Borders Act 2007 provided for automatic deportation of those sentenced to 12 months' imprisonment or more for a single offence. *Masih* (deportation - public interest - basic principles) Pakistan [2012] UKUT 46 (IAC) sets them out, by reference to the English and European jurisprudence, as it stood at the time. So far as relevant to the present case, where the appellant is well over 18, and, though he has spent a good deal of time in this country, has done so as a grown-up, and without leave, they are as follows

(a) In a case of automatic deportation, full account must be taken of the strong public interest in removing foreign citizens convicted of serious offences, which lies not only in the prevention of further offences on the part of the individual concerned, but in deterring others from committing them in the first place.

(b) Deportation of foreign criminals expresses society's condemnation of serious criminal activity and promotes public confidence in the treatment of foreign citizens who have committed them.

(c) The starting-point for assessing the facts of the offence of which an individual has been committed, and their effect on others, and on the public as a whole, must be the view taken by the sentencing judge.

(d) The appeal has to be dealt with on the basis of the situation at the date of the hearing.

(e) Full account should also be taken of any developments since sentence was passed, for example the result of any disciplinary adjudications in prison or detention, or any OASys or licence report.

19. The very latest pronouncement by the Court of Appeal is in *SS (Nigeria)* [2013] EWCA Civ 550, inevitably by way of a re-statement of principle, rather than any startling new *aperçu*: while it may be news to some that the principle involved in automatic deportation is Parliament's will, and not the Secretary of State's, that too should have been clear enough since the 2007 Act. Also well-established are the principles where children are concerned: as Lady Hale said in *ZH (Tanzania)* [2011] UKSC 4, their best interests are neither paramount, nor *the* primary, but *a* primary consideration. If explanation of that were required, at paragraph 44 in *SS (Nigeria)* it is given as meaning 'a consideration of substantial importance'.

20. The Court of Appeal's summary of general considerations comes at paragraph 47:

(1) The principle of minimal interference is the essence of proportionality: it ensures that the ECHR right in question is never treated as a token or a ritual, and thus guarantees its force.
(2) In a child case the right in question (the child's best interests) is always a consideration of substantial importance.
(3) Article 8 contains no rule of "exceptionality", but the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail.
(4) Upon the question whether the principle of minimal interference is fulfilled, the primary decision-maker enjoys a variable margin of discretion, at its broadest where the decision applies general policy created by primary legislation.

In plain English, 'minimal interference' means that article 8 rights should be interfered with as little as is necessary to fulfil the public purpose in hand.

21. The Court of Appeal had already referred specifically to deportation cases at 46; what was said there is repeated, with added emphasis, at 55:

> … while the authorities demonstrate that there is no rule of exceptionality for Article 8, they also clearly show that the more pressing the public interest in removal or deportation, the stronger must be the claim under Article 8 if it is to prevail. The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.

22. **<u>Child/children: best interests</u>** Although Adisa is expecting a child in February, it was not suggested that I should do other than consider the situation at the date of the hearing, when only Rey is in legal terms 'in being'; but I do not think the existence of a second child could significantly change the position in any event, except as set out at **24 - 25**. When I made clear to Mr Behbahani that I accepted as a general principle that children need a present father, and do much better with one than without, he sensibly refrained from any further reference to the numerous articles to that effect which appear in the appellant's bundle. The principle is one of ordinary common sense, not requiring any 'scientific' support.

23. Whether children are happier and better off without a present father, rather than one who continues to be involved in serious criminal offences, is not I think a question capable of any general answer: of course a criminal who gets caught is liable not to be present very much. I am going to deal here with Rey's best interests in being where he is now, in a happy united family; then I shall turn to the example the appellant might give him in future when I have considered the facts about his criminality.

24. So far as the present situation is concerned, there can be no doubt that it is far and away in Rey's best interests for things to stay as they are, rather than for the appellant to be removed to Albanian, leaving his family here: while Adisa is a capable and independent person, she will be busy with the new baby next year and beyond, and, as soon as she can, busy with her work again. I have some doubts just how much help around the house this appellant or any other Albanian man is likely to be; but, having seen them together, I have no doubt that he does spend a lot of time with Rey, which both takes pressure off Adisa, and gives Rey the grown-up company he needs at his age. In a year or two Rey will be at primary school, and need less of that; but for the present he and Adisa, not to mention the new baby, will need the appellant very much.

25. **Other article 8 interests** The appellant would not be destitute or homeless on return to Albanian, and it is to his credit that he has not tried to pretend so. He would no doubt find it very hard to get paid work, and lead a rather more restricted life than here, besides losing direct contact with Rey and the new baby, at ages where that is crucial. However, all that would be his own fault, for the very serious crime he has committed, and not of much weight in comparison to that.

26. Adisa would also lose the appellant's help and support; but, while she has committed no crime herself, and may possibly not have realized that the "relatively luxurious lifestyle" referred to by the sentencing judge was paid for by the appellant's dealing in cocaine, rather than by gambling, she certainly did realize that he had no right to be in this country when she took up with him again on her return here in 2008. Yet she chose to accept the indefinite leave to remain she had been given as the wife of Naim, without saying anything at all to the Home Office about the situation as it really was.

27. Adisa says she was still trying to save her marriage; but her relationship with the appellant, which had lasted before from 1999 – 2005, was very far from a casual affair. It must have been clear to her, before she got indefinite leave to remain as Naim's wife on 26 March 2009, that she was carrying the appellant's child, to be born on 23 August; and I do not believe she meant to do anything other than stand by him. I have to say that in my view Adisa has, at least to that extent, deliberately manipulated this country's immigration system to her own advantage. While no doubt that included her view of the best interests of her then unborn child, as well as the appellant's and hers, it does mean that her article 8 rights are of less weight than they might otherwise be.

28. **Public interest** There is no need to repeat what has been said so many times in so many courts about the harmful effect of class 'A' drugs, not limited to the users themselves, but seriously affecting others they rob, burgle and otherwise steal from to feed their habit. It is not hard to sympathize with simple users; but this appellant, according to the sentencing judge, was only a user incidentally to dealing. The judge, having heard the evidence on which the jury convicted the appellant, did not find it necessary to go into too much detail about what he had done. However, the length of the sentence passed, about twice what an ordinary street dealer might expect, and the amount of ill-gotten money found in the appellant's possession, show that he was no common pedlar.

29. The appellant himself acknowledged that the jury's verdict had to be respected; but he still kept up his denial of any guilt beyond simple possession of cocaine. Mr Behbahani suggested that I should not attach too much importance to this; and certainly the appellant has served his sentence, and is in a way appealingly straightforward in his view of the events which had led to it. However, I am not now concerned with punishing him, but with whether the public interest requires him to go. The real difficulty for someone who denies doing anything seriously wrong in the first place, but has been convicted of it by a jury, is that it is hard to find in his attitude any assurance of real reform of the ways in which he had, but denies having gone wrong.

30. The only official source material I have about the appellant's prospects of reform is in the very partial OASys assessment (see **13 – 14**). I am not prepared to assume that, because the 'risk of serious harm' is assessed as 'low', so also must the risk of re-offending: though of course the two things are linked, the familiar full version of the OASys report deals with them as separate categories. It also gives the opportunity for a number of other assessments to be made, in particular about the offender's attitude to his crime.

31. If this appellant had simply been drawn into dealing on the side by a drug habit of his own, then the courses he undertook in prison, together with the happy family life he is leading for the present, might perhaps have given the necessary assurance of reform; but his case is quite different. The evidence, as judged by the jury and the sentencing judge, shows on the contrary that he dealt in drugs for money, and quite serious money at that, and his own use of them was on the side. The easy money to be made by such activity can all too easily become a way of life; and, while the appellant's family life might make him regret the trouble he has caused them, I am not prepared, having heard what he himself says about what he has done, to accept that he is more likely than not to turn away from it for the foreseeable future.

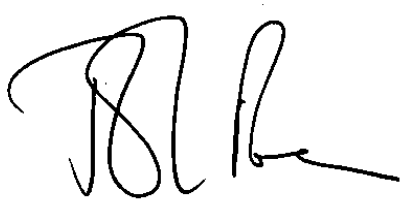
32. I have no doubt that the appellant is a loving father to Rey, and would be, if he had the chance, to his unborn child; and I accept that, as things stand, he is a supportive baby-father to Adisa. While he might manage, even if he did not turn away from dealing in future, to keep his involvement from his children, the probabilities, based on the events which led to his conviction, are that he would not provide them with a good

example, and that he, and they with him would be drawn down into misery. That in the end, whatever the present position (see **24**) has to mean that Rey's long-term best interests would not be served by letting the appellant stay in this country.

33. Rey's interests were the strongest consideration against those of the public, even more strongly in favour of this appellant's being deported. It must be quite clear from *SS (Nigeria)* , even for those who did not find it so before, that there is a strong public interest in the deportation of anyone sentenced even to so little, relatively speaking, as 12 months' imprisonment for a single offence. While it would be a mistake to extrapolate arithmetically from that to this appellant's six years', both the sentence passed on him, and the nature of his offence, show a very strong public interest indeed in his deportation.

34. Though the appellant's present family situation might make a strong claim for him to be allowed to stay with them, if there were any real assurance of his reform, as things stand I do not think it raises anything like the 'very strong claim indeed', required in *SS (Nigeria)*, especially when weighed against the gravity of his crimes. I can well understand why the first-tier panel decided as they did, and I do not reach my own conclusion with any particular enthusiasm. The appellant has both charm and intelligence, as one of the reports on him makes clear; Adisa is a very charming and hard-working person indeed, while Rey from what I have seen of him is a delightful child. It would be very tempting to make them all happy; but, unfortunately for them, I have a public duty to do which makes that impossible.

First-tier decision set aside: decision re-made
Appeal dismissed



(a judge of the Upper Tribunal)