IAC-FH-AR-V3

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00372/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22 July 2015	**On 17 August 2015**

Before

UPPER TRIBUNAL JUDGE STOREY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ERVIN MURATI
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Whitwell, Home Office Presenting Officer
For the Respondent: Miss G Brown, Counsel, instructed by Duncan Lewis & Co Solicitors

DECISION AND DIRECTIONS

1. The appeal with permission is brought against a determination of a First-tier Tribunal panel (Judge Boardman and Non Legal Member Mr F Jamieson JP). Sent on 22 September the determination allowed on Article 8 grounds the appeal of the respondent (hereafter "the claimant") a national of Kosovo, against the decision of the appellant (hereafter "the Secretary of State or SSHD"). The claimant is a foreign criminal as defined by s.32(1) of the UK Borders Act 2007 and on 5 February 2013 the SSHD made a

deportation order against him under s.32(5) of this Act. The trigger for this decision was his conviction in 2010 for robbery and having a sharply pointed blade in a public place for which he was sentenced to 40 and 9 months respectively to run concurrently.

2. The claimant arrived in the UK as an unaccompanied minor and on 5 June 1999 he was granted ILR as a refugee. In October 2011 he was issued with a s.72 warning letter and the claimant was issued a decision that his refugee status had ceased on the same day he was served with his deportation order.

3. The SSHD's grounds of appeal allege that the FtT misdirected itself in several respects: (1) in failing to identify any unduly harsh effect of deporting the claimant; if his partner or children were to remain in the UK (in this regard the FtT was said to have failed to engage fully with s.117C(5) of the Nationality, Immigration and Asylum Act 2002 as amended); (2) in attaching too much significance to the issue of the risk of reoffending (in this regard the FtT was said to have wrongly treated the claimant's expression of remorse as negating the seriousness of the claimant's index offence, and ignoring the fact that the public interest has to reflect not just the particular circumstances of a claimant but also general factors going to deterrence, social abhorrence and maintaining confidence in a system of control.

4. A further issue was raised (by me) in the grant of permission (which I shall deem a third ground) as to whether the panel had erred in allowing the appeal under Article 8 despite accepting that he did not comply with the Rules.

5. Before proceeding further, I would observe that in grounds seeking permission from the FtT the SSHD had argued that the panel had failed to provide sufficient reasons for concluding that the claimant had rebutted the s.72 presumption that he is a danger to the public. However, this was rejected by the judge who refused permission and this challenge was not maintained in the grounds seeking permission from the Upper Tribunal.

6. By the same token there was no response or reply from the claimant seeking to challenge the panel's finding that he was no longer at risk on return to Kosovo of persecution, serious harm or ill-treatment. Plainly the claimant was someone who had ceased to be a refugee under Article 1C of the 1951 Convention.

<u>The Rules as a Complete Code</u>

7. In relation to ground (3) above, it is true that the panel did say in one place that it was allowing the appeal outside the Rules: see e.g. [49].

8. If that had been the panel's definitive position, it would have erred in law because it is settled law that in respect of foreign criminals subject to automatic deportation provisions, the new Immigration Rules are a

compete code: see e.g. MF (Nigeria) [2013] EWCA Civ 1192. However, I am satisfied this was not the panel's definitive position and that in substance it had clearly satisfied itself that the claimant met the requirement set out in the last paragraph of paragraph 398. Thus at [48] it held that:

> "We find the appellant's case falls within para 398(b), in that his sentence of 40 months was between 12 months and 4 years, and that paragraphs 399 and 399A therefore apply."

and at [77(c)] it said it was allowing the appeal because the claimant had set out exceptional circumstances as referred to in paragraph 398 of the Rules.

9. Although not raised in the grounds, Mr Whitwell sought to argue that the panel had failed to apply the wrong version of the Rules to the claimant's case. Leaving aside that it was not open to the SSHD to add new grounds without seeking or obtaining the Tribunal's permission, I would reject this argument. Mr Whitwell sought to rely on cases such as YM (Uganda) [2014] EWCA Civ 1292 and Oladeje [2014] UKUT 00326 (IAC), but these were concerned with cases in which the decision of the First-tier Tribunal had been set aside and the Upper Tribunal was engaged in the task of re-making the decision. In that context – and in that context only – the latter Tribunal was obliged to consider a decision under a version of the Rules in operation at the date of the hearing.

10. Miss Brown submitted that Mr Whitwell's claim that the wrong version of the Rules stood to be rejected for a separate reason, namely that there were transitional provisions preserving the application of the previous Rules. She referred us to paragraph 1 of the Statement of Changes HC 352 which provides that:

> "If an applicant has made an application for entry clearance or leave before 11 July 2014 and the application has not been decided before that date, it will be decided in accordance with the Rules in force on 10 July 2014."

She prayed in aid Singh v SSHD [2015] EWCA Civ 74 in which the court held that the "implementation provision" (in that case HC 194) displaced the usual Odelola principle that the date of decision is the relevant date. That submission overlooks that the claimant in this case had not made an application for leave; he had simply been the subject of a deportation decision.

11. In any event, even if Mr Whitwell were correct in his argument that the post-28 July 2014 version of the Rules applied, he has not identified any respect in which the FtT would have been required to assess matters differently than it did. Even assuming there are differences, he has not begun to demonstrate that they had a material impact on the panel's assessment.

Section 117C(5) as Determinative

12. Although not set out plainly in the grounds it is clear that the SSHD's position is that the FtT erred in treating the claimant as entitled to succeed solely by virtue of satisfying the requirements of s.117C(5). That position is untenable. It is plain from the way the panel structured its "Findings" that having concluded that the claimant had established family life and that there had been an interference in the same and that the decision was in accordance with the law and pursued a legitimate aim, the FtT turned at [58] to consider proportionality. At [72] the FtT ruled that the policy that deportation of foreign criminals was in the public interest was enshrined in s.117C(1). It then concluded at [73] that the weight to be attached by the SSHD to the public interest in this case is "justifiably high". Only then in the two paragraphs headed "Balancing the Factors" ([75] and [76]) did it turn to consider s.117C(5) and that was in only one of three subheadings ("a") all of which were proceeding by the overarching statement .. "However having considered all the factors in the round". Significantly "b" referred to a factor outside the scope of s.117C(5), namely the relevance of the claimant's expressions of remorse - a factor clearly going to the relevance of his risk of reoffending and level of criminality.

Undue Hardship

13. As regards the SSHD's first ground, I am in agreement with Miss Brown that it amounts to no more than a disagreement with the panel's assessment. It is said that the panel "failed to identify any unduly harsh effect of deporting the appellant if his partner and children were to remain in the UK". That assertion flies in the face of the panel's careful elaboration of reasons as to why it considered the effect on both the partner and the children would be unduly harsh. It is said that the difficulties identified by the panel were less serious than "unduly harsh" in its plain and ordinary meaning as given in the Oxford dictionary which denoted severity. But it is clear from the language used by the panel that they did apply its ordinary meaning and did consider the effect would be severe - see e.g. [39], [60] - [70] and [75].

Public Interest

14. However I do consider that the SSHD's second ground is made out. Despite stating that it found the public interest in the deportation of the claimant "justifiably high" ([73]) and despite stating that this reflected the consideration set out in s.117C(1) ([72]) , the panel's actual proportionality assessment, which commences at [75] under the heading "Balancing the factors" fails to demonstrate that this public interest was properly weighed in the balance. Indeed it is not even clear it was weighed at all since the only factor at all relevant to it was set out at [75(b)], but this was confined to (i) acceptance of is expression of remorse; (ii) acceptance that he would not reoffend (and had not committed any further offences since release).

15. In so limiting assessment of the importance of the public interest the panel committed the classic error of treating the public interest as merely one-dimensional, concerned only with whether the individual claimant's

deportation is in the public interest, e.g. because (as here) there is a low – or no-risk of reoffending: see e.g. AM [2012] EWCA Civ 1634 at [42] *per* Elias J.

16. Since this legal error had a material impact on the outcome of the appeal, I hereby set aside the FtT decision.

17. I consider that because the judge's decision is now a year old and there are children involved who are now British citizens, it would be appropriate for the remaking of this decision to be remade at a hearing in advance of which the claimant's representatives have had fuller opportunity to produce updated evidence.

Notice of Decision

The decision is set aside for error of law.

Signed Date

Upper Tribunal Judge Storey