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

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 May 2017	**On 25 May 2017**

Before

UPPER TRIBUNAL JUDGE PITT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

EM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mr Lindsay, Senior Home Office Presenting Officer
For the Respondent: Ms Brown, Counsel instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I continue the anonymity order made by the First-tier Tribunal. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the appellant from the contents of the protection claim.

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2. For the purposes of this decision I refer to the Secretary of State as the respondent and to EM as the appellant, reflecting their positions before the First-tier Tribunal.

3. The appeal came before me following remittal from the Court of Appeal. The Court of Appeal made an Order on 4 February 2017 in the following terms:

> "1. The appeal be allowed for the reasons identified by Lord Justice Lloyd Jones in his Order granting permission of 2 December 2016;
>
> 2. The matter be remitted to the Upper Tribunal for a Substantive Hearing on the earliest date available and if possible within three months of the date this Order is sealed and that the Upper Tribunal's decision of 1 March 2016 be set aside ..."

4. The Upper Tribunal decision dated 1 March 2016, referred to in the Order, was made by Upper Tribunal Judge Gleeson which found an error of law in the decision of Designated Judge of the First-tier Tribunal Shaerf dated 27 October 2015.

5. There was agreement between the parties that the terms of the Order of the Court of Appeal meant that I was in the position of Judge Gleeson. I therefore had to decide, whether the decision of Judge Shaerf disclosed an error on a point of law. The respondent's grounds were those dated 30 November 2015. Permission was granted by Upper Tribunal Judge Eshun on 14 December 2015.

6. The appeal concerns Article 8 ECHR in the context of deportation. The appellant is from Kosovo. It is not disputed that he left as a minor in 1998 after the war broke out there and after he witnessed the violent murder of his parents. After coming to the UK, he was recognised as a refugee and granted indefinite leave to remain on 5 June 1999. The appellant's refugee status does not feature further in this decision as the respondent's decision to revoke that status under paragraph 339A of the Immigration Rules has been upheld and is no longer in issue.

7. The respondent considered deporting the appellant in 2008 due to convictions for wounding and failing to surrender to bail. He was sent a warning letter on 27 October 2010 setting out the consequences of re-offending.

8. On 17 September 2010 the appellant was convicted of robbery for which he received a sentence of 40 months. The respondent made a deportation order against him on 5 February 2013.

9. The appellant appealed the deportation order. In a decision promulgated on 29 August 2014 First-tier Tribunal Judge Boardman and Mr F T Jamieson JP allowed the appeal under Article 8 ECHR. The panel found that it would be "unduly harsh" for the appellant's Portuguese partner and their three children if the appellant were to be deported. That conclusion was reached

as part of the "exceptional circumstances" assessment provided for by paragraph 398 of the Immigration Rules.

10. The respondent challenged the decision of Judge Boardman and Mr Jamieson. In an error of law decision dated 17 August 2015, Upper Tribunal Judge Storey found an error of law and remitted the appeal for rehearing in the First-tier Tribunal.

11. In his reasons, Judge Storey confirmed that notwithstanding the reference at [37d] of the First-tier Tribunal decision to a decision being made "outside the Rules" panel had made a correct "exceptional circumstances" assessment under paragraph 398, applying the provisions of Section 117C(5) of the Nationality, Immigration and Asylum Act 2002.

12. At [13] of his decision, Judge Storey found no error in the conclusion made under paragraph 117C(5) that the partner and children would be "unduly harsh". The error which led to the decision being set aside was that the First-tier Tribunal panel did not properly weigh the public interest. At [14] – [17], Judge Storey set out:

> "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 Section 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 (sic) 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."

13. Thus the appeal came before Judge Shaerf. His decision indicates at [23] that:

> "Initially there was a discussion about the scope of the remittal to the First-tier Tribunal from the Upper Tribunal. Both parties agreed the sole issue was the "public interest" point."

14. By the time of the hearing before Judge Shaerf, however, as he identified at [55], the provisions of paragraphs 398, 399 and 399A had changed substantively and he had to apply the new law. Instead of assessing whether there were "exceptional circumstances", the new provisions required an assessment of whether, over and above the new provisions of paragraphs 399 and 399A, there were "very compelling circumstances".

15. Judge Shaerf went on to allow the appeal under paragraphs 399(a), 399(b), 399A and outside the Immigration Rules. There has never been any objection to his approaching the appeal in this way, notwithstanding the limited remittal on the "public interest" point by Judge Storey. It was not suggested before Judge Gleeson or the Court of Appeal that Judge Shaerf was incorrect to carry out an assessment under the new provisions.

16. The respondent's grounds do not challenge the correctness of the legal matrix applied, therefore, but go to the findings made under paragraphs 399(a), 399(b) and 399A, and, thus, the assessment outside the Immigration Rules.

17. The core of the respondent's challenge before me is that Judge Shaerf did not give adequate or rational reasons for finding that it would be unduly harsh for the appellant's partner and children to remain in the UK without him and that he could not be expected to return to Kosovo.

18. In my judgment, Ms Brown's defence to these challenges, set out in her skeleton argument, has force. As set out above, the remittal to Judge Shaerf expressly upheld a finding that it would be unduly harsh for the children and the partner if the appellant were to be deported. Judge Shaerf only had to consider the proper role of the public interest. The decision at [13] and [23] shows that Judge Shaerf clarified this with the parties. In any event, Judge Shaerf correctly directs himself at [61], to the "very high standard" for an "unduly harsh" assessment, as found by the Court of Appeal in KMO (Section 117 – unduly harsh) [2015] UKUT 543 and nothing in his consideration suggests that he did not follow this self-direction in substance when making his decision.

19. If more is needed, read fairly, Judge Shaerf's finding at [58] is to the effect that it was his view, with a proper direction to the stringency of the "unduly harsh" test and the role of the public interest at [61], that it would be unduly harsh for the children if the appellant were deported. At [61], Judge Shaerf indicates that he has applied the correct test from KMO to "these conclusions" which must be a reference to not only the 399A finding in [60] but to the 399(a) finding in [58] that it would be unduly harsh for the children if the appellant were deported. When making those assessments, the First-tier Tribunal had the benefit of oral evidence from the appellant and his wife. The evidence was that the appellant was a particularly devoted parent. That was also the view of the sentencing judge; see [58]. The evidence of the appellant's wife referred to there being a "special bond" between him and the children and that they would be "lost" if he was deported. The appellant's mother-in-law gave evidence to the same effect.

20. It is also my view that it was unarguable before Judge Shaerf, as now, that the children could be expected to go to live in Kosovo. The children were all born here. Their dates of birth are 24 April 2001, 28 February 2003 and 12 April 2013. The youngest was born British. The two older children had lived here for 16 years and 12 years respectively as of the date of the decision of Judge Shaerf. They had never left the UK.

21. It is also my judgment that, at [60] and [63], the First-tier Tribunal made a lawful decision in finding that paragraph 399A was met as there were "very significant obstacles" to re-integration in Kosovo. The factors set out by the judge at [60] appear to be undisputed, namely that the applicant experienced significant trauma because of the murder of his parents in Kosovo in front of him, that he only began to deal with that trauma after being on remand for the index offence in 2013 and that his previous strategies for avoiding the trauma included the alcohol problem, addressed whilst in prison, which led to his offending behaviour. He had been in the UK lawfully for 17 years at the time of the hearing. Judge Shaerf sets out as follows in the second half of [60]:

> "The evidence is that subsequent to bereavement counselling and release from prison he has made progress in coming to terms with his past and has been able to involve P in that process. Notwithstanding that his sister and her family remain there, and incidentally of whose circumstances there were no details before the Tribunal, I find that his return to the country where he witnessed the murder of his parents would inevitably stir up memories which he has only recently started to face and come to terms with and then only in the context of his life in the United Kingdom with his family. Without the security of his family and the safety of his pattern of life in the United Kingdom the appellant is unlikely to be able even to cope, never mind reintegrate."

22. The bereavement counsellor referred to the appellant's experiences as "particularly harrowing" and that was clearly something upon which the judge was entitled to place weight. The assessment was made with explicit consideration given to the appellant having a sister in Kosovo. It was open to the First-tier Tribunal to make the decision it did on the materials provided.

23. The respondent's fourth ground argues that where the finding under Article 8 outside the Immigration Rules relies on the findings under the Immigration Rules it was unsound, the proportionality assessment having to be conducted through the "lens of the Rules". This is, in fact, the approach taken by the judge. Findings were made under paragraphs 399 and 399A. Those provisions were found to be met. The assessment outside the Immigration Rules included the following at [66]:

> "Taking these findings into account with the rest of the evidence and balancing the weight of the public interest and the public good requirements in the proposed deportation of the Appellant against the personal integrity as well as the private and family life of the Appellant and taking into account the latest letter from the Probation Service, dated as long ago as 18 March 2013 I find for the reasons already given that his deportation would in all the circumstances be disproportionate to the legitimate need of the state

to prevent disorder and crime. The appeal therefore also succeeds on human rights grounds outside the Immigration Rules."

24. That assessment is made "through the lens of the Rules" and with proper reference to the role of the public interest.

25. Where I have found that the appeal allowing the claim under paragraphs 399(a) and 399A and outside the Immigration Rules is not in error, any challenge to the findings concerning the appellant's wife under paragraph 399(b) cannot be material and does not need to be addressed further.

26. For all of these reasons, it is my conclusion that the decision of Designated Judge Shaerf does not disclose a material error on a point of law.

27. I should perhaps also highlight the long history of the appeal in which two Tribunals have found that because of the relatively unusual circumstances of this appellant he should not be deported. Two more years have elapsed since the hearing before Judge Shaerf. Nothing before me suggested other than that during that time the appellant's family and private life claim has strengthened.

Notice of Decision

The decision of the First-tier Tribunal does not disclose error on a point of law and shall stand.

Signed:  Dated: 15 May 2017
Upper Tribunal Judge Pitt