



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/12440/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 16 October 2018**

**Decision & Reasons Promulgated
On 6 November 2018**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

A T

[ANONYMITY ORDER MADE]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr Chris Avery, a Senior Home Office Presenting Officer
For the respondent: Ms Michelle Harris, Counsel instructed by Turpin & Miller LLP (Oxford)

DECISION AND REASONS

Anonymity. *The First-tier Tribunal made no anonymity order, despite Presidential Guidance given by the President of the FtTIAC in 2011 that all asylum appeals should be anonymised at case creation. Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order in this appeal. The claimant will be referred to in these proceedings only as A T. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall identify the*

claimant, her husband or her children, whether directly or indirectly. This order applies to, amongst others, all parties. Any failure to comply with this order could give rise to contempt of court proceedings.

Decision and reasons

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 5 October 2017 to deport her to Albania as a foreign criminal, pursuant to the automatic deportation provisions of section 32(5) of the UK Borders Act 2007.
2. The claimant is a citizen of Albania.
3. The First-tier Judge found that the claimant was entitled to the human rights exception provided in section 33 of the 2007 Act.

Background

4. The claimant came to the United Kingdom from Albania as a student on 18 April 2005, but her leave expired on 8 June 2013 and she did not embark, remaining in the United Kingdom without leave. The claimant was born Muslim, but has converted to Christianity. She is vulnerable to depression and copes poorly with stress.
5. The claimant's husband, also an Albanian citizen, has indefinite leave to remain but is not a British citizen. The couple have three children, two sons and a daughter, all born in the United Kingdom, who are Albanian citizens. The children are now 9, 6 and 3 years old. The elder two children were born out of wedlock. The middle child, the claimant's only daughter, has autism.
6. The youngest child, a son, has dual nationality: as well as being an Albanian citizen he is a British citizen. The elder boy was a qualifying child at the date of hearing; the autistic daughter had not yet been in the United Kingdom for 7 years. They are both said to be entitled to register for British citizenship but the claimant cannot yet afford to pay the registration fee.
7. On 26 September 2015, the claimant committed an assault and on 14 September 2016, she was convicted of wounding and grievous bodily harm and sentenced to 30 months' imprisonment.
8. The Judge's sentencing remarks record that the claimant boiled a kettle of water and threw it over a neighbour with whom she was in dispute, in front of the victim's 8-year-old son, and then went back to her flat without helping her neighbour with the serious burns which the boiling water caused. The offence was treated as being at the very upper end of Category 1 because serious injury was caused and a weapon was used (the kettle full of boiling water). The claimant has no previous convictions and the sentence was reduced because she was suffering moderate to

severe depression when sentenced. Her relationship with her husband was said not to be good.

9. While the claimant was in prison, her husband looked after the children, albeit with difficulty, because of what their autistic daughter needs, and also because the younger boy, born in 2015, was still completely dependent on his mother when she was incarcerated.
10. The Secretary of State made a deportation order on 29 January 2017. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

11. The First-tier Judge found the case very difficult and finely balanced. By agreement, she took into account that the claimant's husband was about to be given indefinite leave to remain. She had regard to the seriousness of the offence, and the indications in the OASys report, as well as the claimant's unlawful presence in the United Kingdom. She gave weight to the claimant's attempts to regularise her situation but focused on future risk as the Rules require her to do.
12. The First-tier Judge found that it was in the children's best interests to stay in the United Kingdom with both parents, and proceeded to consider whether it would be unduly harsh for them to go to Albania with their mother, or to remain in the United Kingdom without her. The First-tier Judge found that the claimant would receive no family support in Albania and that she would be unable to cope with them in Albania on her own.
13. The First-tier Judge also found that the husband would have difficulty coping with the three children alone: the Judge accepted the expert evidence of Ms Pearce, an independent social worker, as to the difficulties involved, and the oral evidence of the husband that he would be unable to work if he had to look after these three children and that doing so as a single parent would be impossible. He had coped during the claimant's incarceration because he and the children had hope that the claimant would be returned to them. The husband is not prepared to go to Albania and as he has indefinite leave to remain he cannot be required to go there.
14. The claimant's autistic daughter, who was 5 years old when this appeal was heard, had the social skills of a 2 year old and spoke only a limited amount of English. She speaks no Albanian and is dependent on routine. She has no sense of danger and needs to be watched the whole time. She is receiving speech and language therapy. The elder boy was having difficulty at school and told the social worker that he had to help his father as a carer for his brothers and sisters.
15. The key conclusions in the Judge's decision are at [91]-[92]:

"91. In this case, there is a real likelihood that the challenges of bringing up three children alone would be too much for [the husband]."

He would not be able to work or contribute financially, and would be dependent on benefits. He is likely to cope poorly in the long term, and I accept that the outcome for the children is likely to be poor. In short, deportation would in my view be unduly harsh [both] on the children and on [the husband]. ...

92. I accept also that although [the autistic daughter] is not a qualifying child, that I must take account of her needs under section 55 and that she cannot be moved to Albania, because the nature of her problems will be exacerbated. She has communication difficulties, both in understanding situations and in language development. She will not learn a new language in the way other children do. ... This family are managing on a fragile pyramid which could collapse if undue stress is placed on one parent. It is an exceptionally challenging situation and a case where two parents need to be working together to look after the children. The nature of [the autistic daughter's] condition is challenging and means that deportation would be unduly harsh on the children. I find that this is not a case where the deportation order should remain and I therefore allow the appeal under Article 8 ECHR."

Grounds of appeal

16. The Secretary of State appealed to the Upper Tribunal. The grounds are lengthy and prolix, and in some places difficult to follow. The Secretary of State asserts that:
- a) The First-tier Tribunal failed to apply *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 617;
 - b) It was not open to the First-tier Tribunal to consider the claimant's return to Albania without her husband, if he was unwilling to do so;
 - c) The First-tier Tribunal should have made a finding in the alternative on the basis of the entire family relocating to Albania;
 - d) The First-tier Tribunal failed to give clear reasons for what the unduly harsh consequences would be if the family relocated to Albania;
 - e) It was speculative to find that the consequences to the children of remaining would be unduly harsh, or that the husband would be unable to work and would be reliant on benefits, and in any case, that merely having to rely on benefits did not amount to undue harshness;
 - f) The First-tier Tribunal failed to have regard to the decision of the Court of Appeal in *WZ (China) v Secretary of State for the Home Department* [2017] EWCA Civ 795 that family separation is a consequence of serious criminality; and that
 - g) If weight were to be given to the assertion that separation results in worse outcomes, 'all that is required to avoid deportation would be to have a genuine and subsisting relationship with a qualifying child'; and that the First-tier Judge had failed to give

the required weight to the public interest, in particular at [81] in her decision.

17. The grounds conclude by asserting that the First-tier Tribunal, 'by primarily focusing only on the positive factors on behalf of the [claimant] has distorted the determination to being one dimensional in effect, with no proper regard to the special weight attached to the public interest'.

Permission to appeal

18. Permission to appeal was granted by First-tier Judge Saffer on the basis that the First-tier Judge arguably had not adequately assessed the public interest in removal of a foreign criminal whose mendacity and manipulation were aggravating features of her offence and reflected on her character. Judge Saffer ordered that all the Secretary of State's grounds of appeal could be argued.

Rule 24 Reply

19. The claimant filed a Rule 24 Reply, settled by Ms Harris of Counsel who appears today, and also represented her before the First-tier Tribunal. The claimant contends that the Secretary of State erred in suggesting that *MM* and section 117C had been overlooked by the First-tier Judge in her decision; that although the Judge did not mention paragraphs 398/399 of the Immigration Rules HC 395 (as amended), and applied paragraph 276ADE, that made no difference since the test in both cases was whether there were very significant obstacles to reintegration on return. Any error was immaterial.
20. The Judge had been entitled to make a finding of fact, having heard the husband give evidence, that he was not willing to return to Albania and the claimant would be returning as a lone mother, if she were returned with her children. The grounds of appeal were drafted by a Home Office Presenting Officer who had not been present at the hearing and were based on a misunderstanding of what had occurred. Paragraphs [4]-[13] of the grounds were affected by this issue.
21. The claimant's Counsel argued that this lengthy and careful decision was sound and sustainable. The Rule 24 Reply concluded:

"... There is nothing wrong with this approach, rather the Judge is following her duties very carefully. In contrast, it is hard to relate the SSHD grounds to the appeal hearing or determination, and very little care appears to have been taken in ensuring that they are accurate."
22. That is the basis on which this appeal came before the Upper Tribunal.

Upper Tribunal hearing

23. I heard argument from Mr Avery, who relied on the grounds of appeal and asserted that the Judge had not given proper weight to the public interest nor assessed correctly the continuing risk which this claimant posed to the public if allowed to remain. The decision, he contended, was fundamentally flawed for that reason.
24. For the claimant, Ms Harris noted that at [6]-[7] in the decision, the First-tier Tribunal analysed the index offence, pulling no punches and recognising that the claimant was a manipulative and dishonest witness in her criminal trial. She set out the issues clearly and had regard to the sentencing remarks and the family difficulties. The sentencing Judge made no dangerousness assessment. All of the expert reports, and the oral and written evidence before the First-tier Tribunal were carefully analysed and taken into account.
25. In contrast, the Secretary of State's grounds of appeal showed little analysis of what the Judge had done in her decision. The grounds were in reality no more than a disagreement with the Judge's findings of fact, in particular her finding that if the claimant were removed, one or other of the parents would become the sole carer of all three children, as the husband was not prepared to go and live in Albania. The OASys report assessed the claimant as presenting a low risk, except to known adults. Ms Harris asked, rhetorically, if the care taken in this long and cogently reasoned decision were insufficient to withstand an appeal, it was difficult to know what would constitute a sustainable decision.
26. The Judge had acknowledged that this was a difficult and finely balanced case, but had reached sustainable findings which were open to her and the Secretary of State's appeal should be dismissed.
27. I reserved my decision, which I now give.

Discussion

28. The Secretary of State's grounds of appeal are notable for failing entirely to mention the decisive factors in relation to the children's best interests, in particular, the evidence that the parties' autistic daughter would adapt very poorly to Albania and would not receive adequate support there, and that her father was only just coping with the three children on a short term basis, unable to work and reliant on benefits.
29. The daughter speaks no Albanian and is very dependent on routine. She is 6 years old now but has a behavioural and social age of 2, and needs to be watched all the time as she has no sense of danger. The older boy has nightmares and considers himself his brother's and sister's carer. There was copious evidence on which the Judge was entitled to find that it would be unduly harsh both for the three children to accompany their mother to Albania, or to remain with their father in the United Kingdom. She was also entitled to accept and to make a finding of fact, following the husband's evidence, that he would refuse to go to Albania.

30. The Judge had proper regard to all necessary facts and matters, including the seriousness of the offence and the poor view which the sentencing Judge took of the claimant's credibility overall. The Secretary of State's grounds of appeal, although couched in terms of error of law, are in essence a challenge to findings of fact which were unarguably open to the Judge on that evidence. It may be that another Judge might have taken a different view but nothing in the grounds of appeal or in the oral argument before me persuades me that the Judge made an error of fact at the level of an error of law.
31. The Secretary of State's appeal is therefore dismissed.

DECISION

32. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of no error on a point of law

I do not set aside the decision but order that it shall stand.

Date: 26 October 2018

Gleeson
Tribunal Judge Gleeson

Signed **Judith AJC**
Upper