**Upper Tribunal (Immigration and Asylum Chamber)** Appeal Number: HU/19242/2018

**THE IMMIGRATION ACTS**

| **Heard at Field House** | **Decision & Reasons Promulgated** |
|---|---|
| **On 11 January 2022** | **On 11 March 2022** |

**Before**

**UPPER TRIBUNAL JUDGE BLUNDELL**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**ERMAL GAXHA**
**(ANONYMITY ORDER NOT MADE)**

Respondent

**Representation:**
For the Appellant: Ms Isherwood, Senior Presenting Officer
For the Respondent: Mr Kerr, counsel, of Karis Solicitors Ltd

**DECISION AND REASONS**

1. The Secretary of State for the Home Department appeals, with permission granted by Upper Tribunal Judge Kekic, against Judge Cohen's decision to allow Mr Gaxha's appeal against the refusal of his human rights claim.

2. It is convenient to refer to the parties as they were before the First-tier Tribunal: Mr Gaxha as the appellant and the Secretary of State as the respondent.

**Background**

3. The appellant is an Albanian national who was born on 20 June 1987. He spent the years 2004-2012 in the United Kingdom unlawfully. On 1

July 2013, he was granted leave to remain as the spouse of a British citizen until 1 July 2016. A further such application was granted on 29 December 2015, with the appellant securing leave to remain until 8 October 2018.

4. On 10 January 2018, the appellant was convicted of Grievous Bodily Harm contrary to s20 of the Offences Against the Person Act 1861. The facts of the offence are described in the short sentencing remarks of HHJ Williams. On 31 October 2016, whilst at work, the appellant and his colleagues had been engaged in 'horseplay' with an air rifle. The appellant shot one of his colleagues in the abdomen with the weapon and caused serious injuries. HHJ Williams sentenced the appellant to 27 months' imprisonment.

5. As a result of that sentence, the appellant became a foreign criminal as defined in statute. The respondent commenced deportation proceedings and, on 11 September 2018 she refused the appellant's human rights claim and made a deportation order against him. The respondent did not accept that the appellant had a genuine and subsisting relationship with his British wife. Nor did she accept that he had a genuine and subsisting relationship with his British daughter (born 18 May 2016) and step-daughter (born 20 September 2004). In the alternative, the respondent did not accept that it would be unduly harsh on the appellant's family members to deport him from the United Kingdom, or that there were very compelling circumstances over and above the statutory exceptions to deportation which outweighed the public interest in that course.

## The Proceedings Below

6. The appellant appealed to the First-tier Tribunal and his appeal was heard by First-tier Tribunal Judge Cohen ("the judge"), sitting at Taylor House, on 5 December 2019. The appellant was represented by Mr Kerr, as he was before me, whilst the respondent was represented by a Presenting Officer. The judge heard oral evidence from the appellant and his wife and submissions from the advocates before reserving his decision.

7. In his reserved decision, the judge found that the appellant had a genuine and subsisting relationship with his wife and children (which term I shall use to refer to the appellant's biological daughter and his step-daughter). He went on to find that the effect of the appellant's deportation on his children would be unduly harsh and he allowed the appeal on Article 8 ECHR grounds as a result of that conclusion.

## The Appeal to the Upper Tribunal

8. The respondent appealed to the Upper Tribunal. The grounds are unduly lengthy, repetitive and lacking in focus. There are said to be four grounds but, in reality, there is a single point, which is that the judge misdirected himself in law in his assessment of 'undue harshness' under s117C(5) of the Nationality, Immigration and Asylum Act 2002. Upper Tribunal Judge Kekic considered the grounds to be arguable. She also noted that the judge appeared to contradict himself

by allowing the appeal on human rights grounds when at [47] he had observed that the appeal was 'bound to fail' on those grounds.

9. On 22 June 2020, Mr Kerr filed and served a response to the grounds of appeal under rule 24 of the Procedure Rules. He submitted that the judge had applied the law correctly and had reached a conclusion which was properly open to him on the evidence.

10. As a result of the pandemic, the question of whether the FtT had erred materially in law was decided on the papers by Upper Tribunal Judge Hanson. In a decision which was sent to the parties on 21 August 2020, Judge Hanson concluded that the FtT had erred in the manner contended by the respondent. He set aside the judge's decision and ordered that the decision on the appeal would be remade in the Upper Tribunal following a further hearing.

11. On 2 December 2020, the appeal returned before Judge Hanson for a resumed hearing. He was aware of the decision in R (JCWI) v President of UTIAC [2020] EWHC 3103 (Admin), which had been handed down by Fordham J a few days previously. He drew that judgment to the attention of the parties and invited their submissions.

12. For the appellant, Mr Kerr submitted that the Upper Tribunal's finding that there was an error of law in the FtT's decision should be set aside and there should be a hearing to decide that issue. Judge Hanson accepted that submission and reviewed his earlier decision under rule 45 of the Procedure Rules. He found that Fordham J's decision was binding and it could have had a material effect on his decision to proceed without a hearing. He therefore set aside his own decision and ordered that the appeal should be listed for a further hearing to decide whether the FtT's decision was legally erroneous.

13. It seems that the rather unusual history of the appeal and the continuing pandemic resulted in further delays to the appeal being listed before me and it was not until 11 January 2022 that the Upper Tribunal came to hear argument on the grounds of appeal which had been filed on 3 March 2020. That delay is regrettable.

14. At the start of the hearing before me, both advocates indicated that they were aware of the history which I have set out above. Neither had any observations to make about the setting aside of the Upper Tribunal's first decision and I was invited by both to hear submissions on the issue of whether or not the FtT had erred in law. Ms Isherwood did not have Mr Kerr's r24 response. He provided her with a hard copy and she was immediately ready to proceed.

## Submissions

15. Ms Isherwood submitted that the judge's decision was vitiated by legal error. The authorities had been comprehensively reviewed by Simler LJ in MI (Pakistan) v SHD [2021] EWCA Civ 1711 and it was clear that the 'unduly harsh' threshold was an elevated one. It was higher than mere reasonableness. The factors which had been set out by the judge at [42] and [43] did not come close to that threshold. The judge

had focused on the offending and the lack of a risk of reoffending rather than considering the individual circumstances of each child.

16. I noted that the judge had attached weight to a social services report. I asked Ms Isherwood to direct me to that report in the papers. She was unable to do so. Mr Kerr helpfully confirmed that he had been in correspondence with social services before the hearing in the FtT but that he had been unable to obtain a substantive response. There was certainly no report from social services, he said, although it was clear from the exchanges he had had with social services that they were aware of the family. Ms Isherwood noted that the judge had erred in attaching weight to a document which did not exist.

17. Mr Kerr submitted that the respondent's appeal should be dismissed The judge's assessment was sustainable. The text was 'economic, pithy and succinct' but did not lack adequate reasoning. It was clear that the judge had understood that the threshold was an elevated one. The reasoning was logical and the judge had taken particular account of the impact of the appellant's imprisonment on his teenage step-daughter. The judge had taken the information from the witness statements, not from the social services documents, and he had not erred in law in doing so.

18. I asked Mr Kerr whether it had been appropriate for the judge to consider, as part of his 'undue harshness' assessment, the appellant's remorse and low risk of reoffending. Mr Kerr submitted that it had been and he cited [94] and [132]-[135] of HA (Iraq) & RA (Iraq) v SSHD [2020] EWCA Civ 117; [2021] 1 WLR 1327 in that connection. Mr Kerr noted that the decision was not without its flaws, and observed that the reference to the appellant having 'acted in anger' in [43] of the judge's decision appeared to have no basis in fact. Nevertheless, focusing on the substance of the decision, it was his submission that the judge had appreciated the threshold presented by s117C(5) and had made findings of fact which properly entitled him to conclude that the threshold was met in this case.

19. In response, Ms Isherwood submitted that the judge had not appreciated the statutory threshold and had erred in law.

20. I reserved my decision at the end of the submissions.

## Statutory Framework

21. Part 13 of the Immigration Rules makes provision for deportation but it is to Part 5A of the 2002 Act that the Tribunal must turn on appeal. That is primary legislation which directly governs decision-making by courts and tribunals in cases where a decision made by the Secretary of State under the Immigration Acts is challenged on Article 8 ECHR grounds. The provisions of that Part of the 2002 Act, taken together, are intended to provide for a structured approach to the application of Article 8 which produces in all cases a final result which is compatible with Article 8: NE-A (Nigeria) v SSHD [2017] EWCA Civ 239; [2017] Imm AR 1077.

22. Section 117B contains public interest considerations applicable in all Article 8 ECHR cases. 117C of the 2002 Act provides the following additional considerations in cases involving foreign criminals:

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

## **Analysis**

23. It is apparent that there are errors in the judge's decision. As Judge Kekic observed in granting permission to appeal, his decision to allow the appeal contradicts his earlier observation, at [47], that the appeal was "bound to fail". I also note that the ultimate outcome of the appeal is not consistent with what the judge said in the final sentence of [45]: "I find that the public interest outweighs the appellant's daughter's interests on this occasion."

24. Equally, as Mr Kerr observed, the origin of the judge's suggestion, at [43], that the appellant had 'acted in anger' appears to have no basis in either the judge's sentencing remarks or any other document in

which the facts of the offence are described. HHJ Williams said that the injury to the appellant's colleague had come about as a result of 'horseplay'. For his part, the appellant had described it as a 'freak accident' in his witness statement.

25. Whilst they should not have been made, these errors are probably typographical and probably immaterial to the outcome of the appeal. They are indicative of a lack of care and not necessarily a substantive legal error. I am not able to come to the same conclusion about the error in [43] of the judge's decision. It is plain from that paragraph that he attached some weight to a social services report speaking to the relationship between the appellant and his step-daughter but the fact is that there was no such report before the judge, as Mr Kerr frankly acknowledged. Neither advocate was able to shed any light on how the judge came to err in that way.

26. These difficulties came to light in oral argument and did not feature squarely in the respondent's grounds of appeal. The error in relation to the social services report does not stand alone, however, and it is quite clear that the decision is also legally erroneous for a reason which *is* identified in the respondent's grounds.

27. The judge accepted at [41]-42] that the appellant had a genuine and subsisting relationship with his wife and children and that it would be unduly harsh for them to uproot themselves and live with the appellant in Albania. The judge had the best of reasons for the latter finding, in that the appellant's step-daughter still sees her biological father and that contact would come to an end in the event that she relocated to Albania. The judge also took account of the fact that she was at a critical juncture in her education as her GCSE year was approaching.

28. At [43], the judge turned to consider what has come to be known as the 'stay scenario', of the appellant's family remaining in the UK without him. It is clear from this paragraph that the judge weighed two matters into his assessment of whether the 'stay scenario' would be unduly harsh on the appellant's family. He took account, *firstly*, of the effect of the appellant's deportation on the appellant's step-daughter, noting as he did so that the effect of the appellant's imprisonment on her was 'highly significant'. The judge took account, *secondly*, of the appellant's antecedents and his (successful) efforts to rehabilitate himself. He then returned to that theme in [45] of his decision, which I should reproduce in full:

> [45] I accept that the appellant's daughter's best interests would be served by the appellant remaining in the UK living in their family unit. I note that there is a strong public interest in the appellant being deported. He has been sentenced to a period of imprisonment of between 12 months and 4 years. He has been convicted of a serious offence involving violence. <u>He has no previous convictions, however. He indicated that he has reflected on his actions and is remorseful and would not reoffence in the future. The index offence was carried out during horseplay with colleagues when he recklessly shot an air rifle at a colleague injuring him. These are circumstances which are highly</u>

> unlikely to be repeated. He has complied with the terms of his licence. He has sought to rehabilitate in prison. His rehabilitation will be interrupted if deported. He worked previously. He has undertaken courses in prison in order to improve his work position upon release. The appellant's wife works part-time in the UK. If the appellant were removed, there would be an increased demand on benefits and possibly the requirement for significant social services involvement noting [the appellant's step-daughter's] history. The appellant speaks English. His removal would have a significant negative impact on 2 British citizen children. I find that the appellant's deportation is in the public interest in order to maintain law and order. I find that the public interest outweighs the appellant's daughter's interests on this occasion.

29. I have underlined these seven sentences in [45] for ease of reference. During his submissions, I asked Mr Kerr whether he could take me to any authority in support of the judge's decision to include the underlined sentences of this paragraph as part of his analysis of undue harshness under s117C(5). Whilst I could readily understand how these considerations might be brought to bear in a wider proportionality analysis under s117C(6), my provisional view was that these were irrelevant considerations to the 'undue harshness' analysis. That provisional view was based on something said by Lord Carnwath at [23] of KO (Nigeria) v SSHD [2018] UKSC 53; [2019] Imm AR 400, as cited and emboldened in the first paragraph of the Secretary of State's grounds of appeal:

> What it [viz, s117C(5)] does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence.

30. Mr Kerr was initially minded to submit that the judge's analysis had been of whether the appellant could satisfy s117C(6) but he did not pursue that submission, which was clearly not available to him in light of the judge's ultimate conclusion that this was a case in which the statutory exception applied. Instead, he submitted that the judge had been correct to calibrate the weight of the public interest for himself, with reference to the seriousness of the appellant's offending and the likelihood of reoffending. He made that submission with reference to [94] and [132]-[135] of HA (Iraq).

31. As I think Mr Kerr was constrained to accept, however, those sections of Underhill LJ's judgment in HA (Iraq) are all directed to the wider proportionality assessment which must take place under s117C(6). So much is clear from [88] and [130] of that judgment, in which Underhill LJ states expressly that what follows is directed to the question of whether the two appellants (HA and RA) are able to rely on s117C(6). Nothing in those parts of his judgment is directed to the analysis of undue harshness under s117C(5) and there is nothing in the authorities which supports the suggestion that a judge considering that question

should attempt to calibrate the public interest in deportation by reference to matters such as the extent of the appellant's rehabilitation.

32. To import such considerations into the s117C(5) assessment is to fail to conduct that assessment in the manner required by [43] of HA (Iraq), which follows Underhill LJ's statement that it is necessary to identify exactly what Lord Carnwath was and was not saying in [23] of KO (Nigeria). At [43], he said:

> The starting point is that the question to which the reasoning is directed is whether the word "unduly" imports a requirement to consider "the severity of the parent's offence": that, as I have said, was the actual issue in the appeal. Lord Carnwath's conclusion is that it does not: see the sentence beginning "What it does not require …". The reason why there is no such requirement is that the exercise required by Exception 2 is "self-contained". I should note at this point that it follows that it is irrelevant whether the sentence was at the top or the bottom of the range between one year and four: as Lord Carnwath says, the only relevance of the length of the sentence is to establish whether the foreign criminal is a medium offender or not.

33. I am satisfied that the judge failed to treat s117C(5) as 'self-contained' in this way. His analysis in [43] and [45] is more in the nature of a balancing exercise, as contended in the respondent's grounds of appeal before me. At that stage of the enquiry, the judge was not required to conduct any such exercise. There was, as Underhill LJ explained at [29] of HA (Iraq) no 'need for a full proportionality assessment' within the analysis required by this self-contained subsection. What the judge should have done, instead, was to evaluate the likely effect of the appellant's deportation on each child and decide whether that effect is not merely harsh but unduly harsh, applying KO (Nigeria).

34. Mr Kerr might have endeavoured to submit that there were factual conclusions in [41]-[46] of this decision which justified a finding that the appellant's deportation would have brought about unduly harsh consequences on the appellant's wife and children. He might have submitted that the judge's erroneous attempt to balance those consequences against the recalibrated public interest in the appellant's deportation was immaterial, since the factual conclusions he had reached about the appellant's step-daughter in particular were such as to justify a finding of 'undue harshness' on their own.

35. Had that submission been pressed before me, I am satisfied that it would not have prevailed. It is unfortunately quite clear from the final two pages of the judge's decision that he was confused about the content of the assessment required by s117C(5). He plainly thought that there would be serious consequences for the appellant's family in the event of his deportation but he appears then to have balanced those consequences against what he considered to be the public interest in the appellant's deportation. It is impossible to state with any certainty what conclusion the judge would have reached had he

confined himself to considering simply whether the consequences of deportation were not merely harsh but unduly harsh, considering the elevated threshold in the authorities. I am satisfied, in other words, that the operative parts of the judge's analysis in [43] and [45] are so corrupted by his error of approach that it would be wrong to hold that the factual conclusions he reached nevertheless sufficed to answer the question posed by s117C(5) in the appellant's favour.

36. I come to the clear conclusion that the FtT erred materially in law and that its decision must be set aside in full. Given the passage of time and the extent of the fact-finding which is now required, I consider that the proper order is that the appeal should be remitted to the FtT for consideration afresh.

**Notice of Decision**

The respondent's appeal is allowed. The decision of the FtT is set aside in full and the appeal is remitted to that Tribunal for consideration afresh.

**Order Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant's family members (but not the appellant) are granted anonymity.**

**No-one shall publish or reveal any information likely to lead members of the public to identify the appellant's family members without their express consent. Failure to comply with this order could amount to a contempt of court. I make this order in order to protect the best interests of the appellant's children.**

M.J.Blundell

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**14 February 2022**