IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/24736/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 17 June 2022	**On the 15 August 2022**

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

FB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms H Foot, Counsel instructed by Oliver & Hasani Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is appealing against a decision of Judge of the First-tier Tribunal Henderson promulgated on 29 January 2019. The grant of permission was initially limited but on 7 November 2019 Upper Tribunal Judge Finch granted permission on all grounds.

2. The appellant is a citizen of Albania who has been in the UK since 1998. In June 2018 he was sentenced to 33 months and two weeks in prison. In November 2018 a deportation order was made against him.

3. The appellant resists deportation on the basis that deporting him to Albania will violate Article 8 ECHR. The respondent refused the appellant's human rights claim in a decision dated 27 November 2018.

Decision of the respondent

4. In the respondent's refusal decision three distinct issues relevant to the appellant's Article 8 claim were considered.

5. First, the respondent considered the appellant's family life with his daughter born on 25 February 2002 (at that time a child). I will refer to her as FB. The respondent did not accept that it would be unduly harsh for FB to live in Albania with the appellant or that it would be unduly harsh for her to be separated from him in the event that he went to Albania without her.

6. Second, the refusal decision considered the appellant's family life with his partner, whom I will refer to as XB. The refusal decision noted that XB has suffered from mental health problems but stated that she would be able to access treatment in Albania; or, alternatively, could continue accessing treatment in the UK without the appellant.

7. Third, the decision considered the private life that the appellant has established in the UK, since arriving in the country in 1998.

Decision of the First-tier Tribunal

8. The appellant's appeal came before Judge of the First-tier Tribunal Henderson. In a decision promulgated on 29 January 2019 the judge dismissed the appeal.

9. In paragraph 23 the judge noted that the appellant's representative (Ms G McCall) stated that the appellant was not relying on his family life with his wife or on his own private life in the UK.

10. This is repeated in paragraph 95 where the judge states:

> "I note that the appellant had chosen not to rely on his private life (399A) and his family life with his wife (399(b)) as part of his appeal on human rights grounds generally."

11. The only argument advanced by the appellant before the First-tier Tribunal to support his claim that deportation to Albania would breach Article 8 was

that the effect of his deportation would be unduly harsh on FB within the meaning of Exception 2 in Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The judge accepted that it would be unduly harsh for FB to relocate to Albania but rejected the argument that it would be unduly harsh for her to remain in the UK without the appellant. The key findings on this issue are in paragraph 91 where the judge stated:

> "I do not find that it would be unduly harsh for her to remain in the UK without him. As I have found above, she does have the support of some other members of her family, as well as that of her friends and teachers. The impact of her father's deportation on her would be difficult and distressing (given their close relationship) but I do not find that it would go beyond what would be felt by any child on the deportation of a parent."

12. The key findings of fact in relation to the relationship between the appellant and FB are set out in paragraphs 74 – 76 where the judge stated the following:

> "On the basis of the evidence presented to me (and the findings of fact set out above) the appellant has shown on a balance of probabilities that he has a close relationship with FB. I accept that due to his wife's illness since around 2004, he had to take extra responsibility for the day-to-day care of FB and consequently their relationship is a close one. I accept that the appellant has a genuine and subsisting relationship with FB. Whilst he made no formal concession, Mr Jones also accepted in his submissions that the appellant had presented sufficient evidence on this issue.
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> However, I do not find that the appellant has shown (on a balance of probabilities) that FB is totally reliant upon him for her wellbeing. The witnesses all stressed FB's closeness to her father, but made little mention of her closeness to her mother. Whilst her mother might not be able to contribute practically to her day-to-day welfare due to her medical issues, I have not seen any evidence to suggest the absence of an emotional bond between them. FB's own witness statement referred to being close to both her parents and she said that her mother often consoles her about her father's imprisonment. I also note that now she is nearly 17, FB is likely to be less reliant on either of her parents with regards to her practical day-to-day welfare. There is no medical evidence to suggest that FB is not in good health or has any mental health issues.
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> I accept that FB has been understandably upset by her separation from her father during his arrest and subsequent imprisonment and would find his removal from the UK upsetting. However, I have seen no evidence that this would be over and above what would be experienced by any child in a close family who was separated from a parent."

Grounds of appeal

13. The appellant has advanced three grounds of appeal. The first ground argues that judge failed, in respect of both the appellant and FB, to adequately (or at all) follow the relevant Practice Direction and Guidance in respect of Child, vulnerable adult and sensitive witnesses.

14. The second ground of appeal argues that the judge failed to take into account material evidence. Specifically, it is argued that the judge failed to take into account evidence about the severe mental health problems suffered by XB which has previously necessitated the involvement of Social Services and the placement of FB on the Child Protection Register.

15. The third ground argues that the judge erred in respect of the assessment of the best interests of FB and whether the effect on her would be "unduly harsh" under Section 117C(5) of the 2002 Act.

Analysis

16. For the reasons set out below, I accept that the judge erred in respect of the approach she took to evaluating whether the effect of the appellant's deportation would be "unduly harsh" on FB. I am not persuaded that there is merit to the other grounds of appeal.

Unduly harsh under Section 117C(5) of the 2002 Act

17. In paragraph 76 the judge stated:

> "I have seen no evidence that this [the effect on FB of the appellant's deportation] would be over and above what would be experienced by any child in a close family who was separated from a parent."

18. In paragraph 91 the judge stated:

> "I do not find that [the effect of deportation on FB] would go beyond what would be felt by any child on the deportation of a parent."

19. It is understandable that the judge has contrasted the effect on FB with the effect on "any child". This is because in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 it is stated in paragraph 23 that unduly harsh requires a degree of harshness which goes beyond what would necessarily be involved for any child faced with deportation of a parent.

20. However, there have been several Court of Appeal cases decided after the decision in this appeal (most notably *HA (Iraq) and RA (IRAQ) v Secretary of State for the Home Department* [2020] EWCA Civ 1176) where paragraph 23 of *KO (Nigeria)* has been explained. These cases clarify that the wording in paragraph 23 of *KO (Nigeria)* does not require a judge to posit an objectively measurable standard of harshness which is acceptable, and that it is potentially misleading to seek to identify an "ordinary" level of harshness as an acceptable level by reference to what may be a commonly encountered circumstances. See, for example, *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 at paragraph 12 and *KB (Jamaica) v SSHD* [2020] EWCA Civ 1385 at paragraph 15(4).

21. I pause to note that after the drafting of this decision (apart from this paragraph), but prior to its promulgation, the Supreme Court's decision in *HA (Iraq)* [2022] UKSC 22 was published. The Court of Appeal's

interpretation of paragraph 23 of *KO (Nigeria)* has been upheld and endorsed by the Supreme Court.

22. The language used in paragraphs 76 and 91 indicates that the judge approached the "unduly harsh" issue by effectively positing an objectively measurable baseline standard of harshness against which to assess the effect of deportation on FB. This is an erroneous approach as confirmed in *HA (Iraq)* and other cases.

Failure to adequately (or at all) consider the vulnerability of the appellant and FB as witnesses

23. Ms Foot argued that there was clear psychiatric evidence (in the form of Dr Gupta's report) incontrovertibly establishing that the appellant needed to be treated as a sensitive witness. She highlighted that Dr Gupta firmly recommended that in the criminal proceedings the appellant would need to be given regular breaks and that breaks should be agreed in advance. She noted that Dr Gupta indicated that a longer time than usual would be needed for his evidence.

24. Ms Foot acknowledged that Counsel for the appellant in the First-tier Tribunal had not raised any procedural fairness concerns at the hearing, but argued that the onus was on the judge to ensure that the appellant was treated in accordance with the relevant Guidance and Practice Direction, as well as the guidance given by the Court of Appeal in *AM (Afghanistan) v SSHD* [2017] EWCA Civ 1123.

25. Ms Ahmed's response was that it is plain from the decision that the judge complied with the relevant Guidance and Practice Direction.

26. I am not persuaded that there is any merit to Ms Foot's argument. The judge plainly was alert to the evidence of Dr Gupta about the appellant's vulnerability. The relevant paragraphs of the decision are 24 – 26 where the judge stated as follows:

> "At the commencement of the hearing I discussed with the appellant and Ms McCall what adjustments were needed to enable the appellant to give his evidence, bearing in mind the comments made in the psychiatric report of Dr A Gupta dated 5 May 2018 with regard to the appellant's ability to give evidence in his criminal trial.
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> It was agreed that the appellant would ask for breaks (for a minimum of fifteen minutes each) when he needed them; he said that he did not need breaks at prescribed times. In fact, I offered the appellant several opportunities to take a break during his evidence (which started at 11.30am and ended 12.30pm) which he declined.
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> I heard evidence from the appellant with the assistance of Drita Musliu, a court-appointed interpreter in Albanian. Unfortunately, Ms Musliu said that she had only been booked until 2.45pm, despite the appeal being listed for a full day's hearing and that she could not extend that time. Fortunately, we were able to take a very short lunch break (with the appellant's and both

representatives' agreement) to enable the hearing to be completed before Ms Musliu had to leave the Tribunal."

27. The relevant guidance is the Joint Presidential Guidance Note No 2 of 2010 on child, vulnerable adult and sensitive appellants ("the Guidance") and the First-tier and Upper Tribunal Practice Direction on child, vulnerable adult and sensitive witnesses dated 30 October 2008 ("the Practice Direction"). Ms Gupta's report highlighted the need for the appellant to be given adequate breaks during his evidence. It is plain from paragraph 25 that the judge took this into consideration. Not only is it clear that the judge discussed with the representatives the need for breaks but she states that she in fact offered the appellant "several opportunities to take a break during his evidence". This indicates that there was not a failure, in any way, to have regard to the need to offer, and to provide, breaks as needed to the appellant.

28. The judge in paragraph 26 describes how it became necessary to shorten the lunch break in order to accommodate the need for the interpreter to leave at 2.45pm. It is clear from paragraph 26 that the shortened lunch break was agreed by the appellant's representative, and there is nothing in Dr Gupta's evidence to suggest that a shortened lunch break would in any way prejudice the appellant or undermine his ability to give evidence.

29. I am not persuaded that there is any aspect of the Guidance or the Practice Direction that was not followed in respect of the appellant.

30. Ms Foot also argued that the judge erred by failing to have regard to the Guidance and the Practice Direction in respect of FB. She acknowledged that there was no medical evidence indicating FB's vulnerability, but argued that (a) she was a child and (b) her evidence indicated that she has suffered mentally as a result of her family's circumstances. She argued that it was incumbent upon the judge to treat FB as a vulnerable witness, notwithstanding that the appellant's representative had not stated, or indicated in any way, that this was appropriate or necessary.

31. Ms Ahmed's response was that the appellant's representative did not raise any concerns about FB's ability to give evidence. She also submitted that as the focus of the appellant's case was on the effect of his deportation on FB, the evidence of FB was obviously material and effective access to justice required her to be given an opportunity to give evidence.

32. I have no hesitation in rejecting Ms Foot's argument that there was procedural unfairness in respect of FB's evidence. At the time of the hearing FB was almost 17. There was no medical evidence to suggest she would have difficulty giving, or would need particular accommodations to give, oral evidence; and in any event this was not raised by the appellant's representative. FB's evidence was clearly material, given that the appellant's case, as advanced by his representative, rested on it being unduly harsh on her for the appellant to be deported. I can discern no

unfairness in the judge proceeding to hear FB's evidence or from the way her evidence was given.

33. The procedural fairness arguments raised in the grounds are not made out.

Failure to take into account material evidence

34. Ms Foot argued that the judge failed to have regard to XB's history of severe mental illness including the fact that she had been found unable to stand trial and that FB had been taken into care as a young child (in 2004).

35. Ms Ahmed argued that this is nothing more than a disagreement as the judge took into account all of the material family history. Ms Ahmed argued that the decision, read as a whole, shows that the judge undertook a balanced assessment, accepting parts, but not all, of the evidence.

36. I am not persuaded by this ground of appeal for two reasons. Firstly, the appellant's representative in the First-tier Tribunal confirmed that the appellant was not relying on his family life with XB. This is clear from paragraphs 23 and 95. If an appellant decides in the First-tier Tribunal to not rely on a particular relationship the judge cannot be criticised in an onward appeal for failing to consider that relationship.

37. Second, and in any event, the judge did in fact consider the circumstances of XB. This is apparent from paragraphs 64 – 68 of the decision, where the medical report by Dr Mehrotra assessing XB's psychiatric condition was considered in detail. For these reasons, I do not accept that the judge erred by failing to have regard to the circumstances of XB.

Disposal

38. I have found there to be a single error of law in the decision: a misapplication of Section 117C(5) of the 2002 Act in the light of Court of Appeal case law published after the decision. I do not accept that there are any other errors, or that this error undermines the findings of fact.

39. In these circumstances, I would ordinarily preserve the findings of fact and retain the matter in the Upper Tribunal for the matter to be remade. However, after hearing submissions from Ms Foot and Ms Ahmed on disposal, I am persuaded by Ms Foot that the appeal should be remitted to the First-tier Tribunal to be made afresh without any findings of fact preserved. This is because the judge (entirely properly in the light of the way Ms McCall advanced the case) failed to take into consideration the appellant's family life with XB and the private life that he has established in the UK since 1998. These are matters which Ms Foot intends to rely on when the decision is remade. Extensive findings of fact on issues that have not yet been judicially considered will therefore most likely need to be made. In these circumstances, and having regard to paragraph 7.2(b) of the Senior President of the Tribunal's Practice Statement for the Immigration and Asylum Chamber and the overriding objective in rule 2 of

the Tribunal Procedure (Upper Tribunal) Rules 2008, I consider remittal to the First-tier Tribunal to be appropriate.

40. I have considered whether the findings in relation to FB should be preserved. Given the significant extent of other issues that will most likely need to form a part of the decision, I have decided that no findings should be preserved.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

The appeal is remitted to the First-tier Tribunal to be made afresh, with no findings preserved, by a different judge.

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

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

D. Sheridan
Upper Tribunal Judge Sheridan

Dated: 28 July 2022