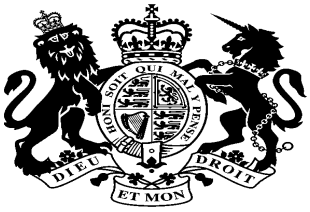

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: IA/08625/2021**
UI-2022-000176; (HU/53173/2021)

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre
On the 7th June 2022

Decision & Reasons Promulgated
On the 04 October 2022

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Blerim Ismalaj
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: Mr Greer, Counsel instructed by MyUKvisas
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Appellant is a national of Albania born on the 3rd August 1992. He appeals with permission against the decision of the First-tier Tribunal (Judge Shanahan) to dismiss his human rights appeal against the Respondent's decision to deport him.

2. The matter raised in this appeal is whether Judge Shanahan was entitled to place additional weight on the public interest in deporting

someone who had twice re-entered the UK in breach of a deportation order.

The Facts

3. The relevant facts are that the Appellant was made subject to a deportation order on the 11th December 2012 after he had been convicted of producing a controlled substance and sentenced to 16 months in a Young Offenders Institute. He was deported to Albania on the 13th January 2013.

4. The Appellant re-entered the UK in breach of that order in October 2016, remaining in the country long enough to embark on a relationship with a British national, P. He returned to Albania in July 2018 but in January 2019 once again entered in breach. His British son was born on the 8th August 2019. On the 12th November 2019 the Appellant made an application for leave to remain on human rights grounds, asking the Respondent to revoke the deportation order in light of the Appellant's Article 8 family life shared with his partner P, his son C1 and his stepchildren C2 and C3.

5. The Respondent accepted that the Appellant has a genuine and subsisting family life with his British family, but by her letter dated the refused to revoke the deportation order.

The Decision of the First-tier Tribunal

6. Before the First-tier Tribunal the Appellant sought to avoid deportation by proving that he comes within one of the exceptions to the automatic deportation procedure. In particular it was his submission that his deportation would have an 'unduly harsh' impact on C1-C3.

7. At its paragraph 23 the Tribunal gives itself what I regard as an unimpeachable legal direction:

> 23. Whether the decision to refuse the application would result in unduly harsh circumstances for the child or partner must be assessed on the facts and the impact on the individual. The threshold is higher than "undesirability" but not as high as "very compelling circumstances" and must be considered in the context of the strong public interest in the deportation of foreign criminals and whether the harshness which the deportation will cause for the children is of a sufficiently elevated degree to outweigh that public interest (HA (Iraq) [2020] EWCA Civ 1176).

8. At paragraph 26 it deals with C2 and C3. It is accepted that the Appellant has a genuine parental relationship with these children. It is accepted that it would be unduly harsh to expect them to relocate

with their stepfather to Albania: they have no connections to that country, are both British and still have contact with their biological father here. It is not however accepted that it would be unduly harsh for either child if the Appellant were to be removed to Albania without them.

9. At paragraph 27 of its decision the Tribunal then turns to the position of C1, the Appellant's biological son who at the date of the appeal was two years old. It finds that it would be unduly harsh to expect this child to go to Albania and therefore be separated from his siblings.

10. At paragraph 28 the Tribunal considers the 'stay' scenario, and whether it would be unduly harsh for C1 to remain in the UK with his mother and siblings, while his father returns to Albania:

> 28. I have then considered whether it would be unduly harsh for him to remain in the UK without his father. I accept he has a genuine and subsisting parental relationship with the Appellant. However, he lives with his mother and siblings. His grandmother is also available for support and he is receiving appropriate care and treatment through the NHS. When he starts school appropriate provision will be made for him. While I acknowledge that if his father is deported this may have an adverse impact on him but he will be remaining with his mother and other family members and will be able to have contact with his father through visits and social media. I accept that as a 2 year-old this will initially be limited but I do not find it would amount to unduly harsh consequences for him.

11. Between its paragraphs 30 and 32 the Tribunal reaches the same conclusion in respect of the Appellant's wife, and between 34 and 38 rejects any argument that the Appellant could rely on his private life to defeat deportation.

12. Having found none of the 'exceptions' to deportation engaged, at its paragraph 39 the Tribunal turns its mind to whether there are very compelling circumstances over and above those matters such that the appeal should nevertheless succeed on human rights grounds. It takes various matters into account before concluding that it should not. Its reasoning includes this passage:

> 43. I have considered the fact that he has breached this deportation order on at least two occasions, in 2016/2017 and 2019 and made an attempt to enter in 2018. Binaku (s11 TCEA; s117C NIAA; para 399D) [2021] UKUT 34 confirms that the Tribunal's approach to an individual who has re-entered the UK in the face of an extant deportation order must follow the same statutory regime of s117A-D as it would employ in relation to an individual who is yet to be removed, or, to an individual who has been removed and seeks revocation. However, I also consider that there is an additional and significant public interest in the maintenance of the rule of law arising from the need for the

> maintenance of public confidence in the immigration system, and thus in the deportation order.

The Challenge

13. The grounds of appeal contend that the decision of the First-tier Tribunal is fatally flawed by reasoning as reflected in its paragraph 43. Mr Greer submits that having referred itself to Binaku the Tribunal then effectively ignores that Presidential decision, concluding that the Appellant's poor immigration history is in fact something that should be weighed against him:

> 5. Firstly, the Tribunal considers that the Appellant's immigration history presents an additional and significant public interest in the Appellant's removal separate to those set out in Section 117B and 117C, namely, the maintenance of the rule of law arising from the need for the maintenance of public confidence in the immigration system. The Appellant's Immigration history is relevant to the assessment under Section 117B(1) and 117C(1). To attach additional weight the Appellant's immigration history as a separate consideration to the weight be attached to these matters under the statute is to double count the Appellant's Immigration history as militating against him.
>
> 16. Secondly, The Tribunal appears to place additional weight on the fact that the Appellant cannot meet the requirements of Paragraph 391 of the Immigration Rules and therefore is not entitled under the Immigration rules to have his deportation order lifted. This approach is contrary to the ruling in Binaku.

My Findings

14. This appeal is entirely misconceived.

15. The point made in Binaku is that where someone shows one or more of the 'exceptions' to be made out, there is no room within the framework set out in s117C Nationality, Immigration and Asylum Act 2002 to weigh against that conclusion a *further* public interest in deportation arising from a failure to observe the immigration rules. In that context paragraph 399D of the rules, which sets down that a test of 'exceptional circumstances' must be applied to those who breach deportation orders, is irrelevant. The only framework to be applied is that set out in Part 5A of the 2002 Act.

16. Thus in Binaku the First-tier Tribunal erred when it dismissed an appeal having regard to paragraph 399A, the breach and the "exceptional circumstances" test because it had already accepted that the 'unduly harsh' test had been met in respect of Mr Binaku's children.

17. Here the situation is quite different. The Tribunal quite properly sealed off the 'undue harshness' assessment from the public interest considerations. Having done so, at paragraph 26 in respect of C2 and C3 and at paragraph 27 and 28 for C1, it concluded that the test had not been made out in respect of any of the children concerned. Only then did the Tribunal go on to conduct the global assessment provided for in s117C(6), and enquire whether there were "very compelling circumstances" over and above the exceptions such that would justify allowing the appeal. There were not. It was not unduly harsh for any of the Appellant's children that he be deported, and there were obviously very weighty factors going the other way, which quite legitimately included the fact that the Appellant has shown a blatant disregard for immigration control. Nothing in Binaku precludes such egregious breaches from being considered in the s117C(6) exercise. To that extent the Tribunal's reference to the case in that part of its decision was perhaps unfortunate, but it was certainly not an error of law.

Decisions

18. The determination of the First-tier Tribunal contains no material error of law and it is upheld.

19. There is no order for anonymity.

Upper Tribunal Judge Bruce
29th September
2022