Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/08343/2020**
UI-2022-003128

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 10 November 2022

Decision & Reasons Promulgated
On the 24 January 2023

Before

THE HON. MRS JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

V N
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the appellant: Mr D Clarke, Senior Home Office Presenting Officer
For the respondent: Ms E Gunn, instructed by Prestige Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department, we shall refer to the parties as in the First-tier Tribunal. The appellant is a citizen of Albania born in 1987. His appeal against the refusal of his human rights claim dated 23 November 2020 and the deportation order dated 17 November 2020 was allowed by First-tier

Tribunal Judge J Austin ('the judge') on 15 June 2022 on human rights grounds.

2. Permission to appeal was sought on the grounds the judge failed to give adequate reasons for finding the appellant met the exceptions under section 117C(5) and wrongly attached weight to immaterial matters, namely the rehabilitation of the appellant in finding the appellant's deportation would be unduly harsh. The respondent submitted the best interests of the child were insufficient to establish that deportation was unduly harsh.

3. Permission was granted by First-tier Tribunal Judge Veloso on 2 July 2022 on the grounds it was arguable the judge erred in law in considering the appellant's remorse, rehabilitation and lack of evidence of any significant risk of re-offending under the unduly harsh test. In addition, the judge arguably failed to give adequate reasons for finding the appellant's deportation would be unduly harsh on the basis the appellant's partner and child would not follow him to Albania and their financial circumstances would prevent future visits. Permission was granted on all grounds.

Relevant facts

4. The appellant has been living in the UK since 2007 and has lived at the same address in London since 2013 with his partner ('MP'), an Ecuadorean national who has indefinite leave to remain in the UK. Their child ('ANA') was born in September 2011 and is a British citizen.

5. The appellant has one criminal conviction for conspiracy to produce cannabis for which he was sentenced to two years' imprisonment. He was separated from MP and ANA for 12 months and released in early 2021. MP was living on a low income as cleaner and single parent during the global pandemic. She has been referred for cognitive behavioural therapy ('CBT').

The judge's findings

6. The appellant could not satisfy exception 1 (section 117C(4) of the 2002 Act) because he had not been lawfully resident in the UK for most of his life. It was accepted the appellant had a genuine and subsisting relationship with MP and ANA. The issue before the judge was whether the effect of the appellant's deportation on MP and ANA would be unduly harsh under section 117C(5). There are two scenarios relevant to this test: 'family follow' (MP and ANA relocate to Albania with the appellant) and 'family split' (MP and ANA remain in the UK and the appellant is removed to Albania).

7. The judge made the following relevant findings:

> "42. I have considered the report of Dr Saima Latif on the daughter, and the potential effects upon her of a decision to expel her father and prevent his return. I also considered the Appellant's own circumstances and of his wife."

"44. I note from the evidence called on behalf of the Appellant, form (sic) the Appellant, form (sic) [MP] and from the report of Dr Latif that [MP] has some significant mental health issues. Since the Appellant's release from custody on licence in early 2021 the Appellant is said to have developed a strong bond with the child. Whilst he was serving his short sentence before release, he maintained very regular contact with the child but she remained ignorant of his whereabouts. The Appellant is said to have a significant role in the child's life, more significant than that of the mother because of her ill health."

"45 …. In giving evidence before me [MP] was somewhat distressed and spoke of the death of her sister with some anguish, and I formed the view that this had been a significant event in her life, as her sister had assisted her with support when the Appellant was incarcerated."

"46. There have been great difficulties for [MP] in managing her home and daughter during the Appellant's incarceration. Her daughter had become increasingly anxious, and that as a family of two alone at home during lockdown they had struggled to manage…. [MP] was living on a low income as a cleaner in London as a single parent for a period when the Appellant was absent. I consider that she would have been under some pressure and stress at the time."

"47. [MP] also has some restrictions on her physical mobility, and along with her emotional and mental health problems this led to her being referred for CBT or cognitive behavioural therapy."

"48. Dr Latif has noted that the absence of the Appellant from his daughter's life caused substantial upset and anxiety for her, such that her emotional well being suffered. Dr Latif concludes that there is a positive relationship and bond between the Appellant and his daughter, and since his release he has played a more significant rile (sic) in the child's life, upbringing and care in the situation where the mother's own physical and mental health has been poor. She considers that an abrupt break in that bond and relationship is likely to cause irreversible developmental consequences in the child, and she is of the view that in this particular case the removal of the Appellant from the UK will detrimental (sic) impact on the child's psychological health and well-being, affecting her education and other aspects of her life, and she expresses the view that removal of the Appellant from the UK, and from the child, would not at all be in the best interests of the child. Overall, I consider that the Appellant's expert witness paints a picture of his partner [MP] suffering from significant mental health issues as a result of the loss of her sister and the strain of looking after the child as a single parent in particularly difficult times, such that the child has been affected and the risk to the child's health and well-being of being permanently separated from the Appellant is a significant one and not at all in the interests of her or her mother."

"49. In considering the Appellant's criminal activity, and where I accept that he is remorseful for his offence and for its consequences, and that he has been persuasive in his account of having been

> rehabilitated and that there is no evidence of a significant risk of re-offending; where I accept the mother's evidence that if the Appellant were to be deported the mother and child would not follow him to Albania; and in particular where the evidence as it stands before the Tribunal is persuasive that it is not in the best interests of the child that the Appellant should be removed, I consider that there would be unduly harsh consequences for the Appellant's partner and particularly for his child if he were removed. The child would be in effect separated from her parent until adulthood, other than contact she could make remotely with him, and possible face to face visits would be unlikely give the family's precarious financial situation where the father does not work and the mother works part time as a cleaner; all of these amount overall to unduly harsh consequences for the child and taking Section 55 into consideration, I find that the interests of the child are to be given significant weight in this appeal and it should succeed.

Respondent's submissions

8. Mr Clarke relied on the grounds and submitted the judge erred in law in finding it would be unduly harsh for MP and ANA to relocate to Albania. Dr Latif did not consider the 'family follow' scenario and it was not a matter of choice. The judge accepted the evidence of MP that she would not relocate to Albania, but gave no other reasons save the best interests of the child which was a primary not paramount consideration. The judge erred in law because his finding was predicated on choice, did not meet the threshold test in KO Nigeria v SSHD [2018] UKSC 53 and was inadequately reasoned.

9. Mr Clarke submitted the judge failed to give adequate reasons for finding that face to face visits would be unlikely given the family's precarious financial position. The judge had failed to take into account that the appellant could work in Albania. In addition, the judge had considered the appellant's rehabilitation which was irrelevant to the unduly harsh test. In response to a question from the panel, Mr Clarke submitted [49] was a consideration of the unduly harsh test and it was not apparent that the judge's reference to the appellant's rehabilitation was in relation to the public interest.

10. Mr Clarke submitted there was no diagnosis or current treatment for MP's physical or mental health. MP was still able to work as a cleaner and the judge's finding that there were 'significant mental health issues' was perverse. In response to a question from the panel, Mr Clarke confirmed he did not challenge Dr Latif's expertise. He submitted Dr Latif did not assess MP's mental health and her opinion was based on what she was told by the appellant and MP. It was not open to the judge to conclude MP had 'significant mental health issues' when there was no medical evidence in respect of her physical or mental health.

11. In summary, it is the respondent's case that the appellant's deportation would not be unduly harsh in either the 'family follow' scenario or 'family

split' scenario. The ultimate assessment of Dr Latif that deportation is not in the child's best interests could not, without more, establish that deportation would be unduly harsh. The judge's findings were highly speculative and based on bare assertions.

Appellant's submissions

12. Ms Gunn relied on the rule 24 response and submitted the lack of reasoning was not material. MP could not relocate to Albania because she had lived in the UK for many years. She was working, paying taxes and owned her home. ANA only speaks English and had no relationship with the appellant's family in Albania. There were significant barriers to relocation and it was not a matter of choice. The judge accepted this evidence and therefore any lack of reasoning was not material. Ms Gunn relied on the 'note of evidence' by the appellant's representative before the First-tier Tribunal to show the oral evidence before the judge supported his finding that it would be unduly harsh for MP and ANA to relocate to Albania.

13. Ms Gunn submitted the judge was entitled to attach significant weight to the best interests of the child. Her finding that face to face visits were unlikely was supported by evidence that the appellant would struggle financially in Albania (see the 'note of evidence'). The judge gave adequate reasons for finding MP had 'significant mental health issues' based on Dr Latif's report, the evidence of the death of MP's sister and the strain of looking after ANA alone during the global pandemic.

14. Ms Gunn submitted that Dr Latif was instructed to provide expert opinion on the effect of the appellant's deportation on ANA. Dr Latif referenced the mental health difficulties of MP having interviewed her and Dr Latif took into account the letter stating she had been referred for CBT. Dr Latif was of the opinion that there would be irreversible development consequences if the appellant was deported given the close bond between him and ANA. Read as a whole the judge had considered the expert report in addition to the evidence of the appellant and MP.

15. Ms Gunn submitted the reference to the appellant's rehabilitation had to be viewed in the context of the strong bond formed between the appellant and his daughter since the appellant was released from custody. The appellant's rehabilitation allowed that relationship to be maintained and strengthened. In the circumstances, it was not an error of law to have regard to rehabilitation when considering whether the appellant's deportation would be unduly harsh. This can be distinguished from considering risk of re-offending. Ms Gunn submitted that the reference to rehabilitation in [49] did not displace the judge's other findings and was immaterial to the decision to allow the appeal.

16. In response Mr Clarke submitted that the respondent was entitled to know why the unduly harsh test was met. There was no reference to the oral

evidence in the judge's findings and the judge had wrongly considered matters relevant to the public interest which was wrong in law.

Conclusions and reasons

17. We have considered the case law referred to in the grounds, rule 24 response, skeleton argument and in submissions. We have also considered post-hearing submissions from the both parties in relation to the 'note of evidence' from the appellant's representative before the First-tier Tribunal.

18. The judge accepted the evidence of the appellant and MP and the respondent has not challenged their credibility or the account they gave to Dr Latif set out in her expert report. The respondent does not challenge Dr Latif's expertise. There is no dispute on the facts in this case.

19. It is apparent from reading the decision as a whole that the judge made the following findings of fact: The appellant has a long term genuine subsisting relationship with MP and a very strong bond with ANA, his 10 year old British citizen child. They have lived in the UK for a long time and are settled here.

20. MP works as a cleaner on a low income. She struggled to manage as a single parent during the global pandemic and was under pressure and stress at that time. The death of MP's sister was a significant event in her life which caused her anguish and distress. MP's mental health has suffered as a result and she has been referred for CBT.

21. ANA is a British citizen and has lived in the UK all her life. She speaks English and is in full time education. She has not been to Albania and does not speak the language. ANA became increasingly anxious and struggled to manage during the global pandemic and the appellant's absence had caused her substantial upset and anxiety.

22. The appellant has a significant role in ANA's life and a break in that relationship would cause serious irreversible developmental consequences for ANA. The appellant's removal would have a detrimental impact on ANA's psychological health and well-being, affecting her education and other aspects of her life. Removal of the appellant from the UK would not be in ANA's best interests.

23. Having considered the evidence of the appellant, MP and Dr Latif, the judge found that MP was suffering from 'significant mental health issues'. We of the view this finding was open to the judge on the evidence before her notwithstanding the absence of a medical report specifically in respect of MP. This point was not taken by the respondent before the First-tier Tribunal and the evidence from the appellant and MP was accepted in its entirety.

24. It is not necessary to admit the 'note of evidence' from the appellant's representative because there are sufficient factual findings to sustain the judge's conclusion that deportation of the appellant would be unduly harsh

in both ‘family follow’ and ‘family split’ scenarios. Any lack of reasoning was not material.

25. We accept the judge may have expressed himself better, but we are not persuaded by Mr Clarke’s submission that the judge’s conclusion in relation to the ‘family follow’ scenario was predicated on MP’s choice. The judge was entitled to attach significant weight to the best interests of the child and it was not necessary to repeat the factual findings at [42] to [48] which were more than sufficient to reach the unduly harsh test.

26. This is not a case where the evidence was finely balanced and we find the reference to rehabilitation was immaterial to the judge’s overall finding. The judge’s finding that family visits would be unlikely was open to the judge on the evidence before him, but in any event was not a factor which attracted significant weight. The opinion of Dr Latif in respect of ANA was not challenged and was sufficient in itself to demonstrate that the ‘family split’ scenario would be unduly harsh. The judge’s reasoning adequately explains why the threshold test was met.

27. In summary, there was no dispute of fact and no misdirection in law. The judge’s findings were open to him on the evidence before him and any lack of reasoning was not material.

28. Accordingly, we find there was no material error of law in the decision dated 15 June 2022 and we dismiss the respondent’s appeal.

Notice of Decision

Appeal dismissed

Direction 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 and his family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or any member of his family. Failure to comply with this order could amount to a contempt of court.

J Frances

Signed Date: 16 November 2022
Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.