IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001005

First-tier Tribunal Nos: HU/56855/2023
LH/02452/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6th of June 2024

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AL
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr G Lee, Counsel instructed by David Benson Solicitors Ltd

Heard at Field House on 21 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Appellant and members of 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 family members. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was known before the First-tier Tribunal. He is a citizen of Sri Lanka born in 1974.

2. The FTT made an order to anonymise the Appellant. There is no reason to interfere with this. Taking into account Guidance Note 2022 No.2 Anonymity Orders and Hearings in Private. I have weighed up the competing interests of the Appellant and his family's rights under ECHR against the need for open justice.

3. The Appellant was granted permission to appeal by the Upper Tribunal (Deputy Upper Tribunal Judge Lewis) on 11 April 2024 against the decision of the FTT (Judge Behan) to allow his appeal under Article 8 ECHR.

4. The Appellant is a foreign criminal. He was convicted of what the judge described as "dangerous violence" in Germany in 1997. While in the UK in 2004 he was convicted of unauthorised possession of a firearm and ammunition for which he was sentenced to four years in prison. In 2017 he was convicted of blackmail and sentenced to three years in prison.

5. The judge noted that the Appellant has a long and complicated immigration history. The judge heard evidence from the Appellant and his wife. She dismissed the Appellant's appeal on asylum grounds, humanitarian protection grounds and under Article 3 ECHR. The judge allowed the appeal under Article 8 ECHR.

6. The grant of permission was on limited was on ground 3 only despite a number of challenges by the Respondent. The salient part of the grounds is paragraph 14 which reads as follows:-

> "14. However, pursuant to Ground 3, and in particular paragraph 3(b) and the case of **Reid v SSHD [2021] EWCA Civ 1158** (at paragraph 59), and paragraph 3(d) (*'it is hard to ascertain what exactly in the appellant's case [satisfied] I threshold that applies very compelling circumstances [test]'*), it is arguable that the First-tier Tribunal Judge has erred in law and/or failed to give adequate reasons in the analysis at paragraphs 79-86 in respect of section 117C(6)".

7. The judge was satisfied that the Appellant enjoys family life with his wife, three stepchildren and two biological children. She was satisfied that the Appellant's wife and children would not go to Sri Lanka and that the decision to deport him is a significant interference in their family life. The judge was not satisfied that the Appellant had entered the UK when he was aged 13. She was satisfied that he had lived in the UK for "decades". The judge directed herself at [66] that the children's best interests are a primary consideration although they may be outweighed by other matters. She found that it was in the children's best interests for them to remain in the UK with their mother and the Appellant.

8. The judge considered s.117C(4) stating that it was not suggested that the Appellant had lawfully resided in the UK for most of his life, having been granted ILR in 1998 on the basis of his refugee status that ceased on 17 January 2011. Having been satisfied that the Appellant had lived in the UK for decades, the judge found that he is socially and culturally integrated in the UK and that he speaks English well. The judge was not satisfied that there would be very significant obstacles to the Appellant's integration into Sri Lanka, although he has lived outside Sri Lanka for a very long time he has been associating with other Tamils from Sri Lanka having left there when he was in his 20s. The judge was satisfied that the Appellant has a genuine and subsisting relationship with

his wife when considering s.117(5) and said that it was "somewhat artificial to separate from her children but for clarity's sake I have considered her position in isolation from that of the children". The judge was not satisfied it would be unduly harsh for her to return to Sri Lanka with her husband, finding that she has not lived there for a long time but she is of Sri Lankan origin and familiar with the culture there.

9. The judge found that it would not be unduly harsh for the Appellant's wife to remain in the UK without him. The judge was satisfied that the Appellant has a genuine and subsisting parental relationship with his stepchildren and biological children. He found that it would be unduly harsh for the children to go to Sri Lanka. He took into account that they are all British citizens and would lose the benefit of growing up in the UK. He noted that the three oldest children are settled in primary school and that they would be leaving a settled home to go to an uncertain future with parents that did not want to leave and that they would have to negotiate finding accommodation and an income. The judge found that it would be unduly harsh for the children to remain in the UK without the Appellant. The judge found that they had a close relationship with the him and the step children regard him as their father. The judge took into account that the oldest children's father has no involvement in their lives and they do not have contact with their mother's parents or siblings. The judge took into consideration that the Appellant's step children had already gone through the upheaval of moving from the home of their mother and biological father to their maternal grandparents' home and then back into the full care of their mother.

10. The judge took into account that one of the Appellant's stepsons had been diagnosed as being on the autistic spectrum and although he found that it was "unfortunate" that he had not been provided with a report from a suitably qualified expert about how this affects him, the judge accepted that he has some social and learning difficulties in some areas and that he needs more support than other children of his age with washing, dressing and eating. The judge took into account that it is known in general that for autistic children changes cause more than usual levels of anxiety and the judge accepted the evidence that the Appellant is very attached to the child who already displays separation anxiety. The judge found that the Appellant does a lot of practical caring for the children and is an emotional support to his wife and that without this help the she would be under considerable strain and that this was likely to adversely affect her ability to parent effectively. The judge found that the children are at present living in a stable, loving home with parents who are happily married and that with regard to the report of the independent social worker the judge considered that deportation of the Appellant "is likely to be a huge loss and have significantly detrimental effects on their well-being in the short and long term". The judge then went on to consider s.117C(6) and said:-

> "79. S. 117C(6) Are there very compelling circumstances over and above my conclusion that that the effect of deportation on the children would be unduly harsh? I remind myself that the maintenance of immigration control is in the public interest, the deportation of foreign criminals is in the public interest and the more serious the offence committed the greater is the public interest in deportation of the criminal.
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> 80. In my judgement the case for finding the effect on the children would be unduly harsh is a strong one.

81. The appellant has, in my judgement, shown positive rehabilitation in that he has shown a commitment to his new family. He supported his wife in obtaining custody and took parenting courses with her, he is a 'hands on' and interested father. The appellant's wife she says he encourages her, and I gained the impression her home life contrasts very favourably with her life with her first husband. I give little weight to the fact that the appellant has not committed an offence since 2017, not least because he has been in prison and on licence but despite the appellant's tendency to make things up, I do accept that in forming a partnership and having children he has found a sense of purpose and happiness he previously lacked. His family is a stabilising influence which I consider is likely to significantly reduce the risk of reoffending.

82. I consider delay is a factor that reduces the public interest in deportation in this case. As has been previously noted, the Respondent caused delay by making, withdrawing, and re-making decisions over the years. The history of the attempts to deport the appellant goes back to 2005. Delay too has been caused by the appellant's challenges and a further period in prison for the offence of blackmail.

83. Of significance in my view is that the Respondent did not enforce the deportation order now under consideration when the appellant was released from prison. The appellant was held in immigration detention following his release from prison and released from immigration detention in May 2019. It was two years and nine months later that the appellant made his application to revoke the deportation order. Mr McCrae told me he had checked and found no record of an attempt to enforce the deportation order or any explanation. The significance of this more recent delay is that during this hiatus the appellant established his family life including the very important roles he plays in the lives of five children.

84. Set against all the above is the fact that the appellant has been convicted of three (including the offence in Germany) very serious offences. He asserted that he had never been a danger to this country which is concerning because these remarks show of a lack of insight into the harm firearms and blackmail cause, but I also take into account they were made in the during a rather hyperbolic, free flowing plea (as opposed to an answer to a specific question) evidently without much thought.

85. I take into account to that the appellant did not rebut in 2015, the presumption that he is a danger to the community and some of the reason for that was his history of criminal acts for which he was not charged which occurred between 2008 and 2013. I take into account that deterrence and public concern are reasons why deportation carries weight as well as rehabilitation.

86. Deportation is required unless the strong public interest in deportation is outweighed by very compelling circumstances over and above the exceptions in s.117C(4) and(5). In my judgment, while I do not minimise the nature of the offences committed by the appellant, such circumstances exist in this case".

Conclusions

11. There is no error of law in the decision identified in the grounds of appeal.

12. I heard submissions from both parties which I will engage with, along with the grounds of appeal, in my conclusions.

13. I have considered this ground 3, in so far as it does not challenge the unduly harsh decision on which permission was refused.

14. It is said in the grounds that the judge did not properly reason the decision under s.117C(6) of NIAA 2002. The judge failed to adequately consider the public interest argument and erroneously attached weight to delay which failed to take into account the chronology of the Appellant's immigration history and the pandemic during the intervening years between his release from immigration detention and the decision to deport him. It is said that this might explain the delay and the judge should have taken judicial notice of this. In any event the FTT failed to apply *Reid v SSHD [2021] EWCA Civ 1158* where it was decided that delay is of little or no significance in assessing whether the unduly harsh test is met or as in this case the very compelling circumstances test.

15. Mr Lee submitted that the case of *Reid* is not on point. I agree. The issue in that case related to the application of the unduly harsh test and the parties in that case agreed that delay was not relevant to that assessment [see 49 and 59]. Mr Lee relied on the *MN-T (Colombia) [2016] EWCA 893* to support that the judge was entitled to attach weight to the delay. The following paragraphs summarise the view of the court insofar as delay is concerned:

> "38. The fourth ground of appeal takes us into new territory. It is necessary for the purpose of this ground to consider the decision of the House of Lords in *EB Kosovo v SSHD* [2008] UKHL 41; [2009] 1 AC 1159. The appellant in that case came to the United Kingdom from Kosovo, being a Kosovo-Albanian. She applied for asylum in September 1999. There was delay on the part of the Secretary of State who refused the application in April 2004. Therefore the total period was four-and-a-half years, not all of which would have been delay but some significant part would have been delay. So that was a case of lesser delay than the present case. The appellant challenged the refusal of asylum and humanitarian relief before the adjudicator, the Asylum and Immigration Tribunal and the Court of Appeal, at each stage without success. However, the appellant succeeded before the House of Lords. The only passage relevant for present purposes is the discussion of the effects of delay. At paragraphs 14 to 16 of his judgment, Lord Bingham identified three ways in which delay might be relevant. Only two are relevant for present purposes, therefore I shall read out the material parts of that passage:
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> > '14. It does not, however, follow that delay in the decision-making process is necessarily irrelevant to the decision. It may, depending on the facts, be relevant in any one of three ways. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily

be strengthened. It is unnecessary to elaborate this point since the respondent accepts it.

15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. ... But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be expected that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal".

16. In the present case, the Upper Tribunal found that delay was relevant in both of the first two ways identified by Lord Bingham - see the error of law decision at paragraphs 17 to 18 and the main decision at paragraph 19. Mr Sharland submits that the Upper Tribunal erred in taking account of the delay twice over. It should have limited this factor to the effect of strengthening family and private life ties.

17. In my view there was no error here. The Upper Tribunal found that delay operated in two of the three respects which Lord Bingham had identified in *EB (Kosovo)*. In both respects that delay was a factor in favour of the claimant. I reject therefore ground (iv) of the grounds of appeal.

18. I should perhaps add this in relation to delay. As a matter of policy now enshrined in statute, the deportation of foreign criminals is in the public interest. The reasons why this is so are obvious. They include three important reasons:

    a. Once deported the criminal will cease offending in the United Kingdom.

    b. The existence of the policy to deport foreign criminals deters other foreigners in the United Kingdom from offending.

    c. The deportation of such persons expresses society's revulsion at their conduct.

19. If the Secretary of State delays deportation for many years, that lessens the weight of these considerations. As to (1), if during a lengthy period the criminal becomes rehabilitated and shows himself to have become a law-abiding citizen, he poses less of a risk or threat to the public. As to (2), the deterrent effect of the policy is weakened if the Secretary of State does not act promptly. Indeed lengthy delays, as here, may, in conjunction with other factors, prevent deportation at all. As to (3), it hardly expresses society's revulsion at the criminality of the offender's conduct if the

Secretary of State delays for many years before proceeding to deport.

16. It follows from *MN-T* that the judge was entitled to attach weight to delay and to conclude that it is a factor that reduces the public interest in deportation (see [82] and [83]). The grounds do not challenge that there was delay in this case. They say at 3(b) of the grounds that the judge has failed to take into account the chronology of the Appellant's immigration history and events happening in the intervening years. They do not explain how the judge has erred in respect of the chronology and Mr Tufan did not explain this to me. Nothing has been drawn to my attention that would undermine the chronology set out at [82] and [83]. The judge noted that there was a history of attempts to deport the Applicant going back to 2005 whilst fairly taking note that delay has been caused additionally by the Appellant's challenges and a further period in prison for blackmail. It is reasonable to infer that the judge did not attach weight to the delay identified at [82] (which the Appellant contributed to). The delay that the judge took into account was that between the date of the deportation order and the failure to enforce this when the Appellant was released from prison in 2019, the Appellant made an application to revoke the order on February 2022. The judge said that there was a delay of two years and nine months, which is correct.

17. The event happening in the intervening years referred to in the grounds is lockdown arising from the global pandemic. It is said that the judge did not take judicial notice of the impact of the pandemic, bearing in mind that the Appellant was released in 2019. The deportation order made against the Appellant is dated 14 December 2018. He was released from prison on a day in May 2019. The HOPO did not only fail to raise lockdown as a reason for delay but positively stated that there was no record of an attempt to enforce the deportation or any explanation for this. The judge was entitled to accept what he was told by the Presenting Officer. If lockdown was responsible for the delay in deporting this Appellant, it is reasonable to assume that there would be a record of this and the Presenting Officer would have raised it at the hearing. The judge understood the chronology and factored it into his assessment of delay.

18. I take into account that the judge does not say what weight he attached to the delay and I take account that the delay was minor; however if this is an error, it is not material. Having read the decision as a whole, I conclude that the issue of delay was not material to the outcome. It was the strength of the Appellant's family life that was determinative of the decision.

19. The Judge's finding that that the impact of deportation on the children was unduly harsh was rational (permission was refused on the ground challenging this). The judge at [80] in respect of this finding described the case as "strong". There is no challenge to this and the reasons for this conclusion are to be found in the assessment of unduly harsh at [73]–[78]. The reasons for the decision (unduly harsh) can be summarised as follows:

a. The children have a close relationship with the Appellant and the stepchildren regard him as their father.

b. The oldest child's biological father has no involvement in their lives.

c. The family no longer has contact with their mother's parents or siblings.

d. The children have already been through upheaval. (Their mother's evidence was that when she left her first husband she had a breakdown and left the children with her parents; however, they refused to return the children to her because they wanted her to return to her husband. Social Services became involved and she issued court proceedings. She was successful and the children were returned to her).

e. One of the Appellant's stepsons has been diagnosed with autism. While the judge said it was unfortunate that there was no report from an expert, he accepted that he had social and learning difficulties and needs supports. The evidence concerning the child is at [37]–[44].

f. The Appellant has shown positive rehabilitation [81].

g. The delay [82] and [83].

20. Against these findings which are in the Appellant's favour, the judge properly weighed into the assessment the public interest at [86] and that in 2015 the Appellant failed to rebut the presumption that he is a danger to the community. She properly directed herself at [79].

21. The grounds say that it is difficult to ascertain what exactly in the Appellant's case satisfies the high threshold with reference to *NA (Pakistan) SSHD & Ors [2016] EWCA Civ 662*. This is a bare assertion and Mr Tufan did not expand on the point. The relevant parts of *NA* which concern a serious offender are as follows:

> "30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute 'very compelling circumstances, over and above those described in Exceptions 1 and 2', whether taken by themselves or in conjunction with other factors relevant to application of Article 8.
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> 31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone

aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2'.

33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.

34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:

> 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation'.

37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)".

22. Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60; [2016] 1 WLR 4799* stated at paragraph 38:

> "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State".

23. I accept that the judge does not refer to the case law. However, this does not amount to an error of law. He gave a number of sound reasons for the finding under s.117C(6) and he factored into the assessment the public interest. I do not find that there is any misapplication of *NA*. Looking at the reasons given by the

judge cumulatively it is unarguable that the decision was not reasoned. The reasons given by the judge can rationally be categorised as not commonplace and sufficiently compelling to satisfy the test.

24. I take account of that the Supreme Court said in *HA (Iraq) v SSHD [2020] UKSC 22* at [58] (albeit in the context of rehabilitation):

> "Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case".

25. The grounds say that the assessment of private life was flawed because the judge did not apply *Binbuga (Turkey) v SSHD [2019]EWCA Civ 551.* The issue is not raised in the grant of permission and Mr Tufan did not expand on this in oral submissions. It is essentially a reasons challenge. However, the judge was entitled to take into account that the Appellant had lived in the UK for decades and that he speaks English well and conclude that despite his criminal conduct he satisfied this aspect of the IR. There is no error arising from this finding.

26. I*n Yalcin v SSHD [2024] EWCA Civ 74* at [50] the Court of Appeal summarised the approach that should be taken in considering whether the FTT made an error of law.

27. At paragraph 72 of his judgment in *HA (Iraq)* (but with reference to the appeal in *AA (Nigeria)*) Lord Hamblen said:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
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> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
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> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
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> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope".

28. I take account of what Popplewell LJ said, at paragraph 34: *AA (Nigeria)* in this Court:

> "Experienced judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing

to refer to them specifically, unless it is clear from their language that they have failed to do so".

29. While the conclusion of the judge was not inevitable; the conclusion reached was open to her on the evidence.

30. I find that there is no error of law and the decision of the FtT is maintained.

Notice of Decision

31. There is no error of law and the decision of the FtT is maintained.

Joanna McWilliam
Judge of the Upper Tribunal
Immigration and Asylum Chamber

29 May 2024