IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2024-001192
First -tier number: HU/53669/2023

THE IMMIGRATION ACTS

Decision and Reasons Issued:

On 9th of July 2024

Before

UPPER TRIBUNAL JUDGE KOPIECZEK
DEPUTY UPPER TRIBUNAL JUDGE HARIA

Between

F D
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Gajjar, Counsel instructed by SMA Solicitors
For the Respondent: Mr E. Banham, Senior Home Office Presenting Officer

Heard at Field House on 13 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity, because this appeal involves minors and a person with refugee status.

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. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

© CROWN COPYRIGHT 2024

1. The appellant is a citizen of Albania born in 1988. According to the respondent’s decision letter he was encountered by police on 31 August 2018 and found to be in possession of a false Italian driving licence in the identity of Aldo Belloni. He is said to have claimed that he had entered the UK two years earlier and that he was separated from his wife.

2. Materially for the purposes of the proceedings before us, the next significant event is that on 19 July 2021 in the Crown Court at Lewes he was convicted of conspiracy to supply Class A drugs (cocaine) and acquiring, using or possessing criminal property. He was sentenced on 14 April 2022 to 3 years and 10 months imprisonment in total.

3. On 21 February 2023 a deportation order was made and on 27 February 2023 a decision was made to refuse the appellant’s human rights claim, made in response to the deportation decision(“the decision letter”).

4. The appellant appealed to the First-tier Tribunal (“the FtT”) and his appeal was heard by First-tier Tribunal Judge Lucas who dismissed the appeal in a decision dated 12 January 2024. Permission to appeal having been granted by First-tier Tribunal Judge Aldridge, the appeal came before us.

5. The further background to the appeal is best illustrated with reference to the decision of Judge Lucas, which we summarise.

Judge Lucas’ decision

6. Judge Lucas referred to the appellant’s convictions, the sentencing remarks and the decision letter. He summarised the appellant’s claim.

7. As regards the appellant’s oral evidence, the summary in the judge’s decision includes the appellant saying that he “got found guilty” and that he denied in evidence that he had ever been involved in conspiracy. He also said that his relationship with his wife was “on and off” but they were now fully committed and had cohabited both before and after his prison sentence. He said that his mother still lived in Albania. There was also a summary of the appellant’s wife’s oral evidence.

8. After summarising the parties’ submissions, the judge made the following findings. The appellant entered the UK illegally and worked illegally. He was found in possession of a false driving licence and admitted at trial that he had used false ID to obtain employment. He found that the appellant has family in Albania and has no basis of stay in the UK.

9. Judge Lucas accepted what was said by the sentencing judge in terms of the appellant’s limited role in the conspiracy and that he was a courier. His involvement was of short duration but his offending was financially motivated.

10. At para 56 he said that the appellant can have no complaint about the decision to deport him and that “there is a clear and obvious public

interest in deporting foreign nationals, especially those without a basis to be here, after conviction for serious offences". He referred to the serious consequences for the wider public in the supply of Class A drugs.

11. At para 58 Judge Lucas said that he noted with some surprise that the appellant appeared to minimise his role in his conviction and to continue to deny his guilt. He could not, therefore, rely on any genuine remorse for his serious offending.

12. At para 59 he noted that he committed the offences despite having three children and a wife in the UK "with whom he claims to be in a genuine and subsisting relationship". At para 60 he said that:

> "The decision to deport him is clearly and obviously in the public interest and I have no hesitation in upholding it in fact and in law."

before going on at para 61 to state:

> "I now consider whether the Appellants claim activates any statutory exceptions to the correct decision to deport him, namely his private and family life with his wife and children in the UK. There are no other realistic grounds given his dubious immigration history and lack of status.".

13. At para 63 the judge accepted that the appellant is married and that they have three children, citing the evidence of the birth certificates and that his wife is referred to throughout the appeal process. He said that although he accepted that the appellant may well have found it difficult to obtain documents to prove his residence with his family because of his immigration status, there was little other evidence of cohabitation apart from his and his wife's oral testimony. He went on to state that the mere fact of a precarious immigration status does not prevent obtaining other and reliable evidence of residence, adding that "After all, the Appellant has proved himself to be resourceful in obtaining false documents to obtain employment".

14. He also noted that in a previous human rights claim in 2018 the appellant said that he had separated from his wife. He went on at para 66 to conclude that there was little reliable evidence to show that he continues to live with his family or that he is in a genuine and subsisting relationship with them. He concluded that the claimed family life was, at best, "flimsy and sporadic" and that the family life that he now relies on did not prevent his offending and occurred when he had no legal basis to be in the UK.

15. At para 67 Judge Lucas concluded that the letters from schools do not prove that he lives with his family and nor do the photographs.

16. In the next paragraph he concluded that his present economic situation appears to be the same as it was before his offending and his questioning of his guilt and minimisation of his involvement in the offending "is not propitious in relation to his future offending".

17. At para 69 he said that …

> "The three children are still young and could easily adapt to life in Albania with their two parents both of whom are Albanian citizens and both of whom have other family there. I also note that despite her status, [his wife] returned to Albania with the children to visit her mother."

18. At para 70 he said that he accepted that neither the UK citizen child nor his wife could be required to leave the UK "but that is a choice they can make". He concluded that the appellant's did not fall within "the statutory exceptions" and at para 72 that there is no realistic Article 8 claim given his immigration history and offending in the UK.

19. He further concluded that the best interests of the children can be served by remaining with their parents as a family unit in Albania if that is their wish, alternatively the appellant's wife could remain in the UK with the children and visit the appellant as she had visited her mother. His wife would also have the support of her sister as she had when the appellant was in prison.

The grounds of appeal and 'rule 24' response

20. The four grounds of appeal upon which permission to appeal was granted are contained within a document described as a skeleton argument, dated 18 January 2024. We summarise the grounds.

21. Ground 1 contends that Judge Lucas' decision was irrational, alternatively that it had regard to immaterial matters in terms of whether the appellant enjoys a genuine and subsisting relationship with his wife and children. Specifically, it is argued that the finding at para 64 that the appellant had been resourceful in obtaining false documents to obtain employment was "wholly irrelevant" when determining whether he could obtain genuine documents to show residence with his family. It is argued that correspondence to a common address is routinely given little weight because it can be arranged without verification of whether the recipient lives or sleeps at the address.

22. Ground 2 alleges a failure to have proper regard to material evidence (as to his relationship with his wife and children). Here it is argued that although it was accepted by the judge that the appellant is married and has children, there was no proper engagement with the written and oral evidence of the appellant and his wife as to their living together. The grounds rely on the rather dated decision of the Immigration Appeal Tribunal *AK (Failure to assess witnesses' evidence) Turkey* [2004] UKIAT 00230.

23. It is further argued that the conclusion that the relationship was at best flimsy and sporadic was inadequately reasoned.

24. Ground 3 argues that the judge reached the irrational conclusion that the appellant's wife could return to Albania despite being a refugee. It is said

that no regard was had to the purpose of the single visit to Albania, namely to see her sick mother. In addition, the judge had failed to take into account that the respondent had written to the appellant's wife on 2 February 2023 noting that she had gone to Albania but advising her that no steps would be taken to revoke her refugee status. It was accordingly perverse for the judge to have concluded that there was no risk to the appellant's wife, which was a conclusion reached without adequate enquiry.

25. Ground 4 (referred to as ground 3 in the written grounds) contends that Judge Lucas failed to apply the 'unduly harsh' test regarding the appellant's children relocating to Albania or remaining in the UK without the appellant. In addition, there was a failure to engage with the evidence in terms of the children being settled in the UK. The conclusion that they are young and could relocate with ease fails to have regard to the guidance in *Azimi-Moayed & Ors (decisions affecting children; onward appeals : Iran)* [2013] UKUT 197 (IAC). Letters from the school detailed the positive effect that the appellant's return had had on D, (born on 8 August 2013).

26. The respondent's 'rule 24' response to the grounds of appeal contends that the judge's comment about the appellant being able to obtain false documents, hence could obtain genuine ones as to his residence, appeared to be a passing remark expressing surprise at the lack of documents.

27. It is further argued in the rule 24 response that whether deportation would be unduly harsh on the appellant's children and their mother depends on the impact on the children and their mother, of staying in the UK or going to Albania. The threshold for establishing undue harshness is a high one, as explained in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22. It is argued that Judge Lucas had formed the view, after considering the evidence in the round, that the evidence provided by the appellant did not show that the impact on the appellants' wife or children would exceed something severe or bleak in the context of the strong public interest in the deportation of foreign criminals.

28. Lastly, it is disputed that there was any irrationality in the judge's conclusion that the appellant's wife could return to Albania despite her having refugee status, given that she had returned there and there was no evidence that she had experienced any harm.

Submissions

29. In oral submissions Mr Gajjar relied on the grounds of appeal, and his skeleton argument for the hearing before us. It was submitted that at para 64 Judge Lucas' conclusions were rather contradictory. Those that are in the UK illegally experience difficulty obtaining documents, it was submitted. The fact that he had been able to obtain false documents did not mean that he would be able to obtain genuine documents in support of

the appeal. Mr Gajjar submitted that this was not a “passing remark” by the judge, as suggested in the rule 24 response.

30. Furthermore, there was a series of other evidence from the school and in photographs, as well as the evidence from the appellant’s wife as to the relationship with the family.

31. In relation to ground 2, it was submitted that the judge had failed to take into account, for example, a letter from D’s school which states that since the appellant had returned home there has been positive improvement in him.

32. Although at para 12 the judge had used the phrase “unduly harsh”, that was in the context of the overall summary of the case. It was submitted that there was no consideration of the unduly harsh test in the reasons part of the decision. It was not enough, Mr Gajjar argued, for the judge simply to say at para 71 that the appellant does not come within the statutory exceptions.

33. In relation to ground 3, it was pointed out that the appellant’s youngest child is a British citizen and his wife has refugee status. Although she had returned to Albania on one occasion, that was to visit her mother, as the judge noted at para 69. The respondent took no action in relation to the visit. It was a single event for compassionate reasons. It was submitted that it did not necessarily follow that in those circumstances the risk to the appellant’s wife as a victim of trafficking, and to their children, has dissipated. It was submitted that the judge did not take those circumstances in to account.

34. As regards ground 4, it was again emphasised that at the time of the appeal the youngest child was a British citizen. Two of the children were born in the UK. D had been in the UK for a significant period of time and was being educated in the UK. We were reminded again about the information from the school.

35. Mr Gajjar accepted that the judge was entitled to take into account that in 2018 the appellant said that he was not in a relationship with his wife, but the hearing before the judge was in 2024.

36. In his submissions Mr Banham submitted that the judge had considered the fact that there was a lack of documents as to the appellant’s residence with his family and the nature of the relationship over time. He submitted that we were being asked to focus on one line in para 64 about the appellant’s ability to obtain false documents. It was entirely appropriate to comment on the lack of documentary evidence, and the use of the term ‘resourceful’ was merely by way of a remark.

37. The letters and photographs do not prove that the appellant lives with his family. Furthermore, his ‘family life’ had not prevented his offending. A focus on para 66 was “island hopping” whereas the decision should be seen as a whole, it was submitted. Mr Banham relied on the guidance

given by Haddon-Cave J sitting in the Upper Tribunal in *Budhathoki (reasons for decisions)* [2014] UKUT 00341 (IAC) that

> "It is generally unnecessary and unhelpful for First-tier Tribunal judgments to rehearse every detail or issue raised in a case. This leads to judgments becoming overly long and confused and is not a proportionate approach to deciding cases. It is, however, necessary for judges to identify and resolve key conflicts in the evidence and explain in clear and brief terms their reasons, so that the parties can understand why they have won or lost."

38. Mr Banham further argued that at para 69 the judge had considered the 'stay/go' scenario in the context of the evidence.

39. In addition, it was submitted that the appellant's wife's passport was issued on 14 August 2021, after the determination of her asylum claim. Mr Banham argued that the UNHCR state that re-availing oneself of the home country's protection by obtaining a passport, under Article 1C of the Refugee Convention leads to a loss of refugee status. In her appeal determination the appellant's wife had asserted a fear for her family.

40. It was submitted that the judge was entitled to take into account that the appellant's wife went back to Albania but did not come to any harm there.

41. Mr Banham referred to para 41 of the judge's decision which summarises the submissions on behalf of the appellant in terms of the exceptions to deportation within the Immigration Rules. At para 61 the judge referred to "statutory exceptions". It was submitted that at paras 62-74 he had considered the 'stay' and 'go' scenarios. It was accepted that in the final paragraphs the judge did not use the expression 'unduly harsh'. However, it was submitted that he had considered everything in context.

42. Mr Banham reminded us of the dictum in *HA (Iraq)* at para 72 about the need for " "judicial caution and restraint" when considering a decision of the FtT.

43. In reply, Mr Gajjar submitted that it was not clear when the appellant's wife left for Albania, although the decision letter refers to her having left on 28 March 2021.

44. Mr Gajjar accepted that, ultimately, a judge could have made the findings that this judge did if the evidence had been considered fully. It was also accepted that irrationality was a high threshold.

Assessment and Conclusions

45. At the end of the hearing we announced that we were satisfied that the decision of Judge Lucas must be set aside for error of law and that the appeal would be remitted to the FtT, but that the finding at para 63 (that the appellant is married and has three children) would be a preserved finding. We now give our reasons.

46. The appellant has three children: D, born on 8 August 2013; M, born on 4 September 2015 and V, a British citizen born on 22 July 2019.

47. In relation to ground 1, we consider that there is some merit in the argument that the ability to obtain false documents does not (or not necessarily) equate to the ability to obtain *genuine* documents as evidence of the appellant's living at the address with his wife and children. However, in para 64 Judge Lucas accepted that the appellant may well have found it difficult to obtain documents to prove his residence, because of his immigration status. He was entitled to find that the mere fact of precarious immigration status did not prevent the obtaining of other reliable evidence of residence. It would have been helpful had the judge given some examples of the types of documents he had in mind, but the conclusion about the lack of supporting documentary evidence was one that he was entitled to come to. We are not satisfied, therefore, that ground 1 is made out.

48. As to ground 2, we note the reference in the judge's decision to the appellant having said in 2018, in a human rights claim, that he had separated from his wife. This is not a matter that is referred to in the appellant's grounds. Nevertheless, as was submitted by Mr Gajjar, that was five or more years before the hearing in the FtT. That fact must also be seen in the context of the written and oral evidence of the appellant and his wife and the (undated) school letter about D and the several positive changes in him since the appellant's return home. There is also a letter from the same school dated 18 July 2023 concerning M in terms of the appellant having brought her to and from school for the previous two weeks. There is a similar letter dated 20 December 2023 in relation to V.

49. Overall, however, we are satisfied that the judge did consider the evidence that was advanced in support of the contention that the appellant and his wife are in a genuine relationship and that the appellant lives at their address. He referred to the school letters and the written and oral evidence of the appellant and his wife, and at para 26 he referred to some of the detail of the school evidence. Accordingly, we are not satisfied that ground 2 is made out.

50. We are, however, satisfied that the error of law contended for in ground 3 is established. The judge was entitled to refer to the fact that "despite her status" (as a refugee) the appellant's wife went to Albania. However, the further conclusion that this meant that she and the children could return to Albania with the appellant fails to take into account the context of the evidence advanced that it was to see her mother who was sick. The judge's conclusion fails to consider the implications of the appellant's wife having refugee status or of the fact that the respondent wrote to her to say no action would be taken on that occasion to revoke her refugee status. There is similarly no reference to how long she went for (not that the evidence before us on that issue was clear).

51. After proper analysis the judge may have been entitled to come to the conclusion that notwithstanding her refugee status she could return to Albania with the appellant, but that analysis is absent.

52. With respect to Mr Banham, his submissions advanced matters that should have featured in the judge's own reasons. Again, the judge *might* have been entitled to consider the issue of the appellant's wife acquiring an Albanian passport seemingly after the grant of refugee status, and the extent to which she could thus be said to have availed herself of the protection of the Albanian state, provided the appellant's representatives were given the opportunity to deal with the point and provided it was a matter that was the subject of proper analysis by the judge.

53. Needless to say, the judge's assessment of the ability of the appellant's wife to live in Albania was directly related to his findings in terms of the children's ability to live in Albania.

54. We are satisfied, therefore, that ground 3 is made out.

55. A further significant error of law arises in terms of ground 4. Although the judge referred at para 41 to the submissions on behalf of the appellant which, in the judge's summary at least, cited in a limited way the Immigration Rules, and made mention of the "statutory exceptions" at paras 61 and 71, there is no reference in the judge's decision to what those exceptions are. Admittedly, one can assume a level of understanding of the relevant statutory regime by a specialist tribunal, but there are limits.

56. More specifically, aside from a lack of reference to the statutory framework, there is no reference in the judge's reasons, still less analysis of, the unduly harsh test applicable in the case of a foreign national criminal who has a genuine and subsisting relationship with a qualifying child. It appears that D was born in the UK and has on the face of it, therefore, lived in the UK for a continuous period of seven years. Similarly, M who was born in the UK on 4 September 2015. V is a British citizen. On the basis of the information before us, and more importantly before Judge Lucas, they are all qualifying children.

57. Extensive citation of authorities is not necessary in a decision, but even limited reference to authority would indicate to the reader that a judge has an appreciation of, and has applied, the correct legal principles in relation to the effect of deportation on children affected by the deportation decision. Such is absent from this decision.

58. Related to the foregoing, we also consider that Judge Lucas fell into error in a failure to undertake any analysis of the children's circumstances in terms of the effect on them of leaving the UK to live with the appellant in Albania. There is, by way of example only, no apparent recognition of the length of time that any of them have been in the UK, or any consideration of the implications of V being a British citizen. It is well recognised that

British citizenship is not a trump card but it is plainly a matter of significance.

59. We are satisfied that the errors of law that we have identified require the decision of the FtT to be set aside.

60. Having considered the Senior President's Practice Statement at paragraph 7.2, and the nature and extent of the further fact-finding required, we are satisfied that the appropriate course is for the appeal to be remitted to the FtT for a hearing *de novo*.

61. We indicated to the parties that in remitting the appeal we would direct that the only preserved finding would be that the appellant is married and has three children. There is no reason to think that there will be any change to the appellant's marital status by the time the appeal is heard afresh.

Decision

62. The decision of the First-tier Tribunal involved the making of an error on a point of law. Its decision is set aside and the appeal is remitted to the First-tier Tribunal for a hearing *de novo* before a judge other than First-tier Tribunal Judge Lucas, with findings of fact preserved as indicated at para 61 above.

A.M. Kopieczek
Judge of the Upper Tribunal
Immigration and Asylum Chamber

3/07/2024