Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13620/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 1 February 2019	**On 25 February 2019**

Before

UPPER TRIBUNAL JUDGE JACKSON

Between

A D
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Kerr, Counsel instructed by Karis Solicitors Limited
For the Respondent: Mr S Walker, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission the decision of First-tier Tribunal Judge Hussain who dismissed his appeal against the respondent's refusal of his human rights claim in the context of a decision to deport him from the United Kingdom further to criminal offences committed here.

2. The appellant is an Albanian national who first entered the United Kingdom in 2003 clandestinely. He was subsequently removed. He again re-entered clandestinely in 2004, came to the attention of the authorities when he was arrested for assault and again removed in 2007. It is

claimed he re-entered the United Kingdom in March 2008. There is no record of lawful entry or leave to remain at the time. He made an application for leave to remain on the basis of family life with his daughter who is a British citizen born in October 2009. That application was made in 2012 and leave to remain was granted on that basis, initially and on further extension to 16 January 2019.

3. On 9 August 2017 the appellant was convicted of assisting unlawful immigration into the EU and was sentenced to twenty months' imprisonment. He was notified of the intention to make a deportation order against him and made submissions in response to that in October 2017. Those submissions relied primarily on his two children in the United Kingdom and his partner here. The eldest child is a British citizen, as I said, born in 2009, and the youngest child born in 2017 to his partner. Both the appellant's partner and youngest child are Albanian nationals with no leave to remain in the United Kingdom.

4. In terms of the respondent's decision refusing the human rights claim, in relation to the oldest child, the respondent noted that she resides with her mother and that there is no evidence of a current parental relationship between her and the appellant, the conclusion being therefore that his deportation would not be unduly harsh on her. In relation to the appellant's current partner and child, neither of them had leave to remain in the United Kingdom and again there was no evidence of any subsisting relationship between them, including during the time that he was in prison, the conclusion also being that his deportation would not be unduly harsh either on those family members to remain in the United Kingdom if they obtained the appropriate leave, or to return to Albania with him. Similarly, the private life exception to deportation had not been met and there were no very compelling circumstances. The decision to make a deportation order was then taken by the respondent on 6 September 2017.

5. The appeal against the refusal of human rights claim came before the First-tier Tribunal on 20 August 2018. At that point an adjournment was sought on the basis that there were ongoing family proceedings involving the appellant to resume a previous child arrangement order for contact to resume between the appellant and his daughter which had essentially ceased when he went into prison. The adjournment request was on the basis that there should have been a hearing in the Family Court proceedings just before the First-tier Tribunal appeal, which was adjourned when the child's mother did not attend. The hearing had been relisted for a further date. The First-tier Tribunal refused to grant an adjournment on the basis of the ongoing Family Court proceedings and further to consideration of the guidance from the Upper Tribunal in **RS (immigration and Family Court proceedings) India [2012] UKUT 00218 (IAC)** found that as the appellant was seeking no more than the reinstatement of the arrangement entered into previously and by consent on 21 January 2016 such that even if he succeeded in the current Family Court proceedings of resuming contact he would still be unlikely to meet

the exceptions set out in paragraph 399A(ii)(b) of the Immigration Rules to prevent deportation on human rights grounds.

6. The previous contact which the appellant sought to resume was unsupervised contact with his child between 11.00 a.m. and 4.00 p.m. every other Saturday that was enjoyed prior to August 2017. It was also noted that the child's mother was a reluctant party in facilitating contact and there had already been a significant gap in contact in the relationship and only limited contact previously. On the basis that no contact was resumed, the First-tier Tribunal found that the deportation would not be unduly harsh on his daughter to remain in the United Kingdom. In paragraph 36 of the decision the Judge goes on to find:

> "Having now had the opportunity of considering the totality of the evidence and reflecting on all of the issues that I am required to consider, the conclusion that I have come to is that firstly, as a matter of fact, presently the appellant does not have a subsisting parental relationship with his daughter, and even if contact was to resume under the same terms as before, that would not amount to the unduly harsh test that is required to be satisfied under paragraph 399(a)(ii)(b)".

7. The appellant appeals essentially on three grounds: the first that there was an error of law in the First-tier Tribunal failing to adjourn the hearing pending Family Court proceedings and that the court therefore pre-empted the outcome of those proceedings rather than waiting for them. Secondly, that there was a failure to consider the best interest of the children in accordance with Section 55 of the Borders, Citizenship and Immigration Act 2009. Thirdly, that the First-tier Tribunal failed to analyse the test of unduly harsh and take into account the public interest in deportation and the nature of the offence. In relation to the final ground of appeal, that has somewhat been overtaken by the Supreme Court's decision in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53, where the test of unduly harsh has been confirmed to focus only on the child and not by reference to any kind of balancing exercise against the public interest in deportation, the nature of the offence or the length of sentence. This final ground of appeal falls away in light of the decision in KO.

8. In relation to the failure to adjourn the proceedings, it is not at all clear from the decision or any evidence from the appellant as to the precise nature of the adjournment request. It appears from what has happened since that hearing that there has been a positive Cafcass report and a further hearing on 23 January in Family Court proceedings with no consent or order for those documents to be disclosed in this appeal at present, but with a final hearing set for 21 March 2019.

9. There is no suggestion that I can see from the file that the First-tier Tribunal was asked to adjourn on the basis that there would be a Cafcass report or further information to be forthcoming from the Family Court proceedings which would be relevant to an assessment of the best

interests of the child or the unduly harsh assessment. Hindsight might show that that is what has happened which may be relevant if the decision needs to be remade, but that is not the information which was before the First-tier Tribunal.

10. In any event, it is difficult to see in this case how the failure to adjourn in these circumstances could be a material error of law. There is no reason to think that the First-tier Tribunal was aware that any further evidence may be available and the findings made by the First-tier Tribunal took the ease at its highest if the Family Court proceedings were successful, as fully set out within the decision of the First-tier Tribunal. For these reasons, I find no error of law in failing to adjourn the proceedings or even on pre-empting the outcome, taken that it was considered in the appellant's favour in any event.

11. The second ground of appeal in relation to failure to consider the best interests is clearly made out as on the face of the decision there is no express consideration of the best interests of the child at all. However, that has to be considered against the factual situation before the First-tier Tribunal and in particular, the lack of evidence in relation to the child before the First-tier Tribunal. The appellant could describe a previous genuine relationship which had previously been accepted by the respondent - that was the basis upon which he had leave to remain granted and there was a child arrangement order for contact and the appellant's evidence was that it was going well up until his point of imprisonment. There is however no further information at all about the appellant's daughter, largely because he had had no direct or meaningful contact with her for over a year by the time of the First-tier Tribunal hearing. There is no information from her, about her, or from her mother to suggest that any detail could be fleshed out on the best interest's assessment, even in the absence of any information from the Family Court.

12. In these circumstances it was fair for the First-tier Tribunal to find, on the history and evidence available, that the best interests of the child were to remain in the United Kingdom where she is a British citizen, where she resides in a stable environment with access to education and where she can continue living with her mother. It could be inferred based on the previous history of the child arrangement order that it was also in her best interests to resume contact with her father and maintain a relationship with him, as that was supported by the previous Cafcass report which was available on file, albeit dating from 2015. There is nothing further than that that could inform any more detailed best interest's assessment. Even taking those matters at their highest, when moving on to the third ground of appeal that there is a failure to analyse undue harshness properly, I can see no error of law in the First-tier Tribunal's decision that in any event the circumstances could not meet the exception in paragraph 399A(ii)(b) of the Immigration Rules.

13. The requirements for a finding that it would be unduly harsh for the child to relocate with the appellant and unduly harsh for them to remain in the United Kingdom without the appellant requires the identification of factors which are beyond the normal consequences of deportation which are inevitably harsh and often damaging for children. Something much more than those usual consequences is required to meet the unduly harsh test. There is nothing to indicate in the papers before the First-tier Tribunal or any evidence given before it that could suggest that test was even arguably met to the standard set out in KO and the authorities referred to therein. Although the best interest's assessment is absent from the First-tier Tribunal's decision, even if included and taking matters at their highest that it is in the best interests of the child for the appellant to remain in the United Kingdom with her, I do not find that the absence of the best interest's assessment could be a material error of law on the facts of this case. It could have no bearing on the outcome of the appeal given the conclusion in paragraph 36 on which there is no separate error of law. It is clear on the facts that this is a case where the appellant simply falls far short of meeting any of the exceptions.

14. The First-tier Tribunal went on to consider, in any event, whether there were further exceptional circumstances or whether other exceptions were met under the Immigration Rules and found that there were not. There is no separate challenge to those final conclusions. For these reasons, although as I have said there is an error of law in relation to a failure to expressly consider the best interests of the child, that is not a material error of law and it could not affect the outcome of the appeal. The First-tier decision therefore stands and this appeal is dismissed.

Notice of Decision

The making of the decision of the First-tier Tribunal did not involve the making of a material error of law. As such it is not necessary to set aside the decision.

The decision to dismiss the appeal is therefore confirmed.

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 given the Family Court proceedings in relation to his child. No report of these proceedings shall directly or indirectly identify him or any member of their 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  Date 21st February 2019

Upper Tribunal Judge Jackson