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KB (Art 8: points-based proportionality assessment) Albania

Upper Tribunal
(Immigration and Asylum Chamber)

Heard at Field House

THE IMMIGRATION ACTS

Heard on 28 March 2022
Promulgated on 16 May 2022

Before

THE HON. MR JUSTICE LANE, PRESIDENT
UPPER TRIBUNAL JUDGE STEPHEN SMITH
UPPER TRIBUNAL JUDGE SHERIDAN

Between

KB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation
For the appellant: *Ms Ferguson*, instructed by Freemans Solicitors
For the respondent: Mr Whitwell, Senior Home Office Presenting Officer

Although judges in the immigration jurisdiction should adopt the "balance sheet" approach to ECHR article 8 proportionality assessments, they must not ascribe points to factors weighing on either side of the balance.

DECISION AND REASONS

1. Upper Tribunal Judge Sheridan has very substantially contributed to this decision.

2. The appellant is appealing against a decision of Judge of the First-tier Tribunal Brannan ("the judge") promulgated on 24 August 2021.

A. BACKGROUND

3. The appellant is a citizen of Albania, born in December 2000. He grew up on the outskirts of Tirana.

4. The appellant claims that in Albania he was forced by two men (whom we shall refer to as K and BL) to sell drugs and that when he refused they beat him (causing cuts to his head and face) and threatened that they would harm his family. He claims that he told his mother he sustained the injuries because he owed people money and that, fearing for his safety, she arranged for him to leave Albania.

5. The appellant claims to face two distinct risks in Albania.
    a. First, he claims to be at risk from K and BL who will physically harm him and/or force him to resume selling drugs for them.
    b. Second, he claims to face a risk of being forced to sell drugs (or commit other crimes) by other criminals.

6. He also claims that removing him to Albania will violate article 8 ECHR.

7. The appellant entered the UK and claimed asylum in November 2016. On 2 May 2017 he was referred to the National Referral Mechanism ("NRM"). On 12 March 2020 a positive Conclusive Grounds decision was made, where it was accepted that the appellant had been forced to sell drugs in Albania.

8. On 21 July 2020 the appellant's protection and human rights claim was refused. The appellant appealed against this decision to the First-tier Tribunal.

B. THE DECISION OF THE FIRST-TIER TRIBUNAL

9. It is clear from paragraphs 22-25 of the decision that the following was not in dispute before the First-tier Tribunal:

    a. the appellant has been the victim of trafficking, which took the form of forced labour in Albania;

    b. the appellant has a genuine subjective fear of return to Albania; and

    c. the appellant belongs to a particular social group (victims of trafficking).

10. The judge directed himself (in paragraph 26) that the two issues he needed to consider were sufficiency of protection and internal relocation.

11. Sufficiency of protection is considered in paragraphs 27 – 53. The judge began his assessment of sufficiency of protection by noting that the respondent's Country Policy and Information Note concerning human trafficking in Albania (dated February 2021) states that many of the risk factors identified in TD and AD (trafficked women) Albania CG [2016] UKUT 92 (IAC) apply to male victims of trafficking. Applying the risk factors set out in TD and AD, the judge made the following findings about the appellant:

    a. As he is male, the Albanian authorities will not provide him with support as a victim of trafficking (paragraph 34).

    b. The appellant will not face serious poverty (paragraph 36).

    c. His level of education is not such as to put him at a disadvantage (paragraph 37).

    d. He has no health complaints (paragraph 38).

    e. He has no children (paragraph 39).

    f. He is from a "barracks area" outside of Tirana which puts him at a higher risk than if he were from an urban centre (paragraph 43).

    g. He is 20 years old (paragraph 44).

    h. He would have family support (paragraph 45).

    i. Police and judicial corruption is problematic and K and BL have some influence in the appellant's local area (paragraph 50).

    j. The appellant does not have any significant vulnerabilities (paragraph 52).

12. Based on these findings the judge found that (a) the appellant faces a real risk in his home area from K and BL as state protection would be insufficient to protect him from them; but (b) he does not face a risk in his home area from traffickers generally.

13. The judge then proceeded to consider whether the appellant could reasonably be expected to relocate within Albania to avoid the risk he faces from K and BL in his home area.

14. The judge found that it was reasonable to expect the appellant to relocate within Albania because (a) there was no evidence that K and BL have influence outside the appellant's home area (paragraph 57); (b) although Albania is a small country the appellant could avoid K and BL by relocating to a city a considerable distance away from his home area (paragraph 58); and (c) even though he would not have the benefit of living near family, the factors considered in the context of sufficiency of protection (which are summarised above in paragraph 11) indicate that he is not vulnerable and that internal relocation would be reasonable.

15. The judge then considered, in paragraphs 62 – 94 of the decision, article 8 ECHR.

16. The judge started by considering whether the appellant satisfied the conditions of paragraph 276ADE(1)(vi) (very significant obstacles to integration). The judge found in paragraphs 73 – 74 that there were no such obstacles.

17. The judge then considered article 8 outside the Immigration Rules. The judge summarised his approach to assessing article 8 in paragraphs 75 – 77. He stated:

> 75. As the rules are not satisfied, I consider proportionality using the 'balance sheet' approach. In *TZ and PG* at paragraph 33 the President of the Tribunals [sic] explained:
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> > The critical issue will generally be whether the strength of the public policy in immigration control in the case before [the Tribunal] is outweighed by the strength of the article 8 claim so that there is a positive obligation on the state to permit the applicant to remain in the UK.
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> 76. He went on to explain how this is achieved at paragraph 35:
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> > To paraphrase Lord Thomas: after the tribunal has found the facts, the tribunal sets out those factors that weigh in favour of immigration control – 'the cons' – against those factors that weigh in favour of family and private life – 'the pros' in the form of a balance sheet which it then uses to set out a reasoned conclusion within the framework of the test(s) being applied within or outside the Rules. It goes without saying that the factors are not equally weighted and that the tribunal must in its reasoning articulate the weight being attached to each factor.

> 77. In order to do this transparently and explain the relative weight of each factor, I give points out of 10 for each. I then give a reasoned conclusion as to whether the "pros" have outweighed the "cons" such that the refusal decision is disproportionate. If it is, the appeal succeeds. If it is not, then I must dismiss the appeal.

18. The judge then set out the factors weighing for and against the appellant, assigning to each points out of 10.

19. The judge found that the public interest in effective immigration controls weighed against the appellant but the weight was reduced because of the delay of over three years in deciding the asylum application. In paragraph 79 the judge stated that he would "normally" give 10 points to the respondent for the public interest in effective immigration controls. However, in paragraph 88 the judge found that the "normal" 10 points should be reduced to 7 points because of the delay. He explained this as follows:

> What weight does one give to effective immigration control when it has not been pursued in relation to the appellant? The consistent approach in the case law is that it reduces the weight to be given to the public interest in removal. In my view the level of reduction of weight should be commensurate with the delay, so one point for every year of delay in the decision-making. I therefore give only seven points to the public interest in immigration control.

20. On the appellant's side of the scales, the judge found that the difficulties the appellant would face on return to Albania warranted five points. This is explained in paragraph 91 in these terms:

> I give moderate weight to the difficulties the Appellant will face in Albania because he would need to relocate internally to an area of the country away from his family. This is an upheaval, but not an insurmountable one. The Appellant has no specific vulnerabilities making it difficult. I give this factor five points in his favour.

21. In paragraph 92 the judge, applying section 117B(4) of the Nationality Immigration and Asylum Act 2002 along with Rhuppiah v Secretary of State for the Home Department [2018] UKSC 58; [2019] Imm AR 452, stated that because the appellant had been in the UK without leave it would only be in exceptional circumstances that his private life could be given more than little weight. The judge gave no points to his private life. In paragraph 93 he stated:

> The exceptional feature that I would consider would be the delay in deciding the appellant's asylum claim. However I have already given this weight in reducing the public interest in immigration control. I will not double count it by giving it significance here.

C. GROUNDS OF APPEAL AND SUBMISSIONS

22. The grounds of appeal were drafted by Ms Ferguson, who also prepared a skeleton argument and made oral submissions at the hearing before us.

23. Ms Ferguson's arguments fall into two broad categories: (i) submissions relating to the appellant's protection claim; and (ii) submissions relating to his article 8 ECHR claim.

24. In respect of the appellant's protection claim, Ms Ferguson argued that the judge erred by:

    a. failing to consider that in AM and BM (Trafficked women) Albania CG [2010] UKUT 80 (IAC) it is said (in paragraph 187) that internal relocation is unlikely to be effective in Albania for a victim of trafficking and that what matters is the motivation of the trafficker;

    b. failing to fully recognise that a young man can be the victim of trafficking. Ms Ferguson described the judge as having a "blind spot" as to the risk of male victims of trafficking being re-trafficked. She argued that the judge failed to properly engage with the fact that the appellant, as a male, would not receive recognition and support from the Albanian authorities as a victim of trafficking;

    c. failing to take into account that there is a high risk of the appellant, as a previous victim of trafficking, being re-trafficked. Ms Ferguson submitted that the decision was inconsistent with paragraph 339K of the Immigration Rules, which stipulates that previous persecution is a serious indicator of there being a well-founded fear of persecution; and

    d. failing to take into consideration all relevant factors when assessing the reasonableness of internal relocation, including the reasons why the appellant was lured into forced criminality in the first place.

25. With respect to the judge's assessment of article 8 ECHR, Ms Ferguson made the following arguments:

    a. When considering whether paragraph 276ADE(1)(vi) of the Immigration Rules was satisfied, the judge failed to adequately take into consideration that past trafficking is a strong indicator of future risk.

    b. The use of a points scoring system when evaluating proportionality under article 8 ECHR appears arbitrary and removes the required flexibility. Ms Ferguson submitted that reducing the points awarded to the respondent in respect of the public interest in immigration control by three points

because of a three year delay is arbitrary. She observed that the delay had been closer to four than three years, and therefore by the judge's logic there should have been a four point reduction. This, she submitted, was indicative of why a points system was not appropriate. She also argued that it was difficult to see why the judge awarded only five points to the difficulties the appellant might face integrating in Albania.

26. Mr Whitwell, on behalf of the respondent, relied on a rule 24 response drafted by Ms Aboni. In the rule 24 response, in respect of the protection claim, it is argued that the judge engaged with the background evidence and case law regarding victims of trafficking and adequately explained why the appellant would not be at risk of re-trafficking outside of his home area.

27. As regards article 8, the rule 24 response argues that the judge adequately considered obstacles to reintegration and factors relevant to the proportionality assessment. The judge's adoption of a points system in the proportionality assessment is not addressed.

28. Before us, Mr Whitwell argued that it was not inconsistent with *AM and BM* to find that the appellant could relocate internally, as it was recognised that in some cases internal relocation is viable. He also argued that it was consistent with more recent Country Guidance cases concerning Albania - TD and AD (Trafficked women) Albania CG [2016] UKUT 00092 (IAC) and BF (Tirana - gay men) Albania CG [2019] UKUT 93 (IAC) - to find that internal relocation is a viable option to avoid risk in a home area.

29. Mr Whitwell submitted that the judge identified strong reasons why this particular appellant would not be at risk of re-trafficking from traffickers with whom he has not had previous contact, including that he had not been the victim of sexual exploitation or of a cross-border enterprise. He maintained that it was open to the judge, for the reasons given, to conclude that the appellant would not face a risk in his home area of re-trafficking from anyone other than K and BL.

D. DISCUSSION

(1) The Protection Claim

30. It is clear from Country Guidance case law on Albania that the effectiveness of internal relocation to avoid a risk of harm from a non-state actor depends, at least in part, on the motivation of the non-state actor. The headnote to BF (Tirana - gay men) Albania CG [2019] UKUT 93 (IAC) states:

> Whether an openly gay man might be traced to Tirana by family members or others who would wish him harm is a question for determination on the evidence in each case **depending on the motivation of the family and the extent of its hostility**. [Emphasis added]

31. A similar point is made in paragraphs 186 – 187 of AM and BM:

> 186 …Moreover we would emphasise that, as stated above, Albania is a country with a relatively small population. Dr Schwandner-Sievers refers to common socio-cultural conduct in which every person was socially positioned. We note the comment that the Director of the Anti-Government Unit, Ms Irena Targa, made to Dr Schwandner-Sievers that:
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> > "Family relations are that strong in Albania, you have to live here to understand this is no fairy tale, how important family links are. A brother might even have trafficked his sister or killed her because she was trafficked, but the relationship is very strong. This is such a small country; it is not possible to live somewhere without being known. The family is so close. For us it is easier to identify everyone immediately. As soon as someone says their surname we know – the police scan the population. Once the name is mentioned, it depends on the family, but they come here from anywhere they can".
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> 187. We consider therefore that Albania is a country where there is a real fear that traffickers might well be able to trace those who have escaped from them or indeed those whom they fear might expose them. **Whether such persons would be motivated to do so is, of course, another matter**, as we have discussed above. It is therefore a country where, at least, internal relocation is problematical for the victim of trafficking. To that should be added the difficulties for a single woman to reintegrate into a society where the family is the principal unit for welfare and mutual support as well as, it appears, the channel through which employment is most often obtained. We have therefore concluded that internal relocation is unlikely to be effective for most victims of trafficking who have a well-founded fear of persecution in their home area, although once again we consider that it is important to consider each case on an individual basis. [Emphasis added].

32. Ms Ferguson argued that the judge's assessment of internal relocation was deficient – and inconsistent with AM and BM - because of a failure to consider whether K and BL would be motivated to pursue the appellant. We agree. Having found that the appellant faces a real risk from K and BL in his home area, it was incumbent on the judge, when assessing whether that risk would extend beyond the home area, to consider whether, and if so to what extent, K and BL would be motivated to trace the appellant. The absence of any such consideration in the decision is an error of law. The error is material because if K and BL are strongly motivated to pursue the appellant, which is a fact specific question that has not been considered, there is a real risk that they will pose a direct threat to him even though, as

the judge found in paragraph 57, they do not have any influence beyond their local area, such as to enable them to harm the appellant by indirect means.

33. We are not persuaded that there is merit to the other submissions made by Ms Ferguson concerning the appellant's protection claim. We address each in turn.

34. First, Ms Ferguson argued that the judge failed to fully appreciate that men can be victims of trafficking. This is plainly not correct. The entire decision is based on the respondent's acceptance that the appellant was a victim of trafficking. The judge set out in detail how the appellant was trafficked (paragraphs 19 – 22), found that the risk factors identified in TD and AD were applicable to him even though he is male (paragraph 28), and set out how those risk factors applied to him (paragraphs 29-53). Far from being overlooked, the appellant's status as a victim of trafficking was central to the decision.

35. Moreover, it is clear that the judge considered how the appellant being male was relevant to risk on return. In this regard, the judge found that, because the appellant is male, he would not benefit from the support and recognition from the Albanian authorities that is available to female victims of trafficking (paragraph 34). The judge also found that a man who has been forced to sell drugs as a child is unlikely to face the same social stigma as a woman who has been sexually exploited (paragraph 45). These findings, which are consistent with the evidence that was before the judge, demonstrate that the judge not only took into account that the appellant is male but also considered the relevance of this to risk on return.

36. Second, Ms Ferguson argued that the decision was inconsistent with paragraph 339K of the Immigration Rules because the judge failed to take into account that previous trafficking is a serious indicator of a risk of re-trafficking.

37. In order to address this submission it is important to appreciate that the appellant advanced two distinct claims as to why, in Albania, he would face a risk of being re-trafficked. The first claim was that he would face a risk from the same individuals (K and BL) who trafficked him five years earlier. The judge accepted that the appellant, as a victim of previous trafficking by K and BL, faced a risk in his home area from them. It is therefore plainly not the case that the judge failed to apply paragraph 339K in respect of the risk to the appellant from those who previously trafficked him.

38. The second claim advanced by the appellant was that, on return to Albania, he would, as a former victim of trafficking, be at risk from traffickers with whom he has not previously had any contact or involvement. The judge gave cogent reasons explaining why he rejected this claim including, in particular, that the appellant is an

adult male without mental health problems or any significant vulnerability, with family support, who will not face the stigma of being a victim of sexual exploitation. It was entirely consistent with paragraph 339K to find that a person with these characteristics, even though he has previously been trafficked, would not face a risk of being trafficked by traffickers with whom he has not previously been involved.

39. Third, Ms Ferguson argued that the judge failed to have regard to relevant considerations when evaluating whether it would be reasonable to expect the appellant to relocate internally. In particular, she submitted that the judge failed to consider why the appellant was lured into criminality in the first place.

40. The evidence of the appellant, as to why he was "lured" into criminality, is set out in paragraph 9 of his witness statement dated 26 July 2021, where he states:

> "Due to my age, my knowledge would have been limited in relation to someone who was older, wiser and more experienced in life."

41. It is clear from the decision that the judge recognised that the appellant was forced by K and BL to distribute drugs at a time when he was a child. The judge therefore did not fail to take this into account. Moreover, it was plainly open to the judge to observe that the appellant, at the time of the hearing, was no longer a child but was a 20-year-old man with no mental health issues or significant vulnerabilities.

42. We have already found that, in respect of internal relocation, the judge erred by not considering the motivation of K and BL to pursue the appellant. To this extent, we accept the argument that the judge erred in his overall assessment of whether the appellant can be expected to relocate internally. However, we do not accept that any other error was made. In paragraph 54 the judge directed himself correctly to the relevant legal framework, citing a clear summary of the law by Lord Bingham in AH (Sudan) & Ors v Secretary of State for the Home Department [2007] UKHL 49; [2008] Imm AR 289. In paragraph 55 the judge identified as relevant to whether it was reasonable for the appellant to relocate the findings he made regarding the appellant not being vulnerable. This included, inter alia, that the appellant does not have any physical or mental health problems, will not be responsible for any children, will not face the stigma of being a victim of sexual exploitation, and will have family support (although this would be reduced because his family would be located in a different part of Albania). In our view, these reasons adequately support the judge's conclusion that internal relocation would be reasonable and not unduly harsh.

43. In conclusion:

a. The judge's finding that the appellant faces a real risk from K and BL in his home area is unchallenged.

b. The judge's finding that the appellant can relocate internally to avoid the risk from K and BL is undermined by an error of law.

c. The judge's finding that the appellant does not face a risk in any part of Albania from traffickers with whom he has not previously had contact is not undermined by an error of law.

d. The judge was entitled to find, for the reasons given, that internal relocation would be reasonable and not unduly harsh.

44. The re-making of the decision in respect of the appellant's protection claim will be limited to the issue identified in paragraph 43(b). The findings of fact in respect of the protection claim are preserved as they are not undermined by the error of law.

(2) Article 8 ECHR

45. The appellant's grounds challenge the use made by the First-tier Tribunal Judge of a "points" system in conducting the proportionality balancing exercise under article 8 of the ECHR. Ms Ferguson submits that the judge's treatment of article 8 outside the rules, awarding scores out of 10 to factors that speak for or against the appellant, appears arbitrary, whilst also being insufficiently flexible to meet the requirements of a proper article 8 assessment.

46. Ms Ferguson refers to the fact that the First-tier Tribunal Judge deducted three points from the 10 points that he would "normally" give "against the appellant" (paragraph 79 of his decision). Ms Ferguson points out that the judge deducted those three points on account of the delay by the respondent in reaching a decision on the appellant's asylum claim. The judge says that this was a deduction of one point per year. However, Ms Ferguson submits that the delay was closer to four years (November 2016 to July 2020) which, even on the judge's approach, should have meant that four points ought to have been deducted. She also asks rhetorically whether a case would have to take 10 years to decide before no weight at all would fall to be given to the public interest in effective immigration control. Ms Ferguson finally contends that the decision by the judge to award five points to the appellant, to reflect his difficulties of integration, appears to be the mid-way point, which is problematic in the context of the appellant's accepted trafficking claim.

47. The first high-level judicial endorsement of a "balance sheet" approach in the context of article 8 proportionality in an administrative law context is to be found in the judgment of Lord Thomas of Cwmgiedd CJ in Polish Judicial Authorities v Celinski and Others [2015] EWHC 1274 (Admin). Lord Thomas was concerned that

a structured approach had not always been applied to the balancing of factors under article 8 by district judges hearing cases under the Extradition Act 2003. Under that Act, a person may not be extradited if to do so would violate article 8. Under the heading "*(b) Balancing of the considerations*", Lord Thomas said:

> "15. As we have indicated, it is important in our view that judges hearing cases where reliance is placed on Article 8 adopt an approach which clearly sets out an analysis of the facts as found and contains in succinct and clear terms adequate reasoning for the conclusion arrived at by balancing the necessary considerations.
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> 16. The approach should be one where the judge, after finding the facts, ordinarily sets out each of the "pros" and "cons" in what has aptly been described as a "balance sheet" in some of the cases concerning issues of Article 8 which have arisen in the context of care order or adoption: see the cases cited at paragraphs 30 to 44 of *Re B-S (Adoption: Application of s.47(5))* [2013] EWCA Civ 1146. The judge should then, having set out the "pros" and "cons" in the "balance sheet" approach, set out his reasoned conclusions as to why extradition should be ordered or the defendant discharged.
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> 17. We would therefore hope that the judge would list the factors that favoured extradition and then the factors that militated against extradition. The judge would then, on the basis of the identification of the relevant factors, set out his/her conclusion as the result of balancing those factors with reasoning to support that conclusion. As appeals in these cases are, for the reasons we shall examine, common, such an approach is of the greatest assistance to an appellate court."

48. In Hesham Ali (Iraq) v SSHD [2016] UKSC 60; [2017] Imm AR 484, the Supreme Court considered the correct approach to deciding whether article 8 precludes the deportation of a foreign criminal under the Immigration Act 1971, read with the UK Borders Act 2007. Hesham Ali was not concerned with Part 5A of the 2002 Act, which introduced statutory considerations to which regard must be had by courts and tribunals in deciding article 8 cases in the immigration context. Hesham Ali did, however, involve the Supreme Court considering paragraphs 396 to 399A of the Immigration Rules. These contained a number of statements regarding how the article 8 balance falls to be struck in foreign criminal cases, which also find expression in Part 5A. It should, however, be noted that Part 5A does not replicate the statement in paragraph 398 of the Immigration Rules, as then in force, that if what might be described as certain exceptions do not apply, then "it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors".

49. With those observations in mind, we can turn to the leading judgment of Lord Reed, which includes the following:

"37. How is the reference in rule 398 to "exceptional circumstances" to be understood, compatibly with Convention rights? That question was considered in the case of *MF (Nigeria) v Secretary of State for the Home Department* [2013] EWCA Civ 1192; [2014] 1 WLR 544. The Court of Appeal accepted the submission made on behalf of the Secretary of State that the reference to exceptional circumstances (an expression which had been derived from the *Jeunesse* line of case law) served the purpose of emphasising that, in the balancing exercise, great weight should be given to the public interest in deporting foreign criminals who did not satisfy rules 398 and 399 or 399A, and that it was only exceptionally that such foreign criminals would succeed in showing that their rights under article 8 trumped the public interest in their deportation (paras 40 and 41). The court went on to explain that this did not mean that a test of exceptionality was being applied. Rather, the word "exceptional" denoted a departure from a general rule:

> "The general rule in the present context is that, in the case of a foreign prisoner (sic) to whom paragraphs 399 and 399A do not apply, very compelling reasons will be required to outweigh the public interest in deportation. These compelling reasons are the 'exceptional circumstances'." (para 43)

The court added that "the exceptional circumstances to be considered in the balancing exercise involve the application of a proportionality test as required by the Strasbourg jurisprudence" (para 44). As explained in the next paragraph, those dicta summarise the effect of the new rules, construed compatibly with Convention rights.

38. The implication of the new rules is that rules 399 and 399A identify particular categories of case in which the Secretary of State accepts that the public interest in the deportation of the offender is outweighed under article 8 by countervailing factors. Cases not covered by those rules (that is to say, foreign offenders who have received sentences of at least four years, or who have received sentences of between 12 months and four years but whose private or family life does not meet the requirements of rules 399 and 399A) will be dealt with on the basis that great weight should generally be given to the public interest in the deportation of such offenders, but that 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 *SS (Nigeria)*. 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. The Strasbourg jurisprudence indicates relevant factors to consider, and rules 399 and 399A provide an indication of the sorts of matters which the Secretary of State regards as very compelling. As explained at para 26 above, they can include factors bearing on the weight of the public interest in the

deportation of the particular offender, such as his conduct since the offence was committed, as well as factors relating to his private or family life. Cases falling within the scope of section 32 of the 2007 Act in which the public interest in deportation is outweighed, other than those specified in the new rules themselves, are likely to be a very small minority (particularly in non-settled cases). They need not necessarily involve any circumstance which is exceptional in the sense of being extraordinary (as counsel for the Secretary of State accepted, consistently with *Huang* [2007] 2 AC 167, para 20), but they can be said to involve "exceptional circumstances" in the sense that they involve a departure from the general rule.

…

46. These observations apply a fortiori to tribunals hearing appeals against deportation decisions. The special feature in that context is that the decision under review has involved the application of rules which have been made by the Secretary of State in the exercise of a responsibility entrusted to her by Parliament, and which Parliament has approved. It is the duty of appellate tribunals, as independent judicial bodies, to make their own assessment of the proportionality of deportation in any particular case on the basis of their own findings as to the facts and their understanding of the relevant law. But, where the Secretary of State has adopted a policy based on a general assessment of proportionality, as in the present case, they should attach considerable weight to that assessment: in particular, that a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life; that great weight should generally be given to the public interest in the deportation of a foreign offender who has received a custodial sentence of more than 12 months; and that, where the circumstances do not fall within rules 399 or 399A, the public interest in the deportation of such offenders can generally be outweighed only by countervailing factors which are very compelling, as explained in paras 37-38 above.

…

50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, as explained in paras 14, 37-38 and 46 above,

> and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in *MF (Nigeria)* - will succeed."

50. Lord Thomas was a member of the panel in Hesham Ali. In his judgment, he advocated the use of a "balance sheet" approach to article 8 in the immigration context:

> "82. I agree with the judgment of Lord Reed and in particular the matters he sets out at paras 37-38, 46 and 50. I add three paragraphs of my own simply to emphasise the importance of the structure of judgments of the First-tier Tribunal in decisions where article 8 is engaged. Judges should, after making their factual determinations, set out in clear and succinct terms their reasoning for the conclusion arrived at through balancing the necessary considerations in the light of the matters set out by Lord Reed at paras 37-38, 46 and 50. It should generally not be necessary to refer to any further authority in cases involving the deportation of foreign offenders.
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> 83. One way of structuring such a judgment would be to follow what has become known as the "balance sheet" approach. After the judge has found the facts, the judge would set out each of the "pros" and "cons" in what has been described as a "balance sheet" and then set out reasoned conclusions as to whether the countervailing factors outweigh the importance attached to the public interest in the deportation of foreign offenders.
>
> 84. The use of a "balance sheet" approach has its origins in Family Division cases (see paras 36 and 74 of the decision of the Court of Appeal *In re B-S (Children) (Adoption Order: Leave to Oppose)* [2014] 1 WLR 563). It was applied by the Divisional Court in *Polish Judicial Authority v Celinski* [2016] 1 WLR 551 to extradition cases where a similar balancing exercise has to be undertaken when article 8 is engaged - see paras 15-17. Experience in extradition cases has since shown that the use of the balance sheet approach has greatly assisted in the clarity of the decisions at first instance and the work of appellate courts."

51. As the First-tier Tribunal Judge observed in the present case, the then Senior President of Tribunals in TZ (Pakistan) and PG (India) v SSHD [2018] EWCA Civ 1109; [2018] Imm AR 1301 reiterated the desirability of using the "balance sheet" approach at paragraph 35 of his judgment.

52. Given that the concept of a "balance sheet" derives from bookkeeping and accountancy, it might be thought appropriate to use numbers to ascribe points in respect of the considerations inherent in

the proportionality balancing exercise, in order to establish the relevant weight of each. In fact, nothing could be further from the truth.

53. Nowhere in Celinski, Hesham Ali, or TZ and PG is there any suggestion that judicial decision-makers should take a "points-based" approach to the balance sheet assessment. If there were any utility in adopting such an approach, it is inconceivable that Lord Thomas would have failed to make this plain. His silence on the issue is, therefore, significant.

54. Following Celinski, district judges at Westminster Magistrates' Court (where first-instance extradition hearings are held in England and Wales) routinely adopt a balance sheet approach. At paragraph 16 of AS v Secretary of State for the Home Department [2019] EWCA Civ 417; [2019] Imm AR 759, Lord Burnett of Maldon CJ, Lord Thomas's successor, said the approach was being taken there on a "daily basis." Like Lord Thomas, in encouraging the use of the balance sheet approach, Lord Burnett in AS made no suggestion that points should be awarded; and as far as we are aware, the judges at Westminster do not ascribe points to any of the relevant factors. Rather, they undertake a broad evaluative assessment.

55. It is also noteworthy that neither the Strasbourg Court nor the United Kingdom legislature has suggested that a points-based system might be a satisfactory way of deciding article 8 proportionality.

56. The reason for this is plain. The nature of the evaluative exercise required of judicial decision-makers is such that any points-based approach is inherently unsuitable for achieving a result which is compatible with the obligations stemming from the ECHR.

57. Accordingly, for an individual judge to adopt their own points-based system is wrong as a matter of law.

58. The present case is a paradigm instance of why such a points-based approach is wrong. At paragraph 77 of his decision, the First-tier Tribunal judge says that he gives "points out of 10 for" the factors tending for and against the appellant in order to "explain the relative weight of each factor". But merely ascribing points does not explain the reason for the relevant weight given by the judge; rather, it is the result of some process of evaluation that is left unarticulated.

59. Although the First-tier Tribunal judge claims that his points-based approach enables him to strike the proportionality balance "transparently", it is difficult to see why ascribing points is inherently more transparent than a "classic" balance sheet exercise of the kind envisaged by Lord Thomas and undertaken by the district judges in extradition cases.

60. We assume that the First-tier tribunal judge's setting a figure of 10 to reflect the public interest in the maintenance of effective immigration controls is confined to situations where section 117C considerations do not apply; that is to say, where the individual in question is not a foreign criminal within the meaning of section 117D of the 2002 Act. Whether this First-tier Tribunal judge adopts the same approach in foreign criminal cases is unclear, at least from the present decision. It is, however, plain that very serious difficulties indeed would arise, over and above what we have said already, were a points-based system to be attempted in respect of section 117C considerations.

61. We have seen that, at paragraph 79, the First-tier Tribunal judge says that "normally I would give this [effective immigration control] 10 points against the appellant". The judge does not explain the circumstances in which he would give more or fewer points. This is a further reason to doubt whether adopting a points-based system aids transparency.

62. Beginning at paragraph 90 of his decision, the First-tier Tribunal judge sets out the factors in the appellant's favour. As we have seen, he considered that the only relevant factor in this regard related to the difficulties that the appellant would face in Albania because he would need to relocate internally to an area of the country, away from his family. The judge gives that factor five points in the appellant's favour.

63. As far as we can see from paragraphs 90 to 94, the First-tier Tribunal judge's approach is to consider all relevant matters tending on the side of the appellant and then to give them an overall points score. If that is right, there is little or no merit in the system, even on the judge's own approach. If, on the other hand, the judge's points-based system involves setting notional maximum scores for discrete factors weighing in favour of the appellant, such as private life, family life and (in the latter case) the effect on the article 8 rights of others, then using the system risks producing an unlawful result by imposing a self-imposed limit on the amount of weight that can be given to each discrete factor. It also risks arbitrariness by precluding the possibility of regard being given to the interplay between various factors, which might produce a result that is greater than the sum of its parts.

64. In the present case, the unsuitability of a points-based approach can be seen most graphically in the First-tier Tribunal Judge's approach to the issue of delay.

65. Although the First-tier Tribunal judge makes brief reference to EB (Kosovo) v SSHD [2008] UKHL 41; [2008] Imm AR 713, he chose, for some reason, to concentrate on High Court judgments, including EOG v SSHD [2020] EWHC 3310 (Admin); [2021] Imm AR 564, which has been overturned by the Court of Appeal: [2022] EWCA Civ 307.

66. Lord Bingham in EB (Kosovo) addressed the issue of delay as follows:

> "13. In *Strbac v Secretary of State for the Home Department* [2005] EWCA Civ 848, [2005] Imm AR 504, para 25, counsel for the applicant was understood to contend, in effect, that if the decision on an application for leave to enter or remain was made after the expiry of an unreasonable period of time, and if the application would probably have met with success, or a greater chance of success, if it had been decided within a reasonable time, and if the applicant had in the meantime established a family life in this country, he should be treated when the decision is ultimately made as if the decision had been made at that earlier time. For reasons given by Laws LJ, the Court of Appeal rejected this submission, for which it held *Shala v Secretary of State for the Home Department* [2003] EWCA Civ 233, [2003] INLR 349 to be no authority. While I consider that *Shala* was correctly decided on its facts, I am satisfied that the Court of Appeal was right to reject this submission. As Mr Sales QC for the respondent pointed out, there is no specified period within which, or at which, an immigration decision must be made; the facts, and with them government policy, may change over a period, as they did here; and the duty of the decision-maker is to have regard to the facts, and any policy in force, when the decision is made. Mr Drabble QC, for the appellant, did not make this submission, and he was right not to do so.
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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.
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> 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. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship. Thus in *R (Ajoh) v Secretary of State for the Home Department* [2007] EWCA Civ 655, para 11, it was noted that "It was reasonable to expect that both [the applicant] and her husband would be aware of her precarious immigration status". This reflects the Strasbourg court's listing of factors relevant to the proportionality of removing an immigrant convicted of crime: "whether the spouse knew about the offence at the time

when he or she entered into a family relationship" see *Boultif v Switzerland* (2001) 33 EHRR 50, para 48; *Mokrani v France* (2003) 40 EHRR 123, para 30. A relationship so entered into may well be imbued with a sense of impermanence. 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. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes. In the present case the appellant's cousin, who entered the country and applied for asylum at the same time and whose position is not said to be materially different, was granted exceptional leave to remain, during the two-year period which it took the respondent to correct its erroneous decision to refuse the appellant's application on grounds of non-compliance. In the case of *JL (Sierra Leone)*, heard by the Court of Appeal at the same time as the present case, there was a somewhat similar pattern of facts. JL escaped from Sierra Leone with her half brother in 1999, and claimed asylum. In 2000 her claim was refused on grounds of non-compliance. As in the appellant's case this decision was erroneous, as the respondent recognised eighteen months later. In February 2006 the half brother was granted humanitarian protection. She was not. A system so operating cannot be said to be "predictable, consistent and fair as between one applicant and another" or as yielding "consistency of treatment between one aspiring immigrant and another". To the extent that this is shown to be so, it may have a bearing on the proportionality of removal, or of requiring an applicant to apply from out of country. As Carnwath LJ observed in *Akaeke v Secretary of State for the Home Department* [2005] EWCA Civ 947, [2005] INLR 575, para 25:

> "Once it is accepted that unreasonable delay on the part of the Secretary of State is capable of being a relevant factor, then the weight to be given to it in the particular case was a matter for the tribunal"

…”

67. It is impossible to reconcile the judgment of Lord Bingham with the First-tier Tribunal judge’s mechanistic approach of deducting one point for every year of delay in decision-making by the respondent. A delay of one year may well have little or no effect in any of the three ways described in paragraphs 14 to 16 of Lord Bingham’s judgment.

Conversely, it may, for instance, have resulted in the individual forming a significant private life with another person, thereby increasing the weight to be given to the individual's article 8 rights. Merely deducting a point for every year fails to address these possibilities.

68. The First-tier Tribunal judge appears to have approached the issue of delay solely by reference to the third of the ways described by Lord Bingham as being relevant; namely, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, where the delay has been shown to be the result of "a dysfunctional system which yields unpredictable inconsistent and unfair outcomes". However, the question of whether one has reached the "dysfunctional system" stage is not necessarily answered by deducting a point for each year of delay.

69. At paragraph 93, in addressing the factors in the appellant's favour, the First-tier Tribunal judge says he would have had regard to the delay in deciding the appellant's asylum claim; but for the fact that he had "already given this weight in reducing the public interest in immigration control. I will not double count it by giving it significance here".

70. We agree with Ms Ferguson that this approach is wrong. It resulted in the judge having no regard to the private life formed by the appellant whilst he was in the United Kingdom as a minor.

71. There is also merit in her submission that, even if one could adopt the points-based approach of the First-tier Tribunal judge, he failed to give proper weight to the factors described in paragraph 16 of EB (Kosovo), in that the delay in reaching a decision on the appellant's asylum claim was closer to four years than to three. This is a further example of the pitfalls inherent in the points-based approach of the judge.

72. At the hearing on 28 March, Mr Whitwell, for the respondent, said that the respondent did not oppose the ground of appeal concerning the First-tier Tribunal judge's approach to the article 8 proportionality balancing exercise. The respondent's stance on this issue is entirely understandable.

73. In conclusion, the decision must be set aside on the article 8 issue also.

74. For the avoidance of doubt, nothing we have said should be construed as casting any doubt on what we have called the "classic" balance sheet approach. On the contrary, that approach has been specifically encouraged in the immigration context by two Lord Chief Justices, as well as a former Senior President of Tribunals. Its use enables the reader (including any appellate court) to see readily the

factors that the judge has considered; and how these have been assessed.

E. DECISION

75. The decision of the First-tier Tribunal involved the making of an error of law. The appeal is accordingly allowed and the matter is remitted to the First-tier Tribunal, on the basis set out at paragraph 44 above (as regards the protection appeal); and on the basis that fresh findings are required in respect of article 8 ECHR.

Mr Justice Lane

The Hon. Mr Justice Lane
President of the Upper Tribunal
Immigration and Asylum Chamber

12 May 2022