



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/10695/2017

**THE IMMIGRATION ACTS**

**Heard at : Manchester Civil Justice  
Centre  
On : 22 February 2022**

**Decision & Reasons Promulgated  
On 23 March 2022**

**Before**

**UPPER TRIBUNAL JUDGE KEBEDE**

**Between**

**DW  
(ANONYMITY ORDER MADE)**

Appellant

**and**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Mr P Haywood, instructed by Duncan Lewis & Co Solicitors  
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals, with permission, against the decision of the First-tier Tribunal dismissing his appeal against the decision to refuse his human rights claim following the making of a deportation order against him.

2. The appellant is a citizen of Liberia, born on 14 January 1968. He lived in Liberia until around 1988 and then from 1998 until he came to the UK in 2001. He married his wife, TW, a British citizen formerly from Botswana, on 25 July 2003 and the couple have five British children aged from 17 to 7 years: D, born

on 10 October 2004; F, born on 19 January 2006; W, born on 13 February 2008; E, born on 23 April 2010; and A, born on 19 May 2014. The appellant's immigration history is lengthy and complex and can be summarised as follows.

3. The appellant entered the UK illegally on 19 October 2001 and claimed asylum a few days later. He was granted exceptional leave to remain until December 2005 owing to the country situation at the time, and on 11 October 2006 he was granted indefinite leave to remain in the UK. On 13 December 2007 he was naturalised as a British citizen. In 2008 he returned to the USA and was detained there for a few months before returning to the UK in 2009.

4. On 13 January 2015 a decision was made by the respondent to deprive the appellant of his British citizenship, owing to his failure to declare a previous conviction from the USA. That conviction was under a different name and was for robbery with a firearm/imitation firearm, for which he received a sentence of imprisonment of between 5 to 20 years. He was initially arrested on 12 December 1988 in the USA but he escaped pre-trial and was later arrested in the Netherlands on 23 December 1993 and extradited to the USA. He was convicted on 4 January 1995 and served several years in prison before being deported to Liberia in 1998, returning to the UK in 2001. At some stage the Secretary of State discovered the appellant's previous conviction in the USA and made the deprivation decision which was appealed by the appellant, unsuccessfully, resulting in a Deprivation Order made on 21 February 2017.

5. On 7 March 2017 the appellant was notified by the respondent that it had been decided to make a Deportation Order against him under section 5(1) of the Immigration Act 1971 because his presence in the UK was not conducive to the public good owing to his failure to declare his previous conviction. The appellant made representations in response on 21 March 2017 giving reasons why he should not be deported, based upon his length of residence in the UK, his lack of family and other ties to Liberia and his family life in the UK with his wife and five children. Those representations were treated as a human rights claim.

6. On 18 July 2017 the respondent made a decision to refuse the appellant's human rights claim. The respondent considered that the exceptions to deportation did not apply to him and that there were no very compelling circumstances over and above those in paragraph 399 and 399A of the immigration rules which outweighed the public interest in his deportation. The respondent accepted that the appellant had a genuine and subsisting relationship with his wife and five children, all of whom were British citizens, and accepted that it would be unduly harsh for his wife and children to relocate to Liberia with him. However it was not considered unduly harsh to separate the appellant from his wife and children and it was considered that he would be able to integrate in Liberia and establish himself there. The respondent considered that the appellant's deportation would not, therefore, breach his Article 8 rights. The respondent had regard to the appellant's medical issues but did not consider that the high threshold was met to make out an Article 3 claim.

7. The appellant's appeal against that decision was heard by the First-tier Tribunal on 14 December 2017 and was allowed by Judge Chambers on 21 December 2017, essentially on the basis of his family life in the UK with his wife and children. That decision was, however, set aside by Upper Tribunal Judge Bruce on the grounds that there had been a failure to show why the requirements of paragraphs 398-399 of the immigration rules were met and it was considered that the decision should be re-made in the Upper Tribunal.

8. The appeal then came before Upper Tribunal Judge Coker on 18 December 2018. The respondent conceded again, before the judge, that it would be unduly harsh to expect the appellant's wife and children to relocate to Liberia to be with him. The evidence before Judge Coker was that the appellant's wife worked as a mental health support worker and that the appellant played a primary role in the children's day-to-day care. Judge Coker had before her a report from an independent social worker dated 27 November 2018 and a report from a child and adolescent psychiatrist. There was also evidence that the appellant had been diagnosed with 'severe left ventricular systolic function (heart failure)', that he had been under the care of the cardiologist and heart failure team and that he was prescribed medication to improve his life expectancy. However Judge Coker found that the appellant would be able to access treatment in Liberia. She concluded that the impact on the children of the appellant's deportation was not sufficient to outweigh the public interest, owing to his offending and immigration history, and she concluded that he was unable to demonstrate very compelling circumstances such as to defeat the decision to deport him. The appeal was accordingly dismissed.

9. Judge Coker's decision was, in turn, appealed to the Court of Appeal, where it was set aside on the grounds that she had applied the provisions of the immigration rules applicable to "foreign criminals" (paragraphs A398-399D), contrary to the principles in the subsequently reported decision in SC (paras A398-399D: 'foreign criminal': procedure) Albania [2020] UKUT 187. It was also noted that Judge Coker did not have the benefit of recent developments in the law in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176, AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 and KB (Jamaica) v Secretary of State for the Home Department [2020] EWCA Civ 1385 and on that basis it was agreed that the appropriate course was for the determination of Upper Tribunal Judge Bruce to be varied to the extent that the appeal was remitted to the First-tier Tribunal. The First-tier Tribunal would determine afresh the proportionality of the appellant's deportation in the light of SC (Albania) and HA (Iraq).

10. The case was accordingly remitted to the First-tier Tribunal and the appeal then came before First-tier Tribunal Judge Jepson on 6 July 2021. Judge Jepson had before him a more recent report from an independent social worker, dated 18 June 2021, as well as the earlier report of 27 November 2018 and a report from Professor Zeitlin, a child psychologist, dated 16 August 2018, all relating to the appellant's children and how they would be impacted by his deportation. The judge also had medical evidence relating to the appellant, from his

consultant cardiologist dated 18 June 2021, as well as a report from Dr Maarten Bedert addressing the availability of medical treatment and medication in Liberia. The judge concluded that the appellant had not made out an Article 3 claim on the basis of his medical condition and the question of accessibility of medical treatment in Liberia and he found that the appellant's deportation to Liberia would not be disproportionate and would not breach Article 8. The judge accordingly dismissed the appeal.

11. The appellant sought permission to appeal Judge Jepson's decision on two main grounds: firstly with regard to Article 8, that the judge's assessment lacked clarity, it did not address the relevant question and did not take into account the respondent's concession that it would be unduly harsh for his wife and children to relocate to Liberia, it did not involve a proper analysis and findings on the expert evidence, it did not properly consider the impact of his deportation on his family members and it did not adequately assess his own position on return to Liberia in terms of his medical needs; and secondly, with regard to Article 3, that the judge misdirected himself on the applicable standard and by failing to treat Article 3 as an absolute right, and that he had erred in his analysis and evaluation of the medical evidence and had failed to consider the availability of and access to all the required medication and drugs.

12. Permission was granted in respect of ground two, with no specific findings in relation to the first ground.

13. The matter then came before me. Both parties made submissions.

### **Hearing and Submissions**

14. Mr Haywood relied, and expanded, upon his grounds of appeal, submitting in summary that the judge erred in his Article 3 assessment by an incorrect application of the law and by failing to consider the appellant's need for his full drugs regime and the impact of failing to access all his medication, and that the error in his Article 3 assessment infected the Article 8 balancing exercise. As for the judge's Article 8 assessment, that lacked clarity and failed to address the correct question and the judge erred by looking at the paradigm type of child, which was contrary to recent caselaw. Mr Haywood submitted that the decision had to be set aside and re-made, probably on a remittal to the First-tier Tribunal.

15. Mr Tan submitted that, whilst the judge improperly referred to a 'disproportionate breach' in relation to Article 3 that was not a material error since his overall approach to Article 3 was in line with the principles in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 and Paposhvili v Belgium [2017] Imm AR 867. As for the assertion that the judge had failed to consider the evidence of the appellant's medication regime not being fully available, the judge was correct to find that the evidence was not sufficient to support such a claim. There was therefore no material error in the judge's Article 3 assessment. As for Article 8 ground, the lack of any rigid structure in the judge's assessment was due to the complex and unusual

nature of the case and there was no material error of law on such a basis. The judge properly considered the appellant's case on the basis that it was only him who was being removed from the UK and had full regard to the expert reports in relation to the impact on the children. The judge took account of the medical evidence in assessing proportionality and gave consideration to relevant matters when assessing the public interest in the appellant's deportation.

## **Discussion and Findings**

16. It seems to me that the real concern with Judge Jepson's decision is not so much his engagement with individual parts of the evidence, but his assessment of the evidence cumulatively, his drawing together of his conclusions on the evidence and his overall analysis of that evidence within the relevant legal framework.

17. Mr Haywood's submission, with reference in particular to the assertion in his grounds at [28], was that the judge failed to examine the cumulative impact of deportation on the appellant's family as a whole. I am not entirely in agreement with that assertion because it seems to me that that was what the judge was doing from [70] to [82]. However what I do agree with is that there was a lack of a full and clear assessment of cumulative factors thereafter and it is not clear how the impact upon the family members weighed into the balancing exercise when considered alongside other relevant factors.

18. That is evident, it seems to me, when looking at the judge's findings from [86] onwards, where there is a particular lack of clarity in his assessment arising out of what appears to be a conflation of Article 3 and Article 8 considerations. The judge makes repeated references to proportionality in the context of Article 3 which lead to difficulties in ascertaining whether he was actually considering Article 3 or Article 8 matters. That is particularly evident at [86], [89] and [94]. I cannot agree with Mr Tan that the judge's references to 'disproportionate breach' in relation to Article 3 can be dismissed as immaterial and it seems to me that that is a misdirection which gives rise to further concerns. Although, as Mr Tan submitted, the judge commenced his Article 3 consideration at [86] with appropriate self-directions on the relevant test pursuant to the guidance in AM (Zimbabwe) and Paposhvili, he then appeared to stray into Article 8 considerations at [86] and [91] and it is simply not clear what assessment he was making. The latter part of [86] appears to be an Article 8 assessment relating to obstacles to integration on return to Liberia rather than an Article 3 assessment, yet any relevance of that assessment in relation to Article 8 does not appear to have been carried forward into the concluding balancing exercise at [95] to [100]. It is difficult to ascertain to what extent the appellant's medical issues and concerns about integration into Liberia formed part of a separate cumulative assessment of proportionality under Article 8 when taken together with other relevant factors.

19. Accordingly, even if it could be said, as Mr Tan suggested, that there is sufficient within the judge's findings on Article 3 to make his conclusions in that

respect legally sustainable, it seems to me that the Article 8 assessment is sufficiently confused by that conflation to support Mr Haywood's submission that the judge's decision as a whole is legally flawed.

20. Both parties agreed that it was likely that remittal would be the appropriate course if the judge's decision was set aside, although both also agreed that that depended upon where the error of law was found to arise. It seems to me that there is sufficient confusion and lack of clarity in the judge's decision to require a fresh hearing of all matters and that there is no part of Judge Jepson's decision which can be preserved. The question of the impact of deportation on the appellant's family members has to be considered in the light of the medical and other issues and I do not see how that part of the judge's decision can be preserved independently of the other findings and conclusions.

21. Accordingly, I set aside the decision in its entirety and remit the case to the First-tier Tribunal to be heard *de novo* before a different judge.

## **DECISION**

22. The decision of the First-tier Tribunal involved the making of an error on a point of law. The decision is set aside. The appeal is remitted to the First-tier Tribunal to be dealt with afresh, pursuant to section 12(2)(b)(i) of the Tribunals, Courts and Enforcement Act 2007 and Practice Statement 7.2(a), before any judge aside from Judges Chambers and Jepson.

Signed: S Kebede  
Upper Tribunal Judge Kebede

Dated: 3 March 2022