



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

**Appeal Number: UI-2023-003015
HU/51395/2022
IA/02196/2022**

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 10 October 2023**

Before

DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

**MR MINTESNOT TADESSE
[NO ANONYMITY ORDER]**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: Mr R Roberts (legal representative), instructed by Cromwell Wilkes

For the respondent: Ms S Cunha, a Senior Home Office Presenting Officer

Heard at Field House on 27 September 2023

DECISION AND REASONS

Introduction

1. I shall refer to the parties as they were below. The Secretary of State, who was the respondent below, appeals with leave against the decision of First-tier Tribunal Judge (FtTJ) Stedman signed on 18 March 2023 following a hearing on 27 February 2023.

2. Mr Tadesse, who was the appellant below, is a national of Ethiopia who was born on 18 October 1980. FtTJ Stedman allowed the appellant's appeal on Article 8 grounds against the Secretary of State's decision of 22 February 2022 refusing to revoke a deportation order made against the appellant dated 19 December 2019.

Background

3. The background as it appears from the FtTJ's decision can be summarised as follows:-
4. The appellant entered the UK on 9 September 2005 clandestinely and made a claim for asylum. In July 2008, he was granted temporary admission. In November 2010 the appellant was granted indefinite leave to remain outside of the immigration rules. His then partner and oldest son, Amanuale, born on 24 December 2005 were also granted leave to remain.
5. On 12 January 2012, the appellant was convicted of wounding with intent to commit grievous bodily harm and sentenced to a term of imprisonment of three years and four months. Automatic deportation provisions were triggered.
6. The appellant appealed against that deportation order unsuccessfully and became appeal rights exhausted. The appellant submitted further representations seeking revocation of the deportation order on the basis of his relationship with Miss Seifu and his second son, Dagem, who was born on 18 April 2015. Following judicial review proceedings, the respondent undertook to consider the further representations, but refused them in the decision and the challenge of this appeal.
7. The position by the date of the hearing before FtTJ Stedman appellant was no longer in a relationship with Ms Seifu, although they maintained good relations, that was in a relationship with Ms Mesfin who is a British citizen who has lived in the UK since childhood. The appellant and Ms Mesfin live together and have a child named Markon who is now who was at the time of the decision one year old.
8. The focus of the appellant's further submissions, and the decision of FtTJ Stedman, was the appellant's relationship with Dagem. The appellant was found by the judge to have a shared care arrangement with Ms Seifu, Dagem living with him three days per week.

First-tier Tribunal decision

9. The FtTJ received witness statements and heard oral evidence from the appellant, Ms Mesfin, and Ms Seifu. There were also additional supporting witness statements. An independent social worker (ISW), Winston Morson, had prepared reports on the instruction of the appellant, a main report dated 12 November 2019 and an updated report dated 24 June 2022.

10. The FtTJ directed himself to section 117C NIAA 2002, which provides in material part that in the case of foreign criminal such as the claimant who has not been sentenced to a period of imprisonment of four years or more, the public interest requires deportation unless exception one or exception two applies. Exception 1 is not relevant here. Exception 2 provides that it *“applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C’s deportation on the partner or child would be unduly harsh”*.
11. He recorded that the effect of the authorities is that application of section 117C should lead to a final result that is compatible with article 8. He further noted at [18] that *“the test of undue harshness under section 117C(5) of the 2002 Act bears the meaning attributed to it by the Supreme Court in KO (Nigeria) [2018] UKSC 53”*.
12. So far as the application of Exception 2 is concerned, the judge found at [20] the appellant and both witnesses to be honest and credible, that the appellant had a *“significant involvement in his son’s life”*, that he was *“involved in taking and collecting his son from school, taking him to after-school activities such as swimming, and would also take into the parking to visit friends, as well as a range of other normal parent-child activities”*. He found that the appellant was financially contributing to his son £150 per month, which amounted to a significant portion of his income. He found ([22]): *“the evidence demonstrated that removing the appellant from the life of his child would unquestionably result in a significant disruption to his life. In this case the child had experienced the history of separation and so it was arguable, as a matter of common sense, that the impact of breaking in our established pattern would be all the more impacting intangible. In practical terms, there would also be a loss of income for his mother and perhaps her ability to manage as a single parent.”*
13. At [23] the judge held:
23. My starting point in this appeal has been an awareness that the deportation of a parent will invariably be harsh and have a negative impact on the welfare of a child. The public interest must be accorded very significant weight if deportation is to serve its purpose and act as a deterrent: Hesham Ali. The correct approach is to recognise the best interests of the child are a paramount factor but not a determinative one: PG Jamaica [2019] EWCA CIV 1213 at [39].
14. At [24] the judge noted *“this was a case where the different pieces came together, and whilst deportation allowed for “real hurt” of the child, the expert evidence was particularly strong. This was a “sliding doors moment” for Dagem.”*
15. At [25] the judge held:
25. I gave considerable weight to the report of Mr Morton, an independent social worker. Mr Roberts referred me to a number of paragraphs of that report and that it was specifically the prerogative of the expert to speculate on the impact on the child. The removal of the appellant, he said, would present a “profound

impact on his well being across several areas“ and a “crushing blow” to the child. Society also had a duty to protect the child and the combination of factors meant that deportation was unduly harsh. On the careful assessment of the evidence as a whole, it was difficult to disagree with that proposition.

16. The judge went on at [26] and [27] to consider the position of Ms Mesfin and Markon and Ms Seifu, finding that weight should be attributed to the appellant’s relationship with all those individuals. At [27] he found that the public interest in deportation was outweighed by the appellant’s relationship with his current and former partner and both his children, albeit in particular his relationship with Dagem to which he attached “*most weight*”. At [28], he expressed his conclusion as being that the appellant’s deportation would amount to a disproportionate interference with the rights of the appellant and Dagem and Ms Mesfin and their son Markon, so that he allowed the human rights appeal.

Upper Tribunal hearing

17. The respondent’s original grounds of appeal were directed at what was asserted to be the FtTJ’s failure to make a finding and/or inadequate reasons for concluding that the effect of the appellant’s deportation on Dagem would be unduly harsh and/or failure to apply the proper threshold for ‘unduly harsh’ in the light of *HA (Iraq)* [2022] UKSC 22. Ms Cunha expanded on these points in her oral submissions. She acknowledged that the Supreme Court in *HA (Iraq)* had rejected the Secretary of State’s case as to the meaning of ‘unduly harsh’, but emphasised that the Supreme Court had still confirmed that the threshold was elevated and submitted that the FtTJ had failed to make a proper assessment of whether the threshold had been crossed in this case.
18. Without objection from the appellant, and with my leave, Ms Cunha also advanced additional grounds of appeal as set out in her application dated 26 September 2023. She argued that the FtTJ had misdirected himself as to the effect of *PG (Jamaica) v SSHD* [2019] EWCA Civ 1213 in stating that the best interests of the child were a paramount factor. Ms Cunha submitted that this was wrong in the light of *ZH (Tanzania)* [2011] UKSC 4 at [23]-[25] where the House of Lords explained that the best interests of a child are to be “*a primary consideration*” in immigration decision-making, not “*the primary consideration*” or “*the paramount consideration*”.
19. She also cited *A (A Child)* [2020] EWCA Civ 731 at [36]:

But that is not to say that the exercises performed in each of the jurisdictions are the same.

The statutory schemes under which they operate are substantially different – driven by very different policy considerations – and even the factual issues and assessments are not the same. Indeed, such assistance as there is in the authorities indicates that the functions of the family courts and the immigration and asylum tribunals are largely distinct and separate: see *Mohan v Secretary of State for the Home Department* [2012] EWCA Civ 1363, [2013] 1 WLR 922 approving the Upper Tribunal in *RS (immigration and family*

court proceedings) India [2012] UKUT 218 (IAC) per McFarlane LJ, Blake J. (President) and Upper Tribunal Judge Martin. As Black LJ remarked in Re H supra, even the approach to the exercise of judgement or risk evaluation is different. Furthermore, by section 55 of the Borders, Citizenship and Immigration Act 2009, the interests of a child are not paramount in the tribunal, they are a primary issue that does not take precedence over other issues. That of itself necessarily constrains the tribunal from understanding questions of risk in the same way as the family court where a child's welfare is paramount (assuming as in this case, the application being made is in respect of a child).

20. She argued that this paragraph also explains why care needed to be taken by the FtTJ in considering the ISW's report given that social workers will generally write their reports from the perspective of the functions of the care system and the family court, where the child's welfare is paramount, whereas that is not the case in the immigration system. She submitted that the FtTJ had erred in treating the ISW's report as determinative.
21. In response, Mr Roberts noted that he had the advantage over us as he was there. He submitted that there was no material error of law in the decision. He submitted that Winston Morson was instructed to give an opinion on impact and consequences. He accepted that there were mistakes in the judgment, but no material errors. It would have been better if there were a paragraph 25a in the decision making a clear finding about unduly harsh, but he submitted the judge had applied the right threshold. It did not matter that the judge had also carried out an Article 8 balancing exercise in relation to the other adults and children. His case is not about the other adults, it was about Dagem. The judge was heavily influenced by the social worker's report as he should have been. He was brought in to give his expert opinion on what losing his father would do to the boy. The expert talks about a profound impact on the child. The judge is fully entitled to give full weight to that.
22. As to the new grounds, Mr Roberts accepted that the reference to "paramount" is an error, but he submitted that it was clear that judge has understood the law because he goes on to say that it is "paramount" "but not determinative". Again, that is a clumsily written paragraph, but the judgment is not then imprinted with it. The judge did not elevate the rights of the child beyond where they should be. Mr Roberts submitted that the Secretary of State's case was 'gossamer thin'. The public interest in deportation was minimal given the nature of the offending and the fact that the offence happened a long time ago. The ISW evidence was strong and it was right to allow the appeal. There is no material error.
23. Ms Cunha in reply submitted that Mr Roberts had highlighted the errors in the judgment. She submitted that the errors were material and the FtTJ's reasoning on unduly harsh inadequate so that the respondent did not know why she had lost this case.

24. Ms Cunha submitted it could be remitted to the First-Tier, or retained in the Upper Tribunal but the passage of time suggested there might be further evidence so that the First-Tier would be appropriate.
25. Mr Roberts submitted that if there was anything wrong it should be remitted back to the first-tier, preferably to the same judge.

Analysis

26. The CA in *CI (Nigeria)* [2019] EWCA Civ 2027 summarised the previous case law on Part 5A of NIAA 2022 as follows at [20]:

The provisions of Part 5A, taken together, are intended to provide for a structured approach to the application of article 8 which produces in all cases a final result compatible with article 8: see *NE-A (Nigeria)*, para 14; *Rhuppiah v Secretary of State for the Home Department* [2018] UKSC 58; [2018] 1 WLR 5536, para 36. Further, if in applying [section 117C\(3\)](#) or [\(6\)](#) the conclusion is reached that the public interest "requires" deportation, that conclusion is one to which the tribunal is bound by law to give effect: see *Rhuppiah v Secretary of State for the Home Department* [2016] EWCA Civ 803; [2016] 1 WLR 4204, para 50; *NE-A (Nigeria)*, para 14. In such a case there is no room for any further assessment of proportionality under [article 8\(2\)](#) because these statutory provisions determine the way in which the assessment is to be carried out in accordance with UK law.

27. The Supreme Court in *HA (Iraq)* [2022] UKSC 22 summarised the position on the application of Part 5A as it had been arrived at in the case law prior to that decision as follows:

2. Foreign criminals who have been sentenced to terms of imprisonment of at least 12

months but less than four years (described in the authorities as "medium offenders") can avoid deportation if they can establish that its effect on a qualifying child or partner would be "unduly harsh": see section 117C(5) of the 2002 Act ("the unduly harsh test"). This exception to deportation is known as Exception 2. The meaning of the unduly harsh test was considered by the Supreme Court in its decision in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273.

3. Foreign criminals who have been sentenced to terms of imprisonment of at least four years (described in the authorities as "serious offenders") can avoid deportation if they establish that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" - see section 117C(6) of the 2002 Act ("the very compelling circumstances test"). As the very compelling circumstances must be "over and above" the exceptions, whether deportation would produce unduly harsh effects for a qualifying partner/child is relevant here too.

4. In *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207, the Court of Appeal held that a medium offender who cannot satisfy the unduly harsh test can nevertheless seek to show that the very compelling circumstances test is met. This was common ground before us and I shall proceed on the basis that it is correct.

5. The very compelling circumstances test requires a full proportionality assessment to be carried out, weighing the interference with the rights of the potential deportee and his family to private and family life under article 8 of the European Convention on Human Rights ("ECHR") against the public interest in his

deportation. It follows that a proportionality assessment will be carried out in all foreign criminal cases, unless the medium offender can show that Exception 1 (which relates to length of lawful residence and integration) or Exception 2 applies, in which case the public interest question is answered in favour of the foreign criminal, without the need for such an assessment.

28. The issue for the Supreme Court in *HA (Iraq)* in relation to the unduly harsh test was whether the Court of Appeal erred in its approach by failing to follow the guidance given by the Supreme Court in *KO (Nigeria)* and, in particular, by rejecting the approach of assessing the degree of harshness by reference to a comparison with that which would necessarily be involved for any child faced with the deportation of a parent. The Supreme Court held that a notional comparator test was the wrong approach and (at [41]) that what was required was the application of the *MK* self-direction in *KO (Nigeria)*:

“... ‘unduly harsh’ does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. ‘Harsh’ in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb ‘unduly’ raises an already elevated standard still higher.”

29. At [42] the Supreme Court noted that although the threshold was elevated, it was still not as high as that required for “*very compelling circumstances*” in s 117C(6) NIAA 2002.
30. I turn now to the judgment of the FtTJ in this case.
31. I have considered it carefully, reading the decision fairly and as a whole. I am afraid I am satisfied that there are a number of material errors in the judgment.
32. First, I am not satisfied that the judge properly directed himself in law as to the approach to be taken to “*unduly harsh*”. Given that the question of what the Supreme Court meant in in *KO (Nigeria)* [2018] UKSC 53 was the issue that reached the Supreme Court again in *HA (Iraq)*, the FtTJ’s direction to himself at [18] to apply the test according to the meaning given to it in *KO (Nigeria)* makes it unclear what legal direction the judge gave himself on that issue.
33. Secondly, looking at the rest of the judgment, it appears from the reference to deportation allowing for “*real hurt*” to the child in [24] and at [25] “*profound impact on ... well being*” and “*crushing blow*” that the judge was applying a relatively elevated threshold, but I remain uncertain as to whether he properly had in mind the threshold as it was explained in *HA (Iraq)*. This is not only because the FtTJ does not direct himself to *HA (Iraq)* or use the language of the *MK* direction anywhere, but also because it appears from the fact that he did not regard Dagem’s situation as determinative of the appeal, but went on also to weigh in the balance the position of Ms Mesfin, Ms Seifu and Markon before concluding that the appeal should be upheld that he did not consider that the effect on Dagem

alone would be sufficient to justify upholding the appeal. That suggests that the judge did not properly have the elevated threshold in mind.

34. Thirdly, that approach was also an error of law. The judge erred in law in carrying out a general Article 8 balancing exercise in relation to Dagem, Ms Mesfin, Ms Seifu, Markon and the appellant. As *CI (Nigeria)* and *HA (Iraq)* make clear, there is no room for an Article 8 balancing exercise in relation to Exception 2. If the Exception applies, the appeal succeeds. If the Exception does not apply, the appeal fails unless the appellant is able to meet the even higher threshold of 'very compelling circumstances'. Since the coming into force of Part 5A of the NIAA 2002, an appeal cannot succeed on the basis that the FtTJ apparently held it succeeded in this case, i.e. on the basis of cumulative Article 8 considerations none of which (subject to the points about the finding in relation to Dagem above) individually meets Exception 1 or Exception 2, or all of which together do not amount to 'very compelling circumstances'.
35. Fourthly, the judge's reasons for apparently concluding that the "unduly harsh" threshold was met are in my judgment inadequate. At [44] of *HA (Iraq)* the Supreme Court held that: "*Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.*" I agree with Ms Cunha that the FtTJ's reasons in this case are not adequate to show that he has made that informed assessment or why he has reached the conclusion he has in this case. Paragraph [25] reads as if the FtTJ thinks that the ISW has expressed the view that deportation would be unduly harsh and he then states that it is 'difficult to disagree with that proposition'. However, the ISW did not express the view that deportation would be unduly harsh, or not in those words anyway. As such, there is in reality no reason given by the judge for concluding that the unduly harsh threshold was met - the FtTJ appears simply to have made a mistake about what was in the ISW's report. The other actual quotations from the ISW's report included in the judgment are also only high-level expressions of opinion by the ISW. It is unclear from the judgment what actual effects on Dagem the judge had in mind in concluding that the unduly harsh threshold was met. There is nothing that shows the judge carried out the 'informed assessment' required.
36. Fifthly, I am also satisfied that there was a material error of law in the FtTJ's approach to the best interests of the child. The combination of the reference in [23] to best interests being a 'paramount' factor (albeit, somewhat contradictorily, 'not determinative') and the reference in [25] to society having 'a duty to protect the child' suggests to me that the FtTJ had failed to grasp the difference between best interests being "*a primary consideration*" and being "*the paramount consideration*" as explained in *ZH (Tanzania)* at [23]-[25]. It also suggests that the FtTJ had failed to grasp the difference explained in *A (A Child)* at [36] between the role played by a child's "*best interests*" in the Family Court (which is charged with enforcing the state's duty to children referred to by the FtTJ in this case)

and the role it plays in the immigration context of being a primary consideration that does not take precedence over other issues. As the Supreme Court observed at [37] in *HA (Iraq)*, the presumption is that the statutory provisions in Part 5A of the NIAA 2002 are consistent with the general principles relating to the ‘best interests’ of children. In other words, although the child’s best interests must always be taken into account as a primary consideration, the unduly harsh test in Exception 2 normally ensures that happens in a deportation appeal. Consideration of the child’s best interests does not therefore add weight to, or contribute anything towards, meeting the unduly harsh threshold as the FtTJ appears to have treated it as doing in this case.

37. I add one further point to deal with Mr Roberts’ argument that the nature of the appellant’s offending and the time that has passed since it occurred meant that the appeal should succeed. That argument is not consistent with Part 5A of the NIAA 2002 or the legal authorities. The Supreme Court in *KO (Nigeria)* concluded that the relative seriousness of the parent’s offending was not relevant to considering whether the unduly harsh threshold was met and there is no scope for a general Article 8 balancing exercise of the sort for which Mr Roberts’ contends. His submission amounts to a disagreement with the law as it is laid down by Parliament in Part 5A of the NIAA 2002 and does not assist the appellant in this case.

Disposal

38. For all these reasons, I find that the FtTJ erred in law and the decision must be set aside in its entirety.

39. Paragraphs 7.2 to 7.3 of the Senior President’s Practice Statement 2012 provides:

7.2 The Upper Tribunal is likely on each such occasion to proceed to re-make the decision, instead of remitting the case to the First-tier Tribunal, unless the Upper Tribunal is satisfied that:-

(a) the effect of the error has been to deprive a party before the First-tier Tribunal of a fair hearing or other opportunity for that party’s case to be put to and considered by the First-tier

Tribunal; or

(b) the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

7.3 Remaking rather than remitting will nevertheless constitute the normal approach to determining appeals where an error of law is found, even if some further fact finding is necessary.

40. I have also considered the guidance *AEB v Secretary of State for the Home Department* [2022] EWCA Civ 1512, where the Court of Appeal emphasised the importance of remitting a case where a party had been deprived of a fair hearing, the logic being that even if little further fact-finding is required, a party is still entitled to have a fair hearing before the

FtT and then enjoy a right of appeal to the UT if need be, rather than being required to go straight to the CA.

41. In this case, the errors I have identified mean that the fact-finding process needs to begin again. The necessary fact-finding may not be very extensive, but time has passed since the decision and it is particularly important the decisions in deportation cases such as this involving young children are taken on the basis of current rather than historic circumstances. It is therefore appropriate in my judgment for the appeal to be remitted to the First-tier Tribunal for re-hearing. There is no need for it to be remitted to the same judge, and doing so may lead to unnecessary delay. It is also difficult for a judge on a case such as this genuinely to start afresh as is required given the legal errors in this case. The remittal will therefore be to a different judge.

Notice of Decision

The decision of the First-tier Tribunal contains material errors of law and I set it aside. The decision is remitted to the First-tier Tribunal to be re-made before a different judge.

Signed H Stout

Date: 29 September 2023