Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/10560/2016
& PA/04415/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 6 January 2022	**On 2 March 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O A
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms J Isherwood, Senior Home Office Presenting Officer
For the Respondent: The respondent appeared in person and without a McKenzie friend

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the respondent, also "the claimant". Breach of this order can be punished as a contempt of court. A similar order was made in the First-tier Tribunal. We make this order because the case necessarily raises considerations about minor children and there is no legitimate public interest in their identity.

2. This is an appeal by the Secretary of State against a decision of the First-tier Tribunal allowing the appeal of the respondent, hereinafter "the claimant", against a decision of the Secretary of State refusing him leave to remain on human rights grounds.

3. An appeal by the claimant against a decision refusing him international protection, identified as PA 04415 2016, was before the First-tier Tribunal. The claimant had shown little interest in pursuing it and at paragraph 46 of the Decision and Reasons the First-tier Tribunal Judge recorded that the claimant "no longer pursued his protection claim". At paragraph 80 the Judge recorded that the claimant had "withdrawn his protection appeal" but there is no record of a notice being sent to the parties pursuant to rule 17(3) of the Tribunal Procedure Rules 2014. The decision on the protection claim was not the subject of any appeal before us but permission appears to have been given to appeal that decision. We mention it to make clear that it was not the subject of an appeal before us.

4. Before us the claimant confirmed that he was not represented and did not expect to be represented. His father attended to support him but did not act as a McKenzie friend.

5. We begin by considering the decision of the First-tier Tribunal Judge.

6. This notes that the claimant entered the United Kingdom with leave as a visitor in May 1994 when he was 11 years old. He returned to Ghana shortly afterwards but re-entered the United Kingdom in September 1994 and overstayed. For reasons that are not entirely clear he was given indefinite leave to remain in November 2000. He has siblings who are British citizens and other relatives in the United Kingdom. He visited Ghana in January 2013.

7. He has a son J, born in January 2008 who is about 14 years old. He is a British citizen and is the child of the claimant and his former partner.

8. He has a second son, JJ, who was born in March 2017 and so is now rising 5. The claimant has a close relationship with one G who is a British citizen. They have lived together for several years but she is not the mother of either of the claimant's children. The claimant has a close relationship with her son who is an adult.

9. The claimant has a criminal record. He was first arrested in January 2001 and pleaded guilty to one count alleging the possession of crack cocaine class A drug with intent to supply. He was also convicted of a similar count relating to heroin and was sentenced to 30 months' detention and a training order.

10. He was arrested in September 2003 and fined for possession of cannabis. He was in trouble again for possessing cannabis between being arrested and brought before the court on the other matter and so was on bail. He was also charged with possessing a class A drug.

11. Later, in October 2003, he was convicted of possessing drugs and in 2004 he was again arrested and charged with possession of cannabis and pleaded guilty and was fined.

12. He was fined for possessing cocaine in September 2004.

13. In 2005 he was fined for possessing cannabis and motoring matters. He was fined for possessing cannabis and convicted after a trial in 2007 and fined.

14. In November 2010 he was arrested and charged with driving offences for which he was fined.

15. He was in trouble again when he was charged with the supply of class A controlled drugs between dates in December 2013. He pleaded guilty and at the Crown Court sitting at Woolwich he was sentenced to three years' imprisonment on each count to run concurrently. This is the matter that led to the decision to deport him.

16. The sentencing Judge commented on the harm illicit drugs do to people who choose to take them and how they undermine social order because people commit crimes to pay for drugs. The Judge found that the claimant was an active street dealer.

17. A deportation order was made in May 2015 and in June 2015 he made a protection claim alleging that he would be killed in the event of his return to Ghana. That claim was "certified", presumably as clearly unfounded, but following the decision in **Kiarie and Byndloss [2017] UKSC 42** on 25 July 2017 the respondent issued a new or supplementary decision refusing him leave on human rights grounds and refusing his protection claim and maintaining the decision to deport him.

18. In January 2016 he was arrested again either when he was on licence or on bail, the Judge did not seem sure, and pleaded guilty to possession of cannabis and was subject to a conditional discharge. He was not recalled to prison.

19. The Secretary of State found his deportation conducive to the public good and in the public interest. The Secretary of State found the protection claim to be vague, inconsistent and incredible. The Secretary of State also found that the claimant was excluded from protection as a refugee by reason of his offending.

20. It was the claimant's case that he had a genuine and subsisting relationship with his two British children and that it was unduly harsh for the children for him to leave them and go to Ghana or to take the children with him. He had not produced any evidence about his relationship with his first child J for the Secretary of State to consider.

21. The claimant relied on a parental relationship with JJ and a close relationship with JJ's mother.

22. There were procedural difficulties in getting the case under way. When the case did come to be heard the claimant indicated that he was not pursuing his protection claim.

23. The First-tier Tribunal Judge heard from the claimant and his brother and friend and father. The mothers of his children did not attend. The Judge looked to the Rules and found that the claimant could not satisfy the requirements.

24. The claimant began his evidence by admitting that he had made a lot of mistakes growing up. Since leaving prison he had been doing youth work to give back to the community and had not been in trouble since 2016. He had nothing in Ghana.

25. It is not entirely clear what the claimant told the First-tier Tribunal Judge about the offence that led to the decision to deport him. He clearly pleaded guilty and he did not appeal the sentence. He denied taking drugs. He gave evidence about his relationship with his children.

26. The Judge set out findings beginning at paragraph 78.

27. The Judge found that the child J, had been the subject of family proceedings and the claimant had contact with him. The Judge found that the claimant did have a genuine and subsisting parental relationship with J. He had regular face to face contact as well as contact by social media. The Judge described the relationship as "positive".

28. The Judge did not have papers relating to the family proceedings but, after taking into account all the material he did have, including, particularly a letter from J and a statement from his mother, the Judge found it likely that it was in J's best interest for the status quo to be preserved so that J would live with his mother and stepfather, attend school and continue to have contact with his natural father, the claimant, on a frequent basis. The Judge regarded it as not contentious that contact with an absent parent, in the absence of countervailing considerations, is generally in a child's best interest.

29. The Judge did not have much evidence about the relationship the claimant enjoyed with JJ but the Judge accepted there was regular contact but found that there was an acrimonious relationship between the claimant and JJs mother. The Judge found there was a parental relationship and again the best interest lay in the child continuing to live with his mother but having contact with the claimant.

30. The Judge then asked himself if deportation was unduly harsh. The Judge's conclusion was clear. The Judge found there was family life with each of the children and regular and positive contact with the sons and that the impact of deportation would be harsh and contrary to their best interests. The Judge also said that the deportation "is likely to be most traumatic for J, who at 13 is already questioning why he cannot have a greater degree of contact with his father, and who has already experienced a lengthy period of separation". However, the Judge found that the deportation "will have a real and severe impact on their wellbeing, with likely long term consequences for their self-esteem and best interests, and future relationships. These are weighty considerations".

31. The Judge found that the claimant had a close relationship with a stepchild and the impact on the stepchild would be a compelling circumstance.

32. In his last paragraph of his decision the Judge said:

> "Balancing as I must the public interest in the [claimant's] deportation, I do not find that each of the factors or matters set out above are individually sufficient to amount to a very compelling circumstance, but that cumulatively they do meet the very compelling circumstances test".

33. The Judge then went on to allow the appeal on Article 8 grounds.

34. The difficulty highlighted in the Secretary of State's grounds of appeal and the difficulty that puzzles us is how the Judge can conclude that the consequence

of the claimant's deportation is not to cause undue harshness but there are nevertheless "very compelling circumstances" that outweigh the public interest in deportation.

35. We appreciate that the "very compelling circumstances" test is necessarily a backstop which might depend on a variety of factors including the cumulated effect of factors but the only points that are really weighty here are the relationships with the children and the Judge has found that disrupting them is not unduly harsh. The Judge is perfectly clear that he finds them very compelling circumstances but we are at a loss to see why.

36. We remind ourselves of the decision of the Court of Appeal in **HA (Iraq) V SSHD** [2020] EWCA Civ 1176 where Underhill LJ, Vice President of the Court of Appeal said of the "unduly harsh" test at paragraph 52 that:

> "it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6)."

37. We recognise that the Judge applied the "very compelling circumstances" test cumulatively and so included factors that do not bear on issues of undue harshness but even if it is possible on some facts to find that "very compelling circumstances" exist without creating "unduly harsh" consequences to children the Judge has not explained how they exist in this case, if in fact they do.

38. We reflected very carefully on this and reminded ourselves of the importance of not interfering with a decision unless it is wrong in law. Given the Judge's findings about the nature of the relationship between the claimant and his children it may be open to a Judge to conclude that the consequences of removal to be unduly harsh although we are far from saying that is the only possible finding. However this Judge did not find the consequences unduly harsh and we cannot work out why the Judge allowed the appeal. If the decision is not perverse then the reasoning is deficient.

39. The conclusion is unexplained and it ought to be explained and it is therefore wrong in law.

40. We considered carefully if this is a case where we should substitute a decision of our own based on the facts that had been found and can be followed. We have decided not to do that. There are several reasons for this. The claimant is representing himself. Although he conducted himself before us with courtesy, not to say charm, his observations were based on his seeking to behave properly before the Tribunal (a courtesy we appreciated) rather than anything to do with the lawfulness of the decision the Secretary of State complained of. His submissions were not helpful. This is not a case where there was any Rule 24 notice. That is not surprising in the case of a person who is not represented.

41. Given the concerns the Judge has about the impact of removal we are not satisfied that the Judge's finding that the effect of removal would not be unduly harsh is binding. It has to read in the context of the Judge's decision to allow the appeal for other reasons and we cannot follow the Judge's reasoning.

42. We have decided the fairest thing to do is to set it aside the decision in its entirety and direct that the human rights appeal be heard again. We wish to

make it quite clear that we are not hinting in any way what the outcome should be but the claimant is entitled to a decision, whichever way that goes, that can be followed and understood and he has not got one. It is always possible that circumstances change in relationships with children, even in quite a short space of time, and it may well be that the claimant will want to serve further evidence about his relationship with his children and particularly the child J who the Judge found would miss him very much. For all these reasons we set aside the decision and allow the Secretary of State's appeal to the extent that we direct the case be heard again in the First-tier Tribunal.

Notice of Decision

43. The Secretary of State's appeal against the decision of the First-tier Tribunal to allow the claimant's appeal in HU 10560 2016 is wrong in law. We ALLOW the Secretary of State's appeal, we set aside the decision of the First-tier Tribunal and we direct that the appeal be heard again in the First-tier Tribunal. No findings of fact are preserved.

44. We draw the attention of the First-tier Tribunal to the apparent failure to have issued an appropriate notice after the Judge's findings that the claimant's appeal in PA 04415 2016 had been withdrawn.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 7 February 2022