Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-001113
HU/52079/2021; IA/05909/2021

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On: 14 December 2022	**On 24 February 2023**

Before

THE HON. MRS JUSTICE THORNTON DBE
UPPER TRIBUNAL JUDGE KAMARA

Between

TN
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Sowerby, counsel instructed by Aristone Solicitors
For the Respondent: Mr D Clarke, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the appellant's appeal against the decision of First-tier Tribunal Judge Ford, promulgated on 20 January 2022.

2. Permission to appeal was granted by Upper Tribunal Judge O'Callaghan on 17 May 2022.

Anonymity

3. An anonymity direction was made previously owing to references to the appellant's historic mental health issues and is reiterated below for the same reason.

Background

4. The appellant is a national of Jamaica. He arrived in the United Kingdom on 10 July 2010, aged sixteen, with leave to enter as the dependent child of his mother. The appellant was granted indefinite leave to remain on 2 January 2013.

5. The appellant was convicted of a robbery in 2012 and of destruction of property and using threatening or abusive behaviour in 2013. He received community punishments for those offences. He was convicted of possession of heroin and crack cocaine with intent to supply as well as for possession of a bladed article in a public place and was sentenced to three years and four months' imprisonment on 12 April 2019.

6. The Secretary of State initially refused the appellant's human rights claim on 20 October 2019. That decision was supplemented by a further decision dated 22 March 2021, which is the subject of this appeal.

The decision of the First-tier Tribunal

7. Before the First-tier Tribunal, the appellant did not rely on mental health issues. According to the skeleton argument dated 4 August 2021, drafted by Mr Zeeshan Raza, the issues to be determined were whether the appellant was socially and culturally integrated in the UK, whether there were any very significant obstacles to the appellant's integration in Jamaica, whether the appellant had a genuine and subsisting relationship with his partner, whether the effect of the appellant's deportation was unduly harsh on his partner and whether there were very compelling circumstances. The First-tier Tribunal judge did not accept that the appellant met any of the statutory exceptions to deportation nor that his deportation was a disproportionate outcome.

The grounds of appeal

8. The grounds of appeal to the Upper Tribunal raised three areas of concern. Firstly, that the judge's assessment of unduly harshness was materially flawed, including that the judge did not follow the guidance in *HA (Iraq)* [2020] EWCA Civ 117 nor *MI (Pakistan)* [2021] EWCA Civ 1711. Secondly, the judge's assessment of whether the appellant was socially and culturally integrated was materially flawed. Lastly, the judge erred in carrying out her assessment of proportionality as well as whether there were very compelling circumstances.

9. Permission to appeal was granted on the basis sought.

10. The respondent forwarded a Rule 24 response on 22 September 2022 as well as on 17 October 2022. It suffices to say that in both responses, the appeal was opposed.

11. On 13 December 2022, the appellant's solicitors requested that the record of proceedings from the First-tier Tribunal hearing be made available for the error of law hearing. However, the Upper Tribunal's administration team was unable to locate this document on the CCD database.

The hearing

12. In terms of preliminary issues, Mr Sowerby explained that he was seeking the record of proceedings in relation to whether the Secretary of State's representative or the judge went behind the acceptance in the decision letter that the appellant and his wife met when the appellant was lawfully in the United Kingdom. Mr Sowerby asserted that a concession was made and was not withdrawn until the submissions made by the Home Office Presenting Officer. Mr Clarke, with reference to the decision letter, disputed that any concession as to there being a qualifying relationship was ever made. We decided to proceed in the absence of the ROP, preferring to hear full submissions from each representative on the point. Otherwise, Mr Sowerby had not been provided with the appellant's bundle before the First-tier Tribunal and borrowed a paper bundle from the panel. In addition, Mr Sowerby had not been provided with the Rule 24 response dated 22 September 2022, which we afforded him the opportunity to peruse the in advance of the hearing.

13. We heard detailed submissions from both representatives which we have taken into consideration in reaching our decision. Mr Sowerby relied heavily on the skeleton argument drafted by Ms Sangeetha Iengar. For his part, Mr Clarke addressed, at length, all the criticisms made in the Upper Tribunal grounds. Mr Sowerby responded briefly to the some of the points made.

14. At the end of the hearing, we reserved our decision.

Decision on error of law

15. We will discuss the grounds in the order in which they were made.

16. The first ground contains three criticisms. Firstly, it is said that in assessing whether the appellant's removal was unduly harsh on his wife, the judge erred in adopting an impermissible notional comparator test and thus failed to be guided by *HA (Iraq)* and *MI (Pakistan)*. Secondly, that the judge ought to have found that the commitments of the appellant's wife were 'capable of rendering' the appellant's deportation unduly harsh. Thirdly, that the judge went behind a concession made by the respondent when she found that the relationship with his wife was not formed until after the deportation order was served.

17. Regarding the judge's assessment of undue harshness, we accept that the alleged error is made out. At [80], the judge posed the following question, '*If the Appellant is deported, will she face a degree of harshness that goes beyond the harsh impact of serious offending on the partner of any foreign national?*

18. Furthermore, at [96], the judge concluded, '*The impact on A does not go beyond the impact on any British national who enters into a relationship with a foreign criminal facing deportation to Jamaica*.'

19. We accept that the comments by the judge clearly indicate that she had in mind a notional comparator. Paragraph [31] of *HA* confirmed the position on this issue.

> *First, I consider that far too much emphasis has been placed on a single sentence in Lord Carnwath's judgment and that if his judgment is considered as a whole it is apparent that he was not intending to lay down a test involving the suggested notional comparator. It is correct that in para 23 of his judgment Lord Carnwath was recognising that the unduly harsh test involves a comparison, but the comparison made was between the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is connoted by the requirement of "unduly" harsh. As Underhill LJ pointed out, Lord Carnwath was not seeking to define the level of harshness which is "acceptable" or "justifiable". Had this been his intention he would have addressed the matter in considerably more detail and explained what the relevant definition was and why. Similarly, if he had been intending to lay down a test to be applied in all cases by reference to the suggested notional comparator he would not only have so stated but he would have explained the nature of and justification for such a test. The reference to the harshness which would be involved for "any child" is to be understood as an illustrative consideration rather than a definition or test.*

20. We find that the second matter raised in ground one amounts to little more than disagreement with the judge's conclusion that the removal of the appellant would not have an unduly harsh effect on the appellant's wife. The grounds refer only to the church and community work of the appellant's wife, stating that this was not taken into consideration by the judge. Contrary to what is said in the grounds, at [95], the judge took into consideration the Christian mission of the appellant and his wife as well as describing the wife as a 'spiritual and socially aware individual.' Furthermore, at [27], the judge sets out the arguments made on the appellant's behalf which include reference to his ties and those of his wife and at [48-49] describes and accepts their activities within the church and the community. At [69], the judge confirms that she has considered all the evidence before her. In considering whether the judge erred in concluding that the unduly harsh test was not met, we remind ourselves of the authoritative definition of that test confirmed in *KO (Nigeria)* [2018] UKSC 53

> *27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:*
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> > *"By way of self-direction, we are mindful that '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."*

21. Mr Sowerby did not argue that the inability of the appellant's wife to continue her religious and community activities in the United Kingdom amounted to unduly harsh circumstances. Instead, he suggested that the judge accepted that the effect on the wife would be 'catastrophic.' This is far from the case. At [64], the judge sets out the evidence she heard and merely repeats what she was told by the appellant's wife. There is no indication that the judge accepted that the effect of the appellant's removal would be catastrophic. Given the test endorsed in *KO*, the judge did not err in concluding that the effect on the appellant's wife did not meet this elevated threshold.

22. We do not accept that the judge went behind a concession which was said to have been made in the decision letter. The letter stated that 'it was accepted that your relationship with A was formed when you were in the UK lawfully and your immigration status was not precarious.' The letter goes on to say, 'It is not accepted that you have a genuine and subsisting relationship with A.' While the respondent's view might initially appear contradictory, this is explained by the reasons set out in the decision letter as well as the history of the relationship given by the appellant and his wife. We note that the relationship between the appellant and his wife was initially a friendship, and that the courtship began only after the appellant was remanded in prison and was confined to telephone calls, letters, and prison visits. In addition, at the time of the decision, the respondent did not accept that the appellant had an established family life with his wife. The judge found, at [93], that the appellant's friendship with his wife transformed into a romantic relationship in March 2020 and that the couple married in March 2021 after the appellant was released from prison [94]. The deportation order was signed in October 2019. The judge's findings differ little from those of the Secretary of State, albeit the judge accepted that, by the time of the hearing, the appellant had established a family life with his wife. It is worth mentioning that the appellant was represented by Mr Adam Pipe of counsel before the First-tier Tribunal who would have been able to make submissions or raise an objection if it was felt that the Presenting Officer was straying from a concession set out in the decision letter. Mr Pipe drafted the permission grounds to the First-Tier Tribunal but makes no mention of whether this matter was addressed in

his submissions or whether an objection was raised at the time. In any event, we find that respondent's concession related only to when the appellant's friendship with his wife commenced and went no further as is apparent from the remainder of the Secretary of State's comments in the decision letter.

23. As indicated above, we accepted that the judge erred in referring to a notional comparator when assessing the issue of undue harshness. We find that this error was immaterial for the following reasons. There is no challenge to any of the judge's findings of fact. Those findings include that emotional and practical support will be available from the appellant's family in the United Kingdom as well as the appellant's maternal uncle in Jamaica, that the couple have skills, qualifications and are in good health. Given the elevated test approved in *KO*, we find that had the judge not misdirected herself, it would have made no difference to the outcome of her assessment of undue harshness.

24. In the second ground, it is argued that the judge's assessment of whether the appellant was socially and culturally integrated in the UK was materially flawed in several respects. It is said that the judge erred in relying on the appellant's criminality; that she erred in disregarding his rehabilitation from the assessment and she was wrong to conclude that he was not socially and culturally integrated.

25. As a starting point, it is accepted in the grounds that the appellant cannot meet the requirements of section 117C (4) of the 2002 Act because he has not been lawfully resident in the United Kingdom for most of his life.

26. The judgment in *CI (Nigeria)* [2019] EWCA Civ 2027 is said to be authority for the proposition that criminality is not relevant to integration. What is said at [78] of that judgment indicates otherwise.

> *'… While criminal offending may be a result or cause of a lack or breakdown of ties to family, friends and the wider community, whether it has led or contributed to a state of affairs where the offender is not socially and culturally integrated in the UK is a question of fact…'*

27. It follows that the judge did not err in taking into consideration the appellant's offending which took place when he was aged in his twenties, along with other relevant matters. Other relevant matters considered by the judge include that the evidence was that he had a good childhood, that he suffered mental health issues which caused him to drop out of university and that there was substantial evidence that he had made efforts to turn his life around. While the judge stated at [85] that rehabilitation was not an aspect of integration and that she would consider it elsewhere in the decision, she nonetheless had regard to rehabilitation while considering integration, at [88] as well as at [97] when considering whether there were very compelling circumstances. The remaining criticism in the second ground amounts to little more than disagreement with the judge's decision. Yet, there was little in terms of evidence before

the judge which went to the appellant's integration. The judge's conclusion on this issue was one which was open to her on the evidence and cannot be characterised as irrational.

28. Lastly, in ground three, it is contended that the judge failed to weigh all relevant matters in assessing whether there were very compelling circumstances. It is argued that the judge failed to set out all the factors and conduct a balancing exercise. We find that the judge addressed the relevant matters earlier in the decision while discussing whether the appellant met the private life and family life exceptions to deportation, and we accept that there was no need for her to repeat the conclusions already reached. There is little merit in the suggestion in the grounds that the judge failed to adequately weigh the appellant's financial independence. While the judge made no finding either way, we note that this is a neutral factor which would have no material impact on the overall assessment. The grounds assert that the judge failed to consider the appellant's valuable contribution to society. This matter was considered by the judge, including at [71], where there was reference to the appellant's work in supporting young people in his church and in the community to avoid them engaging in behaviours which had led to his criminal conviction.

29. We have been guided by the decision in *Thakrar* [2018] UKUT 00336 and note that it was never argued on the appellant's behalf that his deportation would amount to an irreplaceable loss to the community owing to his community activities.

30. The grounds assert that the judge failed to consider the entirety of the judge's sentencing remarks including positive aspects, his guilty plea, his remorse. The judge specifically records that all the evidence before her has been considered and there are many references to the positive steps taken by the appellant and his rehabilitation throughout the decision. It is further asserted in the grounds, that the judge failed to assess the best interests of the appellant's minor sister. This is simply not the case. While the judge may not have used that phrase, at [99-101], she considers, in adequate detail, the appellant's claim to a family life with his mother, stepfather and his younger sister. The judge was entitled to find that appellant had formed a family unit with his own wife and that his sister's primary carers were her parents. It is claimed in the grounds that the judge failed to consider the appellant's mental health issues, despite it being accepted by counsel at [36] that those issues were historic and were not relied upon. Similarly, it is argued that the judge failed to consider the impact of the appellant's deportation on close family members, the church and society. Yet the grounds refer to no evidence that the human rights of those groups would be adversely affected by the appellant's deportation. The assertion in the grounds that the judge failed to apply the guidance at {75} of *Maslov* is misconceived given that the appellant has not spent all or the major part of his childhood and youth in the United Kingdom, having arrived aged fifteen and having resided in this country for twelve years at the time of the hearing before the First-tier Tribunal.

31. We find that the judge made no material error of law and uphold her decision.

Decision

The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal is upheld.

Direction Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

Signed: T Kamara Date: 20 December 2022

Upper Tribunal Judge Kamara

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email