



**IN THE UPPER TRIBUNAL**  
**IMMIGRATION AND ASYLUM**  
**CHAMBER**

**Case No: UI-2022-000871**  
**First-tier Tribunal No: PA/53525/2021**  
**IA/09139/2021**

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**  
**On the 11 March 2023**

**Before**

**UPPER TRIBUNAL JUDGE HANSON**

**Between**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**OMAR GEBRESS MOHAMED**  
**(NO ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Tan, a Senior Home Office Presenting Officer.  
For the Respondent: No appearance – see below

**Heard at Manchester Civil Justice Centre on 7 February 2023**

**DECISION AND REASONS**

1. The Secretary of State appeals with permission decision of First-tier Tribunal Judge Sweet ('the Judge'), promulgated following a hearing at Manchester on 7 February 2022, in which the Judge allowed the appellant's appeal against the refusal of his application for leave to remain on human rights grounds relied on as an exception to the order for his deportation from the United Kingdom.
2. It is recorded above that there was no attendance on behalf of Mr Mohamed. On 6 February 2023 I received notice that Mr Mohamed had passed away in January. The appeal has proceeded as it is not Mr Mohamed's appeal at this stage, it is the appeal of the Secretary of State. The Tribunal made it known that it would be understandable in all the circumstances if Mr Mohamed's representatives did not attend the hearing. Their response was to confirm that they will not attend but

they placed reliance upon the Rule 24 reply filed in response to the Secretary of State's grounds, of which proper notice has been taken.

3. Mr Mohamed was a citizen of Eritrea. There is one child specifically mentioned, Ahmed, who attained the age of 18 in January 2022 and who was, therefore, at the date of hearing, an adult. The Judge records that there are two other children who were under the age of 18 at the date of the submissions made by Mr Mohamed in 2015.
4. Mr Mohamed was married, and it was accepted by the Secretary of State in the refusal letter that it would be unduly harsh for his wife and Ahmed to live in Eritrea. The issue before the Judge was whether it was unduly harsh for them to remain in the United Kingdom if Mr Mohamed is deported.
5. The Judge finds at [31] that the wife's health conditions were not such that it required her husband to remain in the United Kingdom, as she could clearly access relevant support. The Judge finds there is a close relationship between Mr Mohamed and the children [32]. At [34] the Judge writes:
  34. Finally, I take into account the respondent's considerable delay in making their decision, when the previous submissions on the appellant's behalf were made in January 2015. Not only were the children all under the age of 18 at the time, but the length of time since the respondent made its final decision in July 2021 has served to diminish the public interest in deporting the appellant and to enhance his private life/family life in the UK. The impact of this delay is set out in the cases of **EB (Kosovo) [2008] UKHL 41, Agyarko [2017] UKSC 17 and Jeunesse [2015] 60 EHRR 17.**
6. The Secretary of State sought permission to appeal on the following grounds:
  1. The respondent submits that the Judge of the FTT materially erred in allowing the appeal and failed to identify on what basis he allowed the appeal.
  2. The respondent submits that the Judge of the FTT failed to make any findings on whether any of the Exceptions to deportation under Para 399 or 399A where met.
  3. The Judge directed himself to Para 398 and 399 of the Immigration Rules, however the Respondent submits that he erred in considering Para 399 as all of the appellant's children were over the age of 18 by the date of the FTT hearing and therefore not qualifying children for the purpose of Para 399 or Sec 117C.
  4. Although the Judge of the FTT found that it would be unduly harsh for the appellant's wife or any of the children to go to Eritrea, he failed to give adequate reasons for finding it would be unduly harsh for the appellant's wife to remain in the UK with the children as required under Para 399 or Sec 117C(5).
  5. Although there was evidence of the appellant's wife's medical conditions, the Judge of the FTT found that these did not necessitate the appellant's presence in the UK.
  6. The respondent submits that the "unduly harsh" test under Para 399 or Sec 117C is a high one. The need to establish very compelling circumstances over and above the Exceptions to deportation under the Immigration Rules and Sec 117C raises the threshold even higher.
  7. The respondent submits that the Judge of the FTT failed to identify any sufficiently compelling circumstances which outweigh the public interest in deportation.
  8. Whilst remaining in the UK without the appellant will obviously have an emotional impact on the appellant's wife and children, the respondent submits that the Judge of the FTT failed to give any reasons why there would be unduly harsh consequences for them.

9. There is no evidence that any of the children (now adults) have any particular health or support needs. Although they are still part of the family unit, they are all developing independent lives, successfully pursuing their education and career paths.
10. Whilst the Judge of the FTT places weight on the SSHD's delay in making this decision, the delay is addressed in the decision letter, and it is accepted that the delay is unfortunate. However the respondent submits that the Judge has failed to make any findings on how the appellant has been materially disadvantaged or why this alone amounts to very compelling circumstances, given that the appellant (and his family) have always been aware that the SSHD was seeking to deport him.
11. The respondent submits that the decision of the FTT is materially flawed and that it should be set aside.

7. The relevant parts of the Rule 24 response are as follows:

Response to the Appellant's ground(s)

Ground 1 - erroneous consideration of paragraph 399

4. The Appellant (A) argues, simultaneously, that the FTJ erred in their consideration of paragraph 399 because R's children were over 18 and that R was not disadvantaged by A's lengthy delay in considering this case.
5. R made his initial submissions in 2015. Further submissions were made in 2020 and 2021. All three submissions were considered and refused by A in her decision - the decision appealed to the FTJ.
6. A delayed her decision on the initial 2015 submissions for around 6 years. At the time of the initial submissions, 2015, all of R's children were minors. R does not consider this, at paragraph 3 of her grounds, A states that: All of [R's] children were over the age of 18 by the date of the FTT hearing and therefore not qualifying children for the purpose of Para 399.
7. At paragraph 10, A states that: The [Appellant] submits that the Judge has failed to make any findings on how [R] has been materially disadvantaged [by the delay].
8. A argues that R's children are no longer qualifying children but also that R has not been disadvantaged by her 6 year delay.
9. The FTJ put this succinctly at paragraph 34 of the decision: Finally, I take into account that [A's] considerable delay in making their decision ... the children all under the age of 18 at the time.
10. This is, plainly, a clear finding on the material disadvantage R has faced. But for A's delay, R's children would have been under 18 and qualifying children under paragraph 399.
11. Further, the FTJ correctly directed themselves to EB (Kosovo), Agyarko and Jeunesse. These three cases confirm that the public interest diminishes in cases of undue delay. The FTJ was entitled to reach their decision and their reasoning was adequate.
12. FTJ Thapar, in refusing permission, stated: Contrary to what is submitted in the grounds, there was ample evidence before the Judge from which he was entitled to allow the appeal based on his reasons which he was unarguably entitled to make on the evidence before him.
13. The FTJ was entitled to find that R's children were qualifying children as they were under 18 at the date of the 2015 submissions and Ahmed, R's youngest child, was under 18 at the date of the 2020 and 2021 submissions.
14. The FTJ finds, at para 33, that the family unit could not maintain contact with R if they were to remain in the UK and that there was little prospect of

meeting in a third country. This reason, the total breakdown of the family unit, is well reasoned and more than adequate to satisfy the 'high bar' of the 'unduly harsh' test. This is true regardless of the fact that the children are now over 18. It is trite law that – when proportionality is considered under Article 8 ECHR – rights do not cease to be protected by the Convention simply because children turn 18; *Singh & Another v SSHD* [2015] EWCA Civ 630.

15. The FTJ has given adequate reasons for concluding that the exception in para 399 is met. This is contrary to A's assertion that the FTJ "failed to make any findings". The FTJ has made a clear finding and given a clear reason. Ground 2 – failure to give adequate reasons
16. At paragraphs 7 and 8 of her grounds, A states that the FTJ failed to give any reasons. This is plainly false.
17. The FTJ found that A's removal would result in the breakdown of the family unit, paragraph 33, and that A's unreasonable delay diminished the public interest in R's removal, paragraph 34.
18. Both reasons are sufficient to satisfy the 'unduly harsh' test in paragraph 399 and the test in paragraph 398, that R's circumstances are very compelling over and above those described in paragraph 399. Rule 15(2A)
19. At this time, the Respondent does not intend to provide any further documents.
20. The Respondent requests an oral hearing at the earliest opportunity.

## **Discussion**

8. The Judge refers to the initial submissions having been made in 2015 and a final decision being made in 2021 indicating a delay of six years. Whilst that may be correct looking at the chronology the appellant's Rule 24 response acknowledges further submissions were also made in 2020 and 2021. The effect of making further submissions is that the application will be considered by the decisionmaker again, taking into account the additional as well as the earlier submissions. What the Judge arguably failed to do is to factor into the comments regarding delay the full chronology or to make any finding as to why any delay is unlawful. In fact there is no finding to this effect. The Judge was entitled to find that the rights being relied upon by Mr Mohamed should be given greater weight if the weight to be given to the public interest in his deportation is reduced, for which adequate reasons must be given. There is merit in the Secretary of State's argument that a reader of the determination is unable to properly ascertain how Mr Mohamad has been materially disadvantaged or why, if this has occurred, it warranted the weight being placed upon the delay which the Judge did, sufficient to outweigh the public interest.
9. Of more concern is the Judge's failure to properly analyse and determine the issues pursuant to section 117C of the Nationality, Immigration Asylum Act 2002. Recent case law has confirmed the correct interpretation of the unduly harsh test – see *HA (Iraq) and Others* [2022] UKSC 22. The Judge was required to properly assess why the consequences of the remaining family staying in the UK whilst deportation occurred crossed the necessary threshold. I find the determination is infected by error of law in the failure to Judge to properly analyse this issue by reference to the correct test.
10. A more fundamental point that arises is the failure of the Judge to consider and determine the appeal on the basis of the situation that existed at the date of the hearing. The Judge refers to the fact that the children were minors when the application was made in 2015 but the decision was made in 2021 and at the date of the hearing before the Judge, the relevant age in a human rights appeal, there

were no minor dependent children. The Judge considering paragraph 399 when the children were not under the age of 18 is therefore a legal error.

11. There is insufficient reference in the determination to any issues or consequences of deportation that would make it unduly harsh, or which establishes very compelling circumstances sufficient to outweigh the public interest. The determinations focus appears to be on finding reasons to allow the appeal rather than undertaking the necessary required balancing exercise, applying correct legal principles to the facts that existed at the relevant time.
12. I do not find the Rule 24 response provides a sufficient counterargument to allow me to find that the identified errors are not material. On that basis I find the Judge has erred in law for the reasons set out in the grounds seeking permission to appeal and the grant, and I set the decision aside.
13. In terms of the future conduct of this appeal; the appeal will have to be re-heard which means it requires consideration of the personal right that would ordinarily vest in Mr Mohamed. He has, however, died, and in accordance with the guidance provided by the Tribunal in FZ (HR appeal, death) [2022] UKUT 00071 I find that the appeal no longer exists. There is therefore nothing on which the Upper Tribunal is required to make any further findings.

### **Notice of Decision**

14. In light of the fact Mr Mohamed, since the making of his human rights appeal, has subsequently died, the appeal no longer exists and must be recorded as having come to an end.

**C J Hanson**

Judge of the Upper Tribunal  
Immigration and Asylum Chamber

**7 February 2023**