IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2021-000527
(HU/08206/2020)

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 June2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

GREGORY TODD
(no anonymity order made)

Respondent

Representation:

For the Appellant: Mr A. McVeety, Senior Home Office Presenting Officer
For the Respondent: -

Heard at Manchester Civil Justice Centre on 30 May 2023

DECISION AND REASONS

1. The Respondent is a national of Jamaica. On the 13th of July 2021 the First-tier Tribunal (Judge Lang) allowed, on human rights grounds, his appeal against a decision to refuse to revoke a deportation order against him. The Secretary of State now has permission to appeal against that decision.

2. The facts of Mr Todd's case can be shortly stated. In September 2016 he was deported from the United Kingdom to Jamaica, where he has remained ever since. His deportation followed his conviction in August 2013 for possession of Class A drugs with intent to supply, for which he was sentence to three years and six months in prison. Mr Todd now seeks to come back to the United Kingdom in order to be with his wife and two children, all of whom are British nationals.

3. In pursuing his application for the deportation order to be revoked, Mr Todd recognised that he had already lost such an appeal. On the 14th of May 2018 the First-tier Tribunal (Judge M Davies) had dismissed his first attempt to have the deportation order revoked. This time round, Mr Todd relied on the following matters to submit that the First-tier Tribunal could properly depart from the findings made by Judge Davies:

    i) That there was now something of a changed legal landscape in that the proper approach to such cases had been clarified by the Court of Appeal in the decision of HA (Iraq) [2020] EWCA Civ 1176 and the by the Supreme Court in HA (Iraq) [2022] UKSC 22;

    ii) The challenges faced by Mr Todd's wife in looking after their two children had become all the more acute, since their daughter, born in December 2017, had serious health issues. She had a heart defect which had necessitated a number of procedures and treatments, and this was making it increasingly difficult for Mrs Todd to look after the children without the support of her husband;

    iii) The passage of time lessened the public interest in maintaining the deportation order.

4. By her decision Judge Lang agreed the cumulative effect of those three of those reasons was sufficient to justify a *Devaseelan* departure from the findings of Judge Davies. She found that at the date of the appeal before her, the refusal to revoke the deportation order had been shown to be disproportionate. In particular she found that it had been shown that the decision would have 'unduly harsh' consequences for this family.

5. The Secretary of State now appeals on the following grounds:

    (i) The passage of time in itself is not a basis for finding that the deportation order should not continue, even in the case where a 10 year period has passed since the making of that order, which in any event is not the case here: EYF (Turkey) v SSHD [2019] EWCA Civ 592. The correct approach is to undertake a balancing exercise including the factors set out in rule 390;

    (ii) In making its finding that it would be unduly harsh for Mr Todd's children to remain in the UK in his absence the Tribunal refers to all of his children, despite only having make particularised findings in respect of his daughter;

    (iii) There is no finding that the child will not be able to travel to visit her father in Jamaica in the future;

    (iv) It is submitted that the Tribunal has failed to appreciate that the best interests of the children are not a trump card and the Tribunal has failed to consider that additional assistance may be available to the children's mother from social services. She has managed to cope without him so far;

    (v) The Tribunal has failed to give adequate reasons as to why the present arrangement cannot continue. The continuation of the

deportation order does not interfere with family life as it is currently maintained via modern means of communication;

(vi) Furthermore, it is submitted that the deportation decision was proportionate in light of Mr Todd's criminality which did not demonstrate any regard or concern for his family life in the UK. It is submitted that the Tribunal has failed to have regard to the established thresholds in respect to what is to be considered as 'unduly harsh' and has failed to give adequate reasons for finding that the appellant's deportation would result in unduly harsh consequences.

6. The grounds also set out, extensively, caselaw going back over a decade.

7. In his submissions Mr McVeety acknowledged that some of the grounds were stronger than others. He did not, for instance make any submissions in support of grounds (ii) or (iii) as I have summarised them. He instead nailed his submissions firmly to the reasons mast, submitting that Judge Lang had simply not done enough to distinguish the facts as they stand today, from the facts as they stood before Judge Davies in 2018. He asked me to note that the decision of Judge Davies was undisturbed, Mr Todd having been refused permission to appeal against it.

Discussion and Findings

8. Insofar as ground (i) contains an accurate statement of the law, I agree with it. The passage of time in itself is not a basis for finding that a deportation order should not continue. Fortunately, it is a statement which has no bearing on the decision of the Tribunal in this case. It is abundantly clear from the decision of Judge Lang that she did not allow this appeal simply because of the passage of time. The relevance of the passing of time is only ever mentioned in relation to the increasing demands placed upon Mr Todd's wife to act as a single parent not just to their seriously ill daughter, but to their son, who really needed a father figure.

9. Ground (ii) also contains an accurate statement, this time of fact, rather than law. Again it makes no difference. If it was unduly harsh for Mr Todd's daughter, that is enough.

10. Ground (iii) consists of the observation that there is no finding that the child will not be able to travel to visit the Appellant in Jamaica in the future. Again, that is correct. Again, it makes no difference. The basis of this decision is that the day-to-day needs of Mr Todd's daughter are such that family life is entirely dominated by them. Although Mrs Todd has a small but important family support network in this country, the support that they are able to provide her with is limited. Consequently the burden of caring for this very ill child falls upon her. Having heard directly from Mrs Todd, in evidence it describes as credible and compelling, the Tribunal describes the burden upon her as "intolerable". Whether or not the child will at one stage be well enough to travel to Jamaica does not appear to be something which featured at all in the submissions made before the Tribunal by the Secretary of State, whose submissions are set out in full between paragraphs 11 and 23 of the decision.

11. Ground (iv) makes two points. The first is that the Tribunal has failed to appreciate that the best interests of the children are not a 'trump card'. I reject that characterization of the Tribunal's decision. Whilst the Tribunal quite properly does reach a finding on the child's best interests [at its §49], it is clear from the decision what it understood its task to be: repeated reference is made to the test of undue harshness, and the relevant legislative framework is set out between paragraphs 24 and 32.

12. The second point made is that the Tribunal has failed to consider what additional assistance may be available to the children's mother "from social services". Again, this is a submission that does not appear to have featured in the Secretary of State's case before the First-tier Tribunal, quite possibly because the Secretary of State appeared to accept that the child is already in receipt of considerable support from a wide range of professionals including health visitors [see §21]. It is not appropriate that the point now appears for the first time, dressed as a ground of legal challenge. I would add this. The Tribunal had the opportunity to hear directly from Mrs Todd. She is a witness whose evidence was accepted in its entirety. She is described as a stoical, honest, compelling and credible. She is a woman who had been caring alone for her children for over four years at the date of the decision. She was therefore in the position of being able to speak to the available support for her children with some certainty; unlike a mother who fears the prospective deportation of her partner, that was a reality that Mrs Todd already lives with.

13. I take grounds (iv), (v) and (vi) together because they formed the basis of Mr McVeety's submission that the Tribunal simply did not give adequate reasons, for departing from the decision of Judge Davies, and for its conclusion that the 'undue harshness' exception was engaged.

14. There are a few preliminary points to be made.

15. The first is that this is certainly not a case which the Secretary of State submits could only go one way. She invites me to remit the appeal to be remade should the grounds be made out, and in doing so acknowledges that it would legitimately be open to the Tribunal to allow an appeal on these facts.

16. The second is that the decision of Judge Davies, although undisturbed, must now be read in light of contemporary guidance from the higher courts about how such cases should be approached. His decision pre-dated the judgment of the Supreme Court in KO (Nigeria) [2018] UKSC 53 and in HA (Iraq). As these decisions, read together, make clear, there is no test of exceptionality involved in this assessment. Families facing splits as a result of deportation action may quite commonly be able to establish that the action will have unjustifiably harsh consequences: it is no longer correct to say (as in SSHD v PG (Jamaica) [2019] EWCA Civ 1213) that the 'commonplace' distress caused by separation from a parent or partner is insufficient to meet the test. It could be. The focus should be on the impact on *this* child: [see HA (Iraq) [2020] EWCA Civ 1176 Underhill LJ 44-56, Peter Jackson LJ 157-159].

17. Furthermore, and perhaps more importantly, the full significance of Part 5A of Nationality, Immigration and Asylum Act 2002 has now been elucidated by the courts. In a number of cases post-dating Judge Davies' decision courts have explained that Part 5A should be read to represent where parliament considers the balance should be struck in Article 8 cases: see for instance HA (Iraq), Binaku

[2021] UKUT 34 (IAC). Crucially, where there is a qualifying partner or child it can be assumed that there is a family life at stake. All that the decision maker need do then is to assess whether one of the 'exceptions' is made out, or alternatively whether other factors mean that the global appraisal required by s117C(6) compels an outcome in favour of the claimant. All of this is to be contrasted with Judge Davies' 2018 analysis, which begins with a finding that he does not even accept Article 8 to be engaged:

> "Firstly, I conclude that the Respondent's decision to refuse to revoke the deportation order simply means that the status quo between the Appellant and his wife and the children continues unaffected. The Appellant has been deported to Jamaica, his wife and children who are British citizens remain in the United Kingdom. The Respondent's decision does not have any bearing on that situation whatsoever".

18. That being the case, there was in this case relatively wide scope for a Tribunal hearing an appeal in 2022 to depart from *Devaseelan* findings made in 2018, albeit that those findings remained the 'starting point'.

19. I return to the facts, which were the focus of Mr McVeety's submissions. In short his case was that the little girl in this family was ill in 2018, and has since then undergone a series of operations, presumably with the goal of improving her condition. In those circumstances it was difficult to understand how the situation could have worsened to the extent that the refusal to allow her father to return to the UK was disproportionate, having regard to his serious criminal offending. Whilst I have some sympathy with this submission, particularly since much of the medical evidence dated from 2018, I have concluded that it is not in fact correct.

20. This child was only months old at the date of the hearing before Judge Davies. Although her mother certainly faced challenges in caring for her, in particular in ensuring that she was feeding properly, those challenges were in reality not significantly greater than she would have faced looking after an infant without a heart defect. At the date of the hearing before Judge Lang she was 3½, and the full extent of the consequences of her illness were more apparent. She had by then undergone three complex operations at Alder Hey Childrens' Hospital, including artery repair and a device being inserted to compensate for a the hole in her septum. These had understandably been extremely stressful for her mother, who gave evidence that her focus on her daughter had come at a cost for her son, who inevitably missed out on some aspects of parenting which he otherwise would have benefitted from. He gets upset and angry about how much time his mum spends with his sister and not him. They are still required to go to the hospital twice a week to have her oxygen levels checked, and there are ongoing requirements to attend for scans. Her daughter becomes upset and distressed when they have to go to the hospital. Her scar from her most recent surgery has not healed and she has to see a paediatric nurse on a regular basis for this. Although her daughter is attending nursery, Mrs Todd explained that her sleep is disturbed and she is exhausted by her days. As a consequence, so is Mrs Todd, who is single-handedly trying to hold down a job as a support worker at Oldham Hospital, as well as coping with the demands of caring for the two children: "she feels family life has got much harder since the last FTT appeal hearing in 2018; everything is more difficult". Having heard all of that evidence, the Tribunal described the pressures on Mrs Todd as "intolerable". This was the core of the finding that the decision not to revoke the 2016 deportation order is

today disproportionate. I find nothing perverse in the Tribunal's decision to accept Mrs Todd's evidence, and to give it the weight that it does. It was plainly entitled to find that the situation had changed since the appeal was listed before Judge Davies. It follows that the Secretary of State's remaining grounds are not made out.

Notice of Decision

21. The decision of the First-tier Tribunal is upheld, and the appeal is dismissed.

22. There is no order for anonymity.

Upper Tribunal Judge Bruce
4th June 2023