



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003119
First-tier Tribunal No:
HU/20382/2018

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 17 July 2023

Before

UPPER TRIBUNAL JUDGE LESLEY SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANDRE DENNIS CLEARY
[NO ANONYMITY DIRECTION MADE]

Respondent

Representation:

For the Appellant: Mr N Wain, Senior Home Office Presenting Officer

For the Respondent: Mr A Eaton, Counsel instructed by Duncan Lewis solicitors

Heard at Field House on 5 July 2023

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Hussain dated 11 May 2022 (“the Decision”) allowing the Appellant’s appeal against the Respondent’s decision dated 10 October 2018 refusing his human rights claim. The making of the human rights claims and the refusal of it were in the context of the Respondent’s decision to deport the Appellant to Jamaica as a foreign national criminal.

2. The Appellant came to the UK as a child in 2007 to join his mother. He had no leave to remain until 2014 when he was granted leave to remain to 28 May 2017 based on his Article 8 rights. He has had no leave to remain since then.
3. On 29 June 2018, the Appellant was convicted of possession of Class A and Class C drugs with intent to supply and sentenced to 32 months' imprisonment. A deportation order was signed on 26 September 2018.
4. The Appellant relies on his private life and his family life with his fiancée, Ms Yasmine Hannah Bokhamy with whom he has a young child (born January 2019). The Appellant's family (mother and siblings) also live in the UK. He has no family remaining in Jamaica.
5. The Judge referred at [84] of the Decision to section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). It was agreed at the hearing before Judge Hussain that the Appellant is a medium offender under those provisions and therefore needs to show either that he meets exception 1 (relating to his private life - Section 117C(4)) or exception 2 (relating to his family life - Section 117C(5)) or that there are very compelling circumstances over and above those exceptions which outweigh the public interest in deportation (Section 117C(6)).
6. Although the Appellant's private life is relied upon in the Appellant's skeleton argument before Judge Hussain, the Judge does not appear to have made any findings in that regard. Instead, he decided at [88] of the Decision that the determinative issue would be whether the effect of deportation on Ms Bokhamy and their child would be unduly harsh. Having found at [97] of the Decision that it would be "harsh" for Ms Bokhamy and their child to go to Jamaica with the Appellant, the Judge went on to consider whether they could remain in the UK without the Appellant. For reasons I will come to at [103] of the Decision, the Judge found that deportation "would result in undue harshness for the appellant's fiancée and child".
He therefore allowed the appeal.
7. The Respondent appeals on the basis that the Judge has misdirected himself in law and/or has failed to give adequate reasons. In short summary, the Respondent asserts that the Judge has failed to have regard to the high threshold which applies to the "unduly harsh" assessment. Since the Judge has referred to none of the authorities on this issue, the Respondent submits that the Judge has misdirected himself as to the legal test. Further, she says that there is an absence of reasons given for the finding that the impact of deportation on the Appellant's fiancée and child would be unduly harsh.
8. Permission to appeal was granted by First-tier Tribunal Judge Elliott on 24 May 2022 in the following terms so far as relevant:
"...3. The Judge took account of the best interests of the appellant's son but properly recognised that those interests, while paramount, were not a trump card to prevent his removal.

4. The Judge took account of the report of a qualified social worker when making his assessment of the child's best interest and, whilst acknowledging that they were not determinative, the Judge has not explained his findings that the inevitable disruption and emotional impact on the appellant's girlfriend and child reach the elevated level required to meet the test for undue harshness.

5. That test remains applicable in the case of those convicted of serious crimes notwithstanding the decision of the Court of Appeal in *HA (Iraq)* (2020) EWCA Civ 1176 (see *Underhill LJ* at paras 51 and 52).

6. It is arguable that the Judge erred in law and permission to appeal is therefore granted."

9. The matter comes before me to decide whether the Decision does contain an error of law. If I conclude that it does, I must then decide whether the Decision should be set aside in consequence. If the Decision is set aside, I must then either re-make the decision in this Tribunal or remit the appeal to the First-tier Tribunal for re-determination.

10. I had before me a core bundle of documents relating to the appeal to this Tribunal, the Appellant's and Respondent's bundles before Judge Hussain and also the Appellant's skeleton argument and updated skeleton argument before the First-tier Tribunal. I do not need to refer to the documents before the First-tier Tribunal as the Respondent's grounds are focussed squarely on the Judge's application of the law and an analysis of the Decision when applying the legal tests. The Appellant filed a Rule 24 Reply dated 21 July 2022 to which I have also had regard in what follows.

11. Having heard from Mr Wain and Mr Eaton, I indicated that I would reserve my decision and provide that in writing which I now turn to do.

DISCUSSION

12. I begin with the asserted misdirection in law. The Respondent refers in her grounds to the cases of *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176 (as now upheld by the Supreme Court - [2022] UKSC 22), *KO (Nigeria) and others v Secretary of State for the Home Department* [2018] UKSC 53, *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213 and *MK (section 55 - Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC).

13. Although Mr Wain referred me to extracts from those judgments, I do not need to set those out at any length. I did not understand it to be disputed that those judgments singly and cumulatively show that the threshold for what constitutes undue harshness is a high one. As was said in *MK (Sierra Leone)* (as cited 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."

14. As Mr Wain submitted and I accept, Judge Hussain did not refer to any of those judgments in the Decision. That is not of itself an error provided that it can be shown that the Judge was applying the correct test when carrying out his assessment.
15. As Mr Eaton pointed out, the Judge has set out Section 117C at [84] of the Decision. He also prefaces that citation with reference to the decision in Binaku (s11) TCEA, s117C NIAA, para 339D [2021] UKUT 0034. That reference however concerns only the application of Section 117C. The case is not relied upon for any self-direction as to the test which applies to the sub-sections in Section 117C or the way in which that section operates.
16. The Judge also refers to the standard self-direction on human rights at [77] of the Decision (that it is for an appellant to establish interference and for the Respondent to then justify that interference). That suggests that, notwithstanding the reference to Binaku, he may not have appreciated that the assessment needed to be conducted through the lens of Section 117C and the tests which are there set out as to the thresholds which apply.
17. I cannot find anywhere in the section of the Decision which purports to apply Section 117C any reference to the elevated threshold which applies or otherwise what is meant by “unduly harsh”. Indeed, at [85] of the Decision, the Judge deals with an issue about whether the Appellant is a medium offender or falls within the higher category. He says that if the Appellant were in the higher category (where Section 117C(6) only applies) the Appellant would have to show that he meets the “higher threshold” in that sub-section without saying that the exceptions themselves involve high thresholds.
18. At [89] of the Decision, the Judge refers to Section 117C (2) regarding the assessment of the level of public interest according to the seriousness of the offence but that has no part to play in an assessment of the exceptions in Section 117C (4) and (5) (although as I come to below it appears that the Judge did not realise this).
19. The paragraphs which follow these self-directions apply what appears on its face to be a normal balance sheet approach of considering the factors weighing in favour and against the Appellant (see in that regard [93] of the Decision). At [97] of the Decision, the Judge finds that if the Appellant’s fiancée and child were to accompany him to Jamaica, the effect on the child would be “harsh” not “unduly harsh”.
20. I asked Mr Eaton in the context of submissions concerning the adequacy of reasons to explain to me why the Judge had found as he had that the impact of deportation on the Appellant’s fiancée and child would be unduly harsh. As he pointed out, it is often conceded by the Respondent that a British partner and child could not accompany a foreign national criminal on return. Although there is no such concession

in this case (possibly because the decision under appeal pre-dates the birth of the child) I accept that is often accepted by the Respondent.

21. In relation to the “stay” scenario, Mr Eaton drew my attention to the difficulties which the Appellant’s fiancée would face on her own, the view of the independent social worker (whose views were he said accepted by the Judge) and the opinion of the psychiatrist who deals with the Appellant’s own mental health problems. He submitted that this evidence and reasoning together with the Judge’s consideration of the child’s best interests as set out at [98] to [102] of the Decision are what led to the Judge’s conclusion at [103] of the Decision.
22. That then brings me on to that conclusion. As I observed at the hearing, and although this is not expressly relied upon by the Respondent, the findings at [103] of the Decision themselves disclose an erroneous legal approach. The Judge said this:

“I reminded myself that the best interest of the appellant’s child is only a primary consideration and not the only consideration. The other considerations are the public interest in the deportation of foreign criminals and that the more serious an offence the greater the interest in their removal. I have acknowledged above that the offence in question is serious, but that has to be balanced against the adverse impact on the appellant’s fiancée and child. In all the circumstances, the conclusion to which I have come in this particular case, the appellant’s deportation would result in undue harsh [sic] for the appellant’s fiancée and child.”
23. As I understood Mr Eaton to accept, that is an erroneous approach. The impact on the Appellant’s fiancée and child, post KO (Nigeria) is not to be balanced against the Appellant’s offending. Undue harshness is a free-standing threshold test.
24. Mr Eaton submitted that this error could not however make any difference because, if anything, the balancing of the interference against the public interest rather than simply looking at the level of the interference would operate in the Respondent’s favour.
25. If I had been satisfied from the remainder of the Decision that the Judge understood how Section 117C is to be applied which would include what the undue harshness test involves and had simply made a slip in the conclusion, I would have accepted Mr Eaton’s submission. However, I am not so satisfied.
26. Although the Judge sets out Section 117C in the Decision, there is no recognition there or anywhere else in the Decision of the threshold which applies to the test of undue harshness. Those words are used in the summary of the Respondent’s decision under appeal, the record of some of the evidence and the conclusion but nowhere does the Judge direct himself that this is an elevated threshold. Moreover, although the Judge appears to accept that the structured approach of Section 117C applies in deportation cases, he has gone on to conduct what appears to be a standard balance sheet assessment of the case. Whilst such an

assessment is appropriate in the application of Section 117C (6), it does not apply to Section 117C (5). That approach indicates a misunderstanding of the legal test and approach which applies.

27. I disagree with Mr Eaton's submission at [8] of the Rule 24 Reply that the Respondent's grounds in this regard are a perversity challenge. The Respondent is not saying that no decision maker properly directed could reach the conclusion the Judge did but rather that the Judge did not understand the test which he was purporting to apply.
28. For the foregoing reasons, I accept the Respondent's ground that the Judge has misdirected himself in law. For the reasons I have given, I am also satisfied that the error is material.
29. Given that conclusion, I can deal very briefly with the adequacy of reasons challenge.
30. I accept as Mr Eaton says in the Rule 24 Reply that it cannot be said that no Judge properly directed could reach the conclusion which the Judge did about the impact of deportation on the Appellant's fiancée and child. It is though somewhat unclear what are the reasons why the Judge reaches that conclusion.
31. The Judge sets out the evidence of the independent social worker without saying whether he agrees with it or not (save in relation to what is in the child's best interests). He records the conclusions of the psychiatrist, again without making any findings about that evidence (which go to the Appellant's private life rather than family life in any event). The Judge finds that the Appellant's fiancée "would have great difficulty in coping on her own" ([98]) and that "keeping in touch through modern means of communication are clearly no substitute for being together in physical form" ([98]) but the Judge does not there consider what support the Appellant's fiancée might obtain from in particular the Appellant's family. The Judge was of course entitled (indeed required) to consider the child's best interests as he did at [102] of the Decision but the Judge has again failed to explain whether and if so why and to what extent the matters set out at [5.2] of the social worker's report as cited at [99] of the Decision (which applies to the 'stay' scenario) would give rise to undue harshness applying the correct legal test.
32. Taken alone, I would not have found the Respondent's grounds to be satisfied for this reason but having concluded that the Judge has materially misdirected himself as to the legal test which applies, I am satisfied that the Respondent's grounds taken together are made out.

CONCLUSION AND NEXT STEPS

33. Having found an error of law in the entire approach of the Judge to the second exception under Section 117C which is the foundation of his conclusion and allowing of the appeal, I set aside the Decision. As I alluded to above, the Judge did not make findings in relation to the first

exception concerning the Appellant's private life even though the Appellant was pursuing a claim in that regard and there was evidence which was relevant to that issue (in particular concerning his ability to cope on return). For that reason, the appeal requires to be re-determined entirely afresh.

34. This appeal has taken a substantial period of time to reach the decision stage of appeal. According to the Appellant's skeleton argument, this arose because the Appellant was convicted of a further criminal offence and was only released from detention in June 2020. I have considered whether in light of the passage of time it would be more appropriate to retain the appeal in this Tribunal for re-making. However, having regard to the lack of findings on certain issues thus far and that I have found the determination of all other issues to be flawed by legal error, I consider it fairer to the Appellant for the appeal to be remitted. Mr Eaton strongly supported this course.
35. I therefore set aside the Decision and remit the appeal to the First-tier Tribunal for re-determination before a Judge other than Judge Hussain.

NOTICE OF DECISION

The decision of Judge Hussain dated 11 May 2022 contains errors of law. I set that decision aside and remit the appeal to the First-tier Tribunal for re-hearing before a Judge other than Judge Hussain.

L K Smith

Upper Tribunal Judge Lesley smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 July 2023