



IN THE UPPER TRIBUNAL

IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-006656

First-tier Tribunal No: HU/51344/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th January 2024

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JJ

(ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Secretary of State: Mr E Tufan, Senior Presenting Officer

For Mr JJ: Mr D Sellwood, Counsel, instructed by Wilsons Solicitors
LLP

Heard at Field House on 5 January 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, Mr JJ 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 Mr JJ. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

Introduction

1. For the sake of continuity and ease of reading I shall refer to the parties as they stood before the First-tier Tribunal. Therefore, the Secretary of State is once more “the respondent” and Mr JJ is “the appellant”.
2. The respondent appeals with permission against the decision of First-tier Tribunal Judge Gibbs (“the judge”), promulgated on 2 May 2022. By that decision, the judge allowed the appellant’s appeal against the respondent’s refusal of his human rights claim. That claim was a response to a previous decision by the respondent to make a deportation order against the appellant on the basis that he was a foreign criminal following his 2019 conviction for possession with intent to supply Class A

and Class B drugs, for which he had been sentenced to 3 years' imprisonment.

3. The appellant is a national of Tanzania who arrived in the United Kingdom at the age of 9 and was granted indefinite leave to remain some 6 years later in 2003. His human rights claim was based on private and family life under Article 8. In respect of private life, he asserted that he had strong ties in the United Kingdom and had no meaningful ties to Tanzania. In respect of family life, the appellant relied on his relationship with a British national partner, Ms X, and their two children, Y (9 years old at the date of the judge's decision), and Z (6 years old at that time). Ms X suffered from mental health problems and Y had a diagnosis of autism.
4. In refusing the appellant's claim, the respondent initially did not accept that he had a genuine and subsisting relationship with Ms X or the two children. In addition, it was concluded that (assuming there was a genuine and subsisting relationship) the family unit could go and live in Tanzania together, or that a separation would not be unduly harsh. There were said to be no very compelling circumstances in the case. The private life element of the appellant's case was rejected, it being said that although he had resided in the United Kingdom lawfully for more than half of his life, he was not culturally socially integrated and there were no very significant obstacles to him reintegrating into Tanzanian society.

The judge's decision

5. The judge recorded that by the time of the hearing the respondent accepted the appellant's genuine and subsisting relationships with Ms X and the two children. Further, the respondent conceded that it would have been unduly harsh for the family members to have accompanied the appellant to live in Tanzania. The key issue was whether a separation would be unduly harsh on Ms X and/or the children, with particular reference to Y.

6. The precise contents of the judge's decision are well-known to the parties and I do not propose to set them out here. I will address relevant aspects when setting out my conclusions and reasons later on. The essence of her decision is as follows. On the evidence, and with particular reliance on the unchallenged reports of Ms Christine Brown, an Independent Social Worker, the judge concluded that it would be unduly harsh on Ms X and the children if the appellant were to be deported: paras 18-20, 23-29. The statutory exception under section 117C(5) of the Nationality, Immigration and Asylum Act 2002, as amended, was satisfied and the appellant's appeal was allowed on that basis. In light of this, the judge did not reach any conclusions on the private life exception under section 117C(4) or the very compelling circumstances test under section 117C(6).

The grounds of appeal and grant of permission

7. I address the respondent's grounds of appeal in detail when setting out my conclusions and reasons. For present purposes it is enough to say that the challenge is made under the heading of "Making a material misdirection/Lack of adequate reasoning" and that issue is taken with the judge's assessment of the unduly harsh test in respect of Ms K and Y.
8. In granting permission to appeal, First-tier Tribunal Judge CJT Lester said the following:
 - “1. ...
 2. The extensive grounds stated that the judge erred in that they: (1) made a material misdirection/lack of adequate reasoning.
 3. If the contention of the respondent is correct then there is arguably an error of law.”
9. With respect, that is not in my view an adequately expressed grant of permission. The test for permission, as apparently applied in para 3, is wrong. In addition, there is a failure to engage in any way with the substance of the grounds.

Rule 24

10. Following the grant of permission, the appellant provided a detailed rule 24 response, dated 24 October 2022.

The hearing

11. I do not propose to set out the representatives' respective submissions in any detail. The submissions made orally have been considered and addressed in my conclusions and reasons, below. In essence, Mr Tufan relied on the unamended grounds of appeal, whilst Mr Sellwood relied on his rule 24 response, the judge's analysis, and the underlying evidence in the case.
12. At the conclusion of the hearing I announced to the parties my decision that the judge had not materially erred in law and that her decision should stand. My reasons for that decision were to follow in writing and I now set these out.

Conclusions and reasons

13. There is a plethora of pronouncements and reminders from the Court of Appeal and Upper Tribunal concerning the task of an appellate jurisdiction and the proper approach to the assessment of whether the first instance tribunal/court has committed material errors of law. By way of examples, see Volpi v Volpi [2022] EWCA Civ 464; Fage UK v Chobani UK [2014] EWCA Civ 5; UT (Sri Lanka) v SSHD [2019] EWCA Civ 1095; FN (Burundi) v SSHD [2023] EWCA Civ 1350; and Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 (IAC). In light of these, I bear in mind the need for appropriate restraint before interfering with the decision of the First-tier Tribunal.
14. In addition to the above, the present case is an example of one in which it is appropriate to have regard to the underlying evidence before the judge when assessing the adequacy of her conclusions and

reasoning: English v Emery Reimbold and Strick [2002] EWCA Civ 605, at paras 11 and 89.

15. There has been no properly articulated challenge to the judge's self-direction on the unduly harsh test. In any event, such a challenge would not have prospered. At para 22, she sets out in full paras 51-53 and 56 of the judgment of Underhill LJ in HA (Iraq) v SSHD [2020] EWCA Civ 1176. Those passages refer to the "elevated" nature of the unduly harsh threshold, together with the crucial need to adopt a child-focused approach based on the particular circumstances of the case. It is to be noted that the judge heard and decided the appellant's case before the Supreme Court handed down its judgment in HA (Iraq) v SSHD [2022] UKSC 22 on 22 July 2022. Nothing in the Supreme Court's judgment undermined what was said by Underhill LJ in the Court of Appeal. Thus, there is no misdirection in law by the judge.
16. There has been no clearly expressed perversity challenge put forward by the respondent in this case.
17. With the points made in the preceding two paragraphs in mind, I have no hesitation in rejecting the poorly-articulated purported challenges as set out in paras 1-5 of the grounds of appeal.
18. In respect of para 1, the first sentence refers to the judge's reasoning, but then goes on to seemingly assert an implied perversity challenge. Even putting to one side the lack of clarity, the complaint is plainly nothing more than a disagreement and comes nowhere near establishing an irrational conclusion by the judge. In addition, reference to SSHD v PG (Jamaica) [2019] EWCA Civ 1213 and a quotation from paragraph 46 of that judgment adds nothing to the respondent's case. Unfortunately, this is not the first occasion on which I have felt compelled to comment on the respondent's use of this judgment (and indeed others) in grounds of appeal. The respondent appears to regularly rely on PG (Jamaica) as a form of factual precedent or to demonstrate a proposition of law which discloses an error of law in the particular case which is the subject of the appeal. Neither basis has any merit.

Deportation cases are highly fact-specific; all the more so following the authoritative guidance on the child-focused approach set out in HA (Iraq). What is said at paragraph 46 of PG (Jamaica) is in generalised terms, bears no relevance to the judge's decision, and falls far short of identifying any error of law.

19. Para 2 of the grounds refers to KO (Nigeria) v SSHD [2018] UKSC 53 and ends by contending that, "the evidence does not support the [judge's] conclusions, there is no evidence that the circumstances in this case go beyond the established threshold as set out in the established case law." The language is again that of disagreement. It is not said in terms that the judge's conclusions were irrational. Further, there is no particularisation as to why the evidence was apparently incapable of meeting the relevant test.
20. Para 3 simply asserts that the unduly harsh test is an "extremely demanding one." That "elevated" threshold is well-settled and was expressly affirmed in the passages from the Court of Appeal's judgment in HA (Iraq) to which the judge referred in her decision. I cannot see any proper connection between para 3 and a challenge to the judge's decision.
21. Para 4 suffers from the same deficiencies as para 3 and I need say no more about it.
22. Para 5 quotes from the Court of Appeal's judgment in HA (Iraq). Again, I cannot discern any particular connection between the passages referred to and any alleged error committed by the judge. If anything, they indicate that the judge did indeed have the relevant threshold in mind when conducting her assessment.
23. Without wishing to labour a point, grounds of appeal should be both concise and precise. They should be relevant to the particular decision under challenge and should clearly articulate the nature of the alleged errors said to have been committed by the First-tier Tribunal. In my judgment, paras 1-5 of the grounds of appeal in the present case do not go to assist the Upper Tribunal in the performance of its appellate

functions and the furtherance of the overriding objective: Joseph (permission to appeal requirements) [2022] UKUT 218 (IAC).

24. The points of any real substance raised in the grounds of appeal begin at paras 6 and 7. It is firstly said that the judge failed to consider that Ms X and Y would have access to assistance from schools, the NHS, and the relevant local authority's Children's Services. The complaint goes on to assert that Y already had access to relevant support for his autism and that the (unchallenged) reports of Ms Brown did "not add any unduly harsh element." In support of these arguments, the respondent cites BL (Jamaica) v SSHD [2016] EWCA Civ 357. In addition, it is said that support from family members in the United Kingdom was a relevant consideration and that the judge failed to address this.
25. This aspect of the respondent's challenge is not made out for the following reasons.
26. *First*, the assistance alluded to is unspecified. As such, it seems to me as though the respondent's position lies contrary to the child-focused and intensely fact-specific approach required by HA (Iraq).
27. *Secondly*, this aspect of the challenge fails to properly address what the judge has said. She was fully entitled to find as a fact that: the appellant played a "crucial" role in his children's lives, with particular reference to Y; that Ms X and Y had suffered harm whilst the appellant was in prison; that both Ms X and Y were particularly vulnerable; that Ms X's mental health problems rendered her more susceptible to suffering undue harshness were the appellant to be deported; and that a deterioration in Ms X's mental health would have a significant impact on the children.
28. These findings were plainly relevant to the forward-looking assessment of undue harshness and the respondent's challenge does not begin to address how any assistance from statutory bodies and/or other agencies might reduce the impact of permanent separation to any material extent.

29. *Thirdly*, the numerous passages from Ms Brown's unchallenged reports quoted by the judge at para 27 of her decision were plainly highly supportive of the conclusion that it would be unduly harsh on Ms X and Y were the appellant to be deported. The judge was fully entitled to place "significant weight" on that evidence. The parties are well-aware of the content of the passages and I do not propose to set them out here. Suffice it to say that Ms Brown's detailed evidence was firmly based on the particular circumstances of Ms X and Y, and that she had assessed their circumstances during the period in which the appellant was in prison and after release, as well as on a prospective basis. On all counts, her expert opinion was that significant problems had arisen in the past and would do so to an even greater extent if deportation occurred. The grounds of appeal do not engage with Ms Brown's unchallenged evidence. Further, Ms Brown's reports quite clearly did "add" to the unduly harsh assessment, contrary to the somewhat opaquely-drafted final sentence of para 6 of the grounds of appeal. It seems to be somewhat non-sensical to assert that unchallenged expert opinion to the effect that children would be at risk of "significant harm" was of little or no relevance.
30. *Fourthly*, the underlying evidence to which the judge did not specifically refer, but which I am entirely satisfied that she took account of and accepted (in the absence of any express rejection thereof), was also supportive of her conclusion on undue harshness. For example, Ms X's detailed witness statement highlighted the very difficult circumstances at home regarding Y's autism and meltdowns, which, it was said, were difficult to deal with and in respect of which the appellant was able to have a calming influence on his son. In addition, the "Autism Spectrum Assessment Report", dated 10 August 2021, concluded that Y displayed a pattern of "significant difficulties" in the fields of "reciprocal social interaction, social communication and restrictive, repetitive, patterns of behaviour, interests or activities." The main concerns facing Y were his difficulties in regulating emotions and dealing with his obsessive nature. The report acknowledged Ms X's own difficulties in

recognising the warning signs for an oncoming meltdown (I acknowledge that the report went on to recognise certain strengths such as Y's aptitude for technology and computer skills). The report listed a number of organisations which might be able to provide the family with support and made recommendations for what the school could do.

31. It is in my view close to inconceivable that the judge did not have in mind the possibility that outside support for Y from the school, the NHS, and other non-family sources might be available in one form or another. Ms Brown was aware of Y's autism diagnosis when preparing her reports and had expressly referred to some support being provided to the family unit by an organisation. Her addendum report specifically addressed the question of support from external agencies (which I take to mean, in particular, social services) and concluded that: support would only be provided once circumstances "drastically" deteriorated; any such support would not represent a "holistic replacement" for what was required; and that Ms X "could not begin to manage family life in a manner that was positive and anchored for the children in the absence of [the appellant]".
32. Before moving on, I briefly address a point raised by Mr Tufan at the hearing. He attempted to criticise the autism assessment report on the basis that it had been written by a Speech and Language Therapist, as opposed to what he described as a "medically qualified" professional. With respect, that was a misguided submission. No issue has previously been taken with the standing of the autism report. To raise any at this stage was way too late in the day. In any event, Mr Tufan's attempted criticism was not supported by any evidence as to who is or is not qualified to provide an autism report. I am entirely satisfied that the autism report was appropriately authored.
33. *Fifthly*, the respondent's reliance on BL (Jamaica) is somewhat akin to the often-cited judgment in PG (Jamaica). It appears to be utilised as a form of factual precedent or as a general proposition of law which does not actually emerge from the judgment itself. The Court's reference to

social services support related to the facts of that particular case. There is no rule of law that a tribunal is bound in all cases to address the precise availability and appropriateness of potential social services care, with a failure to do so amounting to an error of law.

34. In the present case my attention has not been drawn to any reliance by the respondent on the provision of support from social services as undermining any possible undue harshness. The judge was not obliged to address points which had not been raised by the respondent. In any event, she was entitled to rely on the evidence before her, which included the assessment made by Ms Brown to which I have already referred, together with Ms X's own evidence and that from the appellant.
35. *Sixthly*, as to the possibility of family support, there is no evidence that this particular point was put to either the appellant or Ms X at the hearing before the judge. In any event, it is again appropriate to have regard to the underlying evidence. Ms Brown and Ms X had been clear: the adverse impact on Y in particular, but also Ms X herself, would not be alleviated by family support. In fact, the evidence indicated that Y was more susceptible to meltdowns whilst at his grandmother's house and that any support provided whilst the appellant was in prison did not prevent significant problems for Ms X and Y. The grounds of appeal fail to acknowledge the underlying evidence which had been considered by the judge and upon which she had been entitled to rely.
36. *Seventhly*, the grounds of appeal do not address the judge's finding and the underlying evidence as to the significant problems experienced by Ms X and Y when the appellant was in prison. Reference has been made to this period already, but it is important to emphasise. The judge was self-evidently cognisant of Ms Brown's reports and, as I have stated previously, it is to be fairly assumed that she also accepted the evidence from Ms X and the appellant. This all indicated that the appellant's incarceration had resulted in a significant deterioration in Ms X's mental health and Y's behaviour. In short, the judge's conclusion that harm had

been caused to them both when the appellant was in prison was fully supported by the evidence. It is clear enough to me that the judge took into account these past experiences during a period of temporary separation when assessing the future, which would have entailed permanent separation. She was fully entitled to do that.

37. As recently noted by the Court of Appeal in Sicwebu v SSHD [2023] EWCA Civ 555, at 63:

“Furthermore, there is an obvious and fundamental difference between the appellant being in prison and the appellant being deported. Prison was temporary and short-lived, and the children could visit easily. Deportation posed a more permanent rupture to this family and the children’s relationship with their father.”

38. Of course, that observation was made in the context of the facts of the particular case before the Court. However, a similar distinction was applicable in the present case. The evidence before the judge provided strong support for the conclusion that a permanent separation would have had a very significant adverse impact on Ms X and, in particular, Y.

39. I now turn to the final aspect of the respondent’s challenge, as set out in para 8 of the grounds of appeal. The point made here is that the judge failed to consider a reference in the 2021 OASys report to the effect that the appellant might have continued to smoke cannabis at home after his release from prison and that she failed to make a finding as to whether this was the case.

40. This aspect of the challenge has little merit and I reject it. There is no evidence before me to indicate that the point was specifically put to the appellant at the hearing before the judge, or that it was raised in submissions to her. Beyond that, the appellant’s detailed witness statement categorically denied that he had ever made such a comment at all and asserted that he did not in fact smoke cannabis at home. In addition, there was before the judge a recent letter from the appellant’s Probation Officer which made clear the absence of any concerns as to his conduct after release from prison. As with the other evidence in the case,

I am satisfied that the judge had it all in mind. She expressly stated that the oral evidence provided to her was credible and in the absence of any contraindication, I am prepared to accept that she also regarded the witness statement evidence as truthful on this particular issue. The ground of appeal is not made out.

41. I am bound to say that I have some concerns with paragraph 8 of the grounds of appeal. The failure to have had any regard to, in particular, the appellant's witness statement, presents a potentially misleading picture of the evidence before the judge.
42. In summary, the judge directed herself correctly, focused on the core issue in the case, was entitled to rely on the entire evidential picture before her without referring to every aspect of it, and ultimately reached a conclusion which was open to her and in respect of which adequate reasons were provided.

Anonymity

43. The judge made an anonymity direction without providing reasons for doing so. One might assume that this was done on the basis of the particular vulnerabilities relating to Ms X and Y. I have considered for myself whether it is appropriate to maintain the anonymity direction in the Upper Tribunal. I sought the views of the representatives at the hearing, Mr Tufan remained neutral, whilst Mr Sellwood submitted that the direction should remain in place.
44. The principle of open justice is very important and this might be said to apply all the more so in cases concerning foreign criminals. In the present case, however, I conclude that the vulnerable position of Ms X and, in particular, Y, outweigh that principle. There is in my view a serious risk that if the appellant was himself identified, it could lead to the identification of his partner and son. Such a consequence would be likely to have a significantly adverse impact on those two individuals.

Notice of 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 appeal to the Upper Tribunal is accordingly dismissed and the decision of the First-tier Tribunal stands.

**H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 8 January 2024**