IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000820
First-tier No: HU/51135/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 13 May 2024

Before

UPPER TRIBUNAL JUDGE GLEESON
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O.H.
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr Tony Melvin, a Senior Home Office Presenting Officer
For the Respondent: Ms Andrea Hounto, Counsel instructed by Turpin Miller LLP

Heard at Field House on 15 April 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials O.H. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision on 3 August 2018 to deport the claimant to Colombia, his country of nationality.

2. For the reasons set out in this decision, we have come to the conclusion that the decision of the First-tier Tribunal Judge involved a material error of law and we set aside its decision. The decision in this appeal will be remade, on Article 8 ECHR grounds only, in the First-tier Tribunal.

Background

3. The claimant spent 6 years in the UK as an asylum claimant between November 1995 and December 2001. He left the UK and returned to Colombia, on an unknown date, then returned and on 30 May 2006, he made an indefinite leave to remain application. On 4 July 2007, indefinite leave to remain was granted.

4. On 12 August 2015, the claimant and his former partner had a son together, who is a British citizen.

5. On 7 May 2016, the claimant applied for a 'no time limit' (NTL) stamp in his passport. On 18 January 2017, the Secretary of State refused to authorise an NTL stamp.

6. The claimant has a criminal history. Between 2006 and 2022, he was convicted on 11 separate occasions, for 26 offences of increasing seriousness. He is a persistent offender.

7. On 8 June 2016, the claimant was convicted of breach of a restraining order in relation to his former partner. He was sentenced to 8 weeks' imprisonment at Bedlington Community Prison for that offence and another 11 weeks, to run consecutively, for three previous driving offences.

8. On 1 February 2018, a permanent restraining order was made, preventing the claimant from contacting his former partner, directly or indirectly, except via solicitors or a contact centre. He was not to go to Swaledale, Bracknell, except for one pre-arranged occasion, accompanied by police, to collect his belongings.

9. On 19 June 2018, the claimant was served with a Stage 1 deportation letter and a one-stop notice. He did not respond. On 3 August 2018,

he was served with a Stage 2 deportation order. That order has not been revoked.

10. On 9 June 2018 the claimant was served with the deportation order. On 31 October 2019, an application was made to the Colombian Consulate for an emergency travel document, which was provided on 24 January 2020.

11. On 26 February 2020, the claimant was detained pending removal, but following judicial review proceedings, the removal directions were deferred and further representations lodged. On 12 January 2023, the Secretary of State refused international protection pursuant to the Refugee Convention or leave to remain on human rights grounds.

12. The claimant appealed to the First-tier Tribunal.

Decision letter

13. In his decision letter of [date], the Secretary of State stated that the claimant's deportation was conducive to the public good and in the public interest, because he was a persistent offender. The Immigration Rules as they then were required deportation unless the claimant could bring himself within the Exceptions at paragraphs 399 and 399A of the Rules.

14. The Secretary of State took into account that the claimant had been lawfully resident in the UK for more than half his life, and had worked throughout. He had studied, and worked as a labourer, an office cleaner, and on warehouse duties at Harrods. He also took account of the claimant's relationship with his son, with whom the claimant asserted that he was in regular contact, seeing the boy every other week.

15. The Secretary of State did not accept that the relationship between the claimant and his young son was a genuine and subsisting parental relationship. There was no evidence of contact beyond a few photographs, and nothing from the child's mother. A restraining order imposed on 30 January 2018 remained in force. The claimant had breached it on 8 June 2018 and been sentenced to 8 weeks' imprisonment for harassment and breach of the restraining order. There was no reliable evidence of a good relationship between the claimant and the child's mother, his former partner, and the Exception in paragraph 399(a) of the Rules was not made out.

16. There was also no evidence of a current partner on whom the 'stay' or 'go' scenario would have an unduly harsh effect.

17. Paragraph 399A, regarding the claimant's private life, was not made out. He had resided lawfully in the UK for just over 15 years, which was

not half of his life as he was 43 years old. The evidence of his having qualified as a carpenter, and worked in construction (according to his tax returns from 2016-2021), was insufficient to demonstrate integration. He was considered still to have family members in Colombia, where he had lived until his return in 2006 or 2007. He spoke Spanish and English.

18. There were no very compelling circumstances making deportation inappropriate, on the facts of this appeal. The claimant had a back problem, for which he had received treatment and medication. A mental health report provided was almost two years old and there was no recent evidence about his mental state. Colombia had a good healthcare system and would be able to deal with any physical or mental health issues on his return.

19. The claimant's application to revoke the deportation order was considered by reference to sections 32 and 33 of the UK Borders Act 2007. The Secretary of State considered that the claimant's deportation remained in the public good and within the public interest. The deportation order was not revoked.

20. The claimant appealed to the First-tier Tribunal.

First-tier Tribunal decision

21. In a decision dated 12 January 2023, First-tier Judge Howard dismissed the international protection element of the claimant's appeal, but allowed the appeal pursuant to Article 8 ECHR. The Judge noted that the claimant has been lawfully present in the United Kingdom for a period of nearly 17 years, from 19 December 2001 until 7 August 2018 when the deportation order was made against him.

22. The issue for the First-tier Tribunal, so far as relevant to Article 8 ECHR, was set out at [32(iii)]:

> "*34. … (iii) Does the [claimant] have an exception to deportation on the basis of his claim that his Article 8 of the ECHR Rights will be breached? Does the [claimant] come within the perimeters of Paragraph 399 (a)(ii) of the Immigration Rules (the 'Rules') and section 117C(5) of the NIAA 2002 (Exception 2) in relation to the undue harshness caused to his son … by his deportation? Are there very compelling circumstances in any event in relation to the present appeal – section 117C(6) of NIAA 2002?*"

23. The First-tier Tribunal found that the claimant had a genuine and subsisting relationship with his son, who was then 8 years old and a qualifying child, because he is a British citizen. The Judge found that it would be unduly harsh for the claimant's son to live in Colombia (the 'go' scenario). He also found that it would be unduly harsh for the claimant's son to remain in the United Kingdom without the regular face-to-face contact with the claimant (the 'stay' scenario). The Judge

found that there were compelling circumstances in the claimant's case, given the *strong bond* with his son.

24. The Secretary of State appealed to the Upper Tribunal.

Permission to appeal

25. Permission to appeal was granted by First-tier Tribunal Judge Hollings-Tennant as follows:

> "…2. Ground [1] asserts that the Judge failed to properly apply the 'unduly harsh' test in the absence of supporting evidence to show the [claimant]'s deportation would be unduly harsh on his son in the 'stay scenario'. I consider there is some merit in this assertion. Whilst the Judge makes reference to the relevant statutory framework under section 117C of the 2002 Act, cites the correct standard of proof to be applied (at paragraph [42]) and refers to HA(Iraq) [2022] UKSC 22, it is at least arguable that he failed to give adequate reasons for finding the [claimant] falls within exception [2] on the basis of his relationship with his son.
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> 3. Ground [2] asserts that the Judge erred by failing to have regard to relevant guidance in *NA (Pakistan)* and *HA (Iraq)* before finding there are very compelling circumstances. The Judge plainly carries out a 'balance sheet' approach to the question of proportionality and considers relevant factors in the public interest and weighing in favour of the [claimant]. The difficulty is that he arguably failed to give adequate reasons for finding exception [2] was met and this infects his conclusion on the question of proportionality. This ground is therefore arguable."

26. There was no Rule 24 Reply on the claimant's behalf. There is no challenge to the international protection element of the First-tier Tribunal decision, or in relation to the claimant's physical or mental health issues. We are concerned only with the Article 8 element, as it affects the 'stay' scenario for the claimant's son, who is now 9 years old.

Upper Tribunal Hearing

27. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal. We reserved our decision, which we now give.

28. For the Secretary of State, Mr Melvin, as is his practice, helpfully prepared and served a skeleton argument before the hearing. His oral submissions closely followed the grounds of appeal.

29. For the claimant, Ms Hounto argued that the claimant's son had suspected autism: there was no medical evidence to support this assertion, as the diagnosis was pending. The restraining order, still in place, limited the claimant's contact with his child. Ms Hounto was

instructed that the claimant and his former partner had almost daily telephone calls, but there was no evidence from her to support that assertion. There was also a relationship conducted by telephone between the child and the claimant's mother and sister in Colombia, conducted in Spanish.

30. Ms Hounto accepted that there was no evidence from the child's mother, or from his school. The claimant's statement was the only evidence of improved relations between the claimant and his son. He had not asked the boy's mother for a statement. The evidence before the Tribunal was all that he could reasonably have provided. The evidence reached the standard of 'very compelling circumstances': see section 117C(6) of the 2002 Act.

31. The claimant relied on the guidance of the Court of Appeal in *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 (29 June 2016) and that of the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 (20 July 2022*)* at [41]-[45] in the judgment of Lord Hamblen JSC (with whom Lord Reed PSC, Lord Leggatt JSC, Lord Stephens JSC and Lord Lloyd-Jones JSC agreed).

32. We reserved our decision, which we now give.

Analysis

33. The evidence regarding the claimant's son was very sparse, limited to his own assertions, with no evidence from his former partner, no independent social worker report, and no evidence from the child's school.

34. We remind ourselves of the guidance given by the Supreme Court in *HA (Iraq).* Their Lordships considered the decision in *NA (Pakistan)* in reaching their conclusions and it is not necessary to consider that judgment separately. The guidance given regarding the unduly harsh test is at [41]-[43]:

> "41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "… '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."

42. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - i.e. it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).

43. … I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself."

35. Guidance on the 'very compelling circumstances' test in section 117C(6) is to be found at [46]-[51], and is summarised at [51]:

"51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment. In *Unuane v United Kingdom* (2021) 72 EHRR 24 the ECtHR, having referred to its earlier decisions in *Boultif v Switzerland* (2001) 33 EHRR 50 and *Üner v The Netherlands* (2006) 45 EHRR 14, summarised the relevant factors at paras 72-73 as comprising the following:

"• the nature and seriousness of the offence committed by the applicant;
• the length of the applicant's stay in the country from which he or she is to be expelled;
• the time elapsed since the offence was committed and the applicant's conduct during that period;
• the nationalities of the various persons concerned;
• the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
• whether the spouse knew about the offence at the time when he or she entered into a family relationship;
• whether there are children of the marriage, and if so, their age; and
• the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …
• the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
• the solidity of social, cultural and family ties with the host country and with the country of destination." "

36. The Judge gave inadequate reasons for finding that Exception [2] was met in relation to the 'stay' scenario. The evidence before the

First-tier Tribunal was that the claimant remains subject to a restraining order in respect of his assault on his son's mother, which restricts the claimant from coming anywhere near the area where she lives with his son. The claimant lives a considerable distance away from his son. It is asserted that the claimant's relationship with his son was recently rekindled in 2022, but there is nothing from the mother to confirm that.

37. We remind ourselves that we must exercise caution in interfering with findings of fact and credibility by the First-tier Tribunal: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

38. However, in this appeal, the First-tier Judge's decision is 'rationally insupportable'. There was no evidence save that of the claimant regarding the relationship between father and son, of the emotional harm that will be likely to flow from the separation. There was no evidence from the claimant's school. There was no evidence from the ex-partner to support the claimant's claim that they are in a better place. The high standard for Exception 2 in section 117C(5) is not met.

39. Nor do we consider that the even more demanding threshold in 117C(6) has been reached. There was simply no evidence on which to find that there were very compelling circumstances over and above those for Exception 2, in this case.

40. In the circumstances we find that the Judge did materially error in respect of his findings pursuant to Exception 2 and the proportionality assessment in the Article 8 of the European Convention on Human Rights.

41. We have considered whether we should remake the appeal. We remind ourselves that there is a child involved and that he may be diagnosed with autism. We consider, in this case, that there should be a remaking hearing on the facts as they are today. We warn the claimant that if, at the remaking hearing, the evidence remains as it presently stands, he should not expect his appeal to succeed.

42. The decision on international protection stands unchallenged and we uphold it.

43. The appeal will be remitted to the First-tier Tribunal for remaking, limited to Article 8 ECHR and section 117C of the 2002 Act. No findings of fact are preserved regarding that element of the appeal.

Notice of Decision

44. For the foregoing reasons, our decision is as follows:

The making of the previous decision involved the making of a material error on a point of law.

We set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal before any Judge other than First-tier Judge Howard.

Dated: 2 May 2024
Sureta Chana

Sureta Chana
Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber