IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002579

First-tier Tribunal No: HU/02132/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 26 September 2024

Before

UPPER TRIBUNAL JUDGE HOFFMAN

Between

MAMADOU DIALLO
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms E Harris, Counsel
For the Respondent: Ms S Mackenzie, Senior Home Office Presenting Officer

Heard at Field House on 24 September 2024

DECISION AND REASONS

1. The appellant appeals to the Upper Tribunal against the decision of First-tier Tribunal Judge G Clarke ("the judge") promulgated on 10 April 2024. In that decision, the judge dismissed the appellant's appeal against the respondent's decision to refuse his human rights claim and deport him to Portugal under section 32(5) of the UK Borders Act 2007.

Background

2. The appellant was born in Portugal in 1996. He arrived in the UK with his parents and siblings in 2011 and remained here lawfully in accordance with the right to freedom of movement under the EU Treaty. On 5 July 2018, the appellant was convicted of four counts of theft from his employer and was issued with a community order. On 3 December 2019, the appellant was convicted of failing to comply with the community order and was fined £80. On 18 November 2019, the appellant applied for settled status under the EU Settlement Scheme. His

application was successful, and he was granted indefinite leave to remain on 23 December 2019.

3. However, on 25 April 2023 the appellant was convicted at Cambridge Crown Court of possession with intent to supply a controlled Class A drug (crack cocaine), possession with intent to supply a controlled Class A drug (heroin) and acquiring/use/possession of criminal property. He was sentenced to 26 months' imprisonment. This resulted in the respondent serving on the appellant notice that he was liable to deportation and in response the appellant raised a human rights claim. On 26 July 2023, a deportation order was made against the appellant under section 32(5) of the UK Borders Act 2007. That order was served on the appellant the following day along with a decision refusing his human rights claim. (For reasons that are unclear, there is also on file a further deportation order and decision letter, both dated 1 November 2023, which are not mentioned in the immigration history prepared by the respondent for the First-tier Tribunal hearing, although the judge proceeded on the basis that it was the 27 July 2023 decision that was under appeal.)

4. The appellant exercised his right of appeal to the First-tier Tribunal against the respondent's decision. He argued that there were very significant obstacles to him re-establishing his private life in Portugal and that there were very compelling circumstances to his case that outweighed the public interest in his deportation. The appellant relied heavily on his relationship with his family in the UK, in particular his parents and five siblings, two of whom were minors. The judge found that there were no very significant obstacles to the appellant re-establishing his private life in Portugal and this element of his decision is not challenged before me. Instead, the appellant seeks to challenge the judge's findings in relation to his family in the UK, which he made as part of his assessment of the very compelling circumstances test. In conclusion, the judge accepted that the appellant had strong ties to the UK and that he and his family were very close. However, the judge found that the appellant had been convicted of a serious crime and that while his deportation would have a detrimental impact on his family in the UK, in particular his minor sister ("S"), any adverse consequences for S or other members of the family could be managed by public services, and that there were no very compelling circumstances to his case.

5. The appellant's subsequent application for permission to appeal to the Upper Tribunal was granted by Deputy Upper Tribunal Judge Wilding on 9 July 2024. The appellant relies upon two grounds:

> (1) The judge erred in law by failing to consider or address whether the appellant has established a family life in the UK, in particular with his minor siblings.
>
> (2) The judge erred in his approach to and consideration of the impact of the appellant's deportation on S.

Conclusions – Error of Law

Ground 1: Family life

6. The respondent argues that contrary to the appellant's assertion, the judge did make findings in relation to the appellant's Article 8 ECHR family life in the UK at [83] where he says: "I accept that [the appellant] has strong Article 8 family life

and private life". However, Ms Harris, on behalf of the appellant, argued that this was insufficient because the judge had firstly failed to explain why Article 8 was engaged and, secondly, the judge did not say who he accepted the appellant enjoyed family life with.

7. Reading [83] in the context of the rest of the decision, I am satisfied that the judge did make a finding that the appellant enjoyed Article 8 family life with his parents and siblings in the UK, including S. At [85], the judge says that he has considered the impact of the appellant's deportation

> "on this close knit family, particular his younger sister. The Appellant has 2 siblings who are minors – his brother who is aged 12 and at boarding school in Senegal and his sister who is aged 10 and lives with the rest of the family here in the United Kingdom."

The reference to "this close knit family" can only be to the family life the judge accepts the appellant enjoys at [83]. Furthermore, at [92] the judge says that he did "not underestimate the impact the Appellant's deportation will have on his whole family, but especially the Appellant's sister". While Ms Harris submitted that it was unclear whether the judge was referring to this in the context of the appellant's private or family life, I am satisfied that, when the decision is considered holistically, the judge plainly had in mind the Article 8 family life enjoyed by the appellant and his parents and siblings. And to the extent that Ms Harris submitted that the judge had failed to give any reasons as to why he found the appellant enjoyed family life for the purposes of Article 8, I do not accept that this amount to a material error of law given that the judge's acceptance that family life did exist was beneficial and not prejudicial to the appellant's case.

8. For these reasons, I am satisfied that the judge did not make a material error of law as argued in Ground 1.

Ground 2: Consideration of the sister's circumstances

9. This ground of appeal consists of two elements. Firstly, the appellant argues that the judge erred by finding at [90] that the opinions of the independent social worker ("ISW"), Mr Laurence Chester, were based upon the "paramountcy principle" when, it is submitted, the ISW's assessment of the best interests of the child, and the welfare checklist he completed, were in line with the Home Office's own guidance on Every Child Matters. Ms Harris submitted that having found that the ISW applied the paramountcy principle, it was unclear to what extent this affected the weight the judge attached to the ISW's report. Secondly, it is argued that the judge erred in concluding at [92] and [97] that the emotional impact on S caused by the appellant's deportation could be mitigated by her referral to children's services. At paragraph 10 of the grounds of appeal it is submitted that

> "To take such an approach is to accept that the child will suffer significant emotional harm but that is mitigated by the support that can be found from Children's Services. This both means that the damage is done before support is provided and further assumes that the support provided will resolve or mitigate the harm. It further fails to take into account the long lasting impact that will take place, not only on the child by the entire family."

10. In relation to the first point, Ms Mackenzie, on behalf of the respondent, submitted that the judge did in fact explain the weight he attached to the ISW's report at [54] where he said,

> "The ISW ignores in my view any consideration of the ability of the Appellant's family to support him – financially and emotionally – as he seeks to reintegrate to life in Portugal. Such an obvious failure on the ISW's part considerably lessens the weight that I attach to his conclusions."

However, I accept Ms Harris's submission that the judge's comments at [54] were confined to the weight that could be attached to the ISW's report in relation to the very significant obstacles element of the appellant's case and not to the very compelling circumstances aspect so far that it was reliant on the circumstances of S.

11. When considering very compelling circumstances, at [89], the judge accepted that the ISW "as a qualified Social Worker of many years' experience in child protection, is qualified to give an expert opinion of the best interests of a child and the matters set out in the welfare checklist". But, at [90], the judge says, "However, the ISW's opinion is based on the paramountcy principle that underpins the Welfare Checklist. As discussed above, the best interests of a child in this Tribunal are not paramount, but primary." Ms Harris submitted that the use of the word "However" indicated that the judge must have limited the weight he attached to the ISW's report. What the judge was evidently referring to when he referred to the "paramountcy principle" is that the welfare checklist derives from the Children Act 1989 and section 1 of that Act says that when a court determines any question with respect to the upbringing of a child or the administration of a child's property, the child's welfare shall be the court's paramount consideration. However, in the immigration context, the requirement to take into account the best interests of the child derives from section 55 of the Borders, Citizenship and Immigration Act 2009 and in the case of ZH (Tanzania) v Secretary of State for the Home Department [2011] UKSC 4 Lady Hale (with whom Lord Brown and Lord Mance agreed) held at [25] that the best interests of a child was "a primary consideration" and not "the paramount consideration". To that extent, what the judge said in the second sentence of [90] was correct: for the purposes of the appeal before the First-tier Tribunal, the best interests of S were a primary, but not a paramount consideration. [90] must also be read alongside [91] where the judge notes that the ISW could not be expected to factor into his report the strong public interest in the deportation of foreign criminals that the tribunal must weigh. Again, the judge was correct in that regard.

12. I am satisfied that, although perhaps clumsily worded, what the judge meant at [89] to [91] was that the ISW's expert opinions on the effect of the appellant's deportation on S's wellbeing were not determinative of the appeal because, unlike the ISW, the judge had to weigh the impact on S (as a primary consideration) against the weighty public interest in the deportation of foreign criminals.

13. Furthermore, while it is correct that the judge does not expressly state how much weight he attached to the ISW's report as regards S's circumstances, it is evident from [89] that given the ISW's qualifications, the judge does place weight on the report. This is confirmed at [87], [88], [92] and [96] where the judge

makes express reference to passages of the ISW's report. At [96], the judge also states,

> "I keep to the forefront of my mind the ISW's assessment at Section 11.3, *"It is likely, in my view, that a decision to refuse this application would have a profound impact on the whole amity's [sic] emotional wellbeing and would be devastating for all of them especially (the Appellant's sister)."*."

I am therefore satisfied that the judge approach to the ISW's report as part of his assessment of the impact of the appellant's deportation on S was not infected by a material error of law as argued in the first part of Ground 2.

14. Turning to the second element of Ground 2, and whether the judge erred by suggesting that any risk of harm to S could be mitigated by the appellant's family seeking the support of public services, the respondent relies upon [53] in the case of BL (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 357 and argues that the judge was entitled to take into account the support that social services and others can provide to mitigate any emotional harm that S might suffer as a consequence of the appellant's deportation. Ms Harris did not dispute what the Court of Appeal said in BL (Jamaica), but she submitted that what the ISW's report showed is that S would suffer emotional harm, not only from the separation from her brother but from seeing the effect on her family, whether or not support from public services is available. She also submitted that it was speculative to say that the effect on S could be mitigated with the assistance of public services and that the judge had failed to take into account the long-term impact on S and the rest of her family. Conversely, the respondent argues that it is speculative for the appellant to assume that damage would be done to S before assistance can be given to her by public services, especially in circumstances where the judge found at [97] that the family had already demonstrated a willingness to seek assistance from medical services.

15. While Ms Harris submitted that the judge failed to explain what the best interests of S were, it is clear from reading [86] to [90] that the judge had this duty in mind when reaching his decision. Reading the decision as a whole, I am satisfied that it could not rationally be considered that the judge approached the case on any basis other than the best interests of S were for the appellant to remain in the UK.

16. I take into account that at the judge expressly stated at [92] that he did not underestimate the impact that the appellant's deportation would have on his whole family and especially S. He found that the family could access public services, including children's services, to assist them, taking into account the contents of the ISW's report, including that support was available for S and that the ISW had recommended to the family that they "seek support to aid them in preparing for whatever decision is made by the Court". I am satisfied that the judge did not err in law by finding that any emotional harm caused to S could be adequately mitigated with the help of public services because, as the grounds of appeal argue, "the damage is done before support is provided and assumes that the support provided would resolve or mitigate the harm". As the Court of Appeal held in BL (Jamaica), a judge is entitled to "work on the basis that the social services would perform their duties under the law". Furthermore, I am satisfied that the judge was entitled to take into account that the ISW had advised the family to seek support in advance of a decision by the tribunal so that support could be put in place before deportation took place. The judge also found that S

could visit the appellant in Portugal. To the extent that the appellant argues that regardless of S being supported by children's services, she would nevertheless be emotionally harmed as a result of her brother's deportation, I find that submission gets close to arguing that S's interests are a paramount consideration. As the judge correctly noted, her interests are a primary consideration to be weighed against the public interest factors, and he proceeded on that basis.

17. At [96], the judge confirmed that he kept at the forefront of his mind the ISW's assessment on "the profound impact" the appellant's deportation was likely to have on his family. At [97], the judge accepted that removal would lead to the long-term separation of the appellant from his family, although he found that this had to be balanced against the strong public interest in his deportation given that he had been convicted of serious offences. Ultimately, I am satisfied that it was reasonably and rationally open to the judge to reach the findings that he did and conclude at [98] that that the matters relied upon by the appellant did not amount to very compelling circumstances capable of outweighing the strong public interest considerations.

18. For these reasons, I am satisfied that the judge did not make a material error of law as argued in Ground 2.

Notice of Decision

There is no material error of law in Judge Clarke's decision.

The appeal is dismissed.

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

25th September 2024