IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002305
UI-2024-002306
First-tier Tribunal No: EA/01494/2023
HU/60466/2023
LH/05027/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 27 January 2025

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE STERNBERG

Between

Mauro Rodrigues
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr G Lee, counsel instructed by Turpin Miller LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 21 January 2025

DECISION AND REASONS

Introduction

1. The appellant was granted permission to appeal the decision of First-tier Tribunal Judge G Clarke who dismissed the appellant's appeals, following a hearing which took place on 27 February 2024. That appeal challenged a deportation order made by the respondent on 10 February 2023 and a decision to refuse his human rights representations dated 26 July 2023. Following an error of law hearing which took place on 7 November 2024, the decision of the First-tier Tribunal judge was set aside in a decision of Upper Tribunal Judge Kamara with written reasons issued on 14 November 2024.

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2. The appeal was retained in the Upper Tribunal for remaking, with the findings of the First-tier tribunal at [85]-[116] preserved in relation to exception 2 under section 117C(5) of the Nationality Immigration and Asylum Act 2002 ('the 2002 Act') (decision of 14 November 2024 at [33]).

3. No anonymity direction was made previously and no such application was made. We anonymise the appellant's child as 'C' in this decision because it contains details of their medical condition.

Factual Background

4. The relevant background is set out in the decision of 14 November 2024 at [4] and [5] which we adopt. The appellant is a national of Portugal now aged twenty who entered the United Kingdom during 2005, at the age of one, with his mother. He was granted Indefinite Leave to Remain (ILR) 9 October 2019 under the EU Settlement Scheme.

5. On 11 January 2023, the appellant was convicted of two counts of dangerous driving, three counts of driving while disqualified and two counts of driving while uninsured. He was sentenced to 12 months' imprisonment. The appellant has also acquired other convictions for other driving-related offences, including dangerous driving and driving while disqualified, between 30 September 2020 and 11 January 2023. A notice of decision to make a deportation order was made on 10 February 2023. This is one of the two immigration decisions which are the subject of this appeal. The other decision is dated 28 July 2023, in which the appellant's human rights representations were refused.

6. The appellant appealed against those decisions to the First-Tier tribunal. The First-tier Tribunal judge dismissed both appeals. He found that the EU decision did not breach the_Withdrawal Agreement. In respect of the human rights' appeal, the judge found that the_appellant could not meet the Exceptions to deportation and that there were no very compelling_circumstances. The appellant sought permission to appeal to the Upper Tribunal, permission to appeal was granted by Upper Tribunal Judge Gill on 18 June 2024. The Tribunal's decision of 14 November 2024 dismissed the appellant's appeal on Ground 1 relating to the proportionality of the deportation decision on EU law principles in accordance with the decision in *Vargova* [2024] UKUT 00336. The Tribunal found a material error of law in relation to the First-tier Tribunal Judge's decisions in relation to the exceptions to deportation in section 117C of the 2002 Act.

7. Subsequent to the error of law hearing, the appellant was convicted at Willesden Magistrates' court on 20 November 2024 for an offence of driving whilst disqualified that occurred on 19 November 2024. He was sentenced to a term of immediate imprisonment of 9 weeks and he was further disqualified from driving for 12 months. Following his completion of the custodial part of that sentence he was granted immigration bail on 20 December 2024.

The remaking hearing

8. The hearing was attended by representatives for both parties as above. We heard oral evidence from the appellant and his mother, Ana Guita, who were both cross-examined by Mr. Tufan. The appellant's former partner and mother of his child, Jadah Charles-Williams, did not attend the hearing although she had provided an updated statement. Both representatives made closing submissions and our analysis and conclusions below consider those arguments and

submissions where necessary. We were provided with an updated skeleton drafted by Mr. Lee and a composite bundle running to 273 pages which included the core documents in the appeal, including the appellant's and respondent's bundles before the First-tier Tribunal as well as the further evidence filed by the appellant following the error of law hearing. That further evidence includes further statements from the appellant and from Ms. Charles-Williams as well as a letter dated 19 June 2024 confirming that C has been referred for speech and language therapy, a letter following a meeting on 11 June 2024 C was referred to the Barnet Child developmental service, the Royal Free Developmental Paediatrics Team and the Barnet Early Years SEND advisory team, each of these referrals was accepted. Finally, the appellant also provided an Observation report on C prepared by the Barnet Early Years SEND advisory team dated 15 December 2024 detailing the concerns raised by their nursery regarding C's language development, their awareness of others and interest in them and limited focus on activities and the strategies suggested to address these concerns.

9. At the end of the hearing we reserved our decision which we now give.

Legal Framework

10. The appellant argues that his removal from the United Kingdom would be a breach of the United Kingdom's obligations under Article 8 of the European Convention for the Protection of Human Rights and Fundamental Freedoms. The burden of proof is on the appellant to establish an interference with his rights under Article 8(1) ECHR and the standard of proof is a balance of probabilities. The burden is then upon the Secretary of State to establish to the same standard that the interference is justified under Article 8(2) ECHR.

11. Section 32(4) of the UK Borders Act 2007 ('the 2007 Act') provides that "the deportation of a foreign criminal is conducive to the public good". Sub-section 5 requires the Secretary of State to make a deportation order in respect of a "foreign criminal," defined as a person who is not a British citizen and who is convicted in the UK of a criminal offence for which they are sentenced to a period of imprisonment of at least twelve months, unless it would be a breach of a person's rights under the European Convention on Human Rights ('ECHR'). Foreign criminals are divided into categories which include: those with sentences of between one and four years imprisonment (medium offenders) and those sentenced to four years or more (serious offenders).

12. Part 5A of the 2002 Act was introduced by the Immigration Act 2014 with effect from 28 July 2014.

13. When considering whether deportation is justified as an interference with a person's right to respect for private life and family life under article 8(2) of the ECHR, section 117A(2) of the 2002 Act requires decision makers to have regard in all cases to the considerations listed in section 117B, and in cases concerning the deportation of foreign criminals to the considerations listed in section 117C.

14. The relevant parts of section 117C of the 2002 Act, provides:

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where-

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

Discussion

15. In reaching our decision, we have taken into consideration sections 117B and 117C of the 2002 Act, as amended as well as all the evidence and submissions, both oral and written. There was no real dispute between the parties as to the facts of the case. Mr. Tufan did briefly cross-examine the appellant and his mother. Mr. Tufan's questions to the appellant focussed on the absence of Ms. Charles-Williams from the hearing, his recent conviction, his mental health, C's development and when he had last visited to Portugal. His questions to Ms. Guita covered her son's relationship with Ms. Charles-Williams, their last visit to Portugal, her relationship with C and her capacity to support her son if he were deported to Portugal. The areas of disagreement between the representatives were: (1) whether the appellant met the requirements of Exception 1 in section 117C(4) of the 2002 Act as to whether there would be very significant obstacles to his integration if deported to Portugal, (2) whether the appellant met the requirements of Exception 2 in section 117C(5) of the 2002 Act, namely whether the effect of the appellant's deportation would be unduly harsh on his child, and, (3) whether he had established that there were very compelling circumstances over and above those described in the Exceptions to deportation.

Preserved findings

16. We summarise the findings of the First-tier Tribunal at [85]-[116] which were preserved following the error of law hearing.

1. The appellant has a partner and a child who was then 18 months old[1]. They are both British citizens.

2. The appellant is in a genuine and subsisting relationship with his partner, although they do not live together. They do not want to start living together while these proceedings are ongoing because of the uncertainty that they are causing.

3. The appellant has a genuine and subsisting relationship with C. He spends most evenings at his partner's home and spends time with his

[1] C is now 2 years old.

partner after C goes to bed. C has had overnight stays with the appellant at his mother's address. He is actively involved in C's life and is with his partner and C the majority of the time. His partner considers him to be a good father, providing financial support above what is required of him. They are in a genuine and subsisting relationship and both love their child and want the best for C.

4. If the appellant is deported and C in the UK with Ms. Charles-Williams the loss of the appellant will be severe or bleak but it will not be unduly harsh

5. The appellant's partner will remain in the UK. It would be unduly harsh for C to be removed from their mother to relocate to Portugal with the appellant.

6. It would not be unduly harsh for the appellant's partner to relocate to Portugal to live with the appellant, albeit she would face obstacles there. To go to Portugal as a family unit will not be unduly harsh. Overall the appellant does not meet the family life exception in section 117C(5) of the 2002 Act.

General observations

17. We begin by noting that the appellant can properly be considered a medium offender owing to the fact that he was sentenced to twelve months detention in a Young Offender's Institute. The judge's sentencing remarks noted that he had displayed '*breath-taking disregard, not only for the law but perhaps more importantly, for the safety of other road users*.' In the most serious of the offences he committed he drove at 70mph in a 30 zone and had a minor collision with another car.

18. We remind ourselves of the statutory provisions which state that the deportation of foreign criminals is in the public interest and the more serious the offence committed, the greater the public interest in deportation. In this case there is a significant public interest in deporting the appellant from the United Kingdom.

Exception 1

19. The appellant relies on Exception 1 in section 117C(4) of the 2002 Act. As set out above, there was no dispute that the criteria in section 117C(4)(a) and (b) are met; that the appellant has been lawfully resident in the UK for most of his life and he is socially and culturally integrated in the UK. Our focus is therefore solely on section 117C(4)(c): whether there would be very significant obstacles to the Appellant's integration into Portugal, the country to which the Respondent proposes to deport him. In approaching this issue the findings of the First-tier Tribunal were not preserved.

20. In his oral evidence before the Upper Tribunal the appellant was asked when he had last visited Portugal. He said he did so 5 or 6 years ago with his mother. When he visited he would stay in hotels or apartments. His mother confirmed in her oral evidence that she last went to Portugal with her son in August 2019 for five days for a cousin's wedding. They stayed in a hotel, they do not have anywhere else to stay there. Their evidence was consistent with each other and their written evidence and we accept it.

21. In *SSHD v Kamara* [2016] EWCA Civ 813 Sales LJ held at [14]:

> In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life.

22. We have considered with care whether the appellant would be enough of an insider to integrate, applying the judgment in *Kamara*, immediately above. It is correct that he left Portugal and came to the UK when he was only 1 year old and he has spent his childhood, adolescence and adulthood in the UK. However, he does retain family links to Portugal including his aunt who owns a property there where she lives for a few weeks each year. He is a Portuguese citizen. There was no suggestion that he does not speak or understand Portuguese, although in his witness statement prepared for the for the First-tier Tribunal records that he cannot read or write in that language. In any event English is widely spoke in Portugal.

23. The appellant has no permanent family home in Portugal. His mother’s evidence is that she would have to support him financially for approximately 6 months to cover his accommodation and food expenses, after which time she expected him to find a job. We accept this evidence.

24. We also accept the evidence of Jodi Symmonds, a registered psychologist who prepared a report on the appellant in January 2024. Her opinion (at [7.0.3]-[7.0.8]) is that the appellant’s symptoms are consistent with moderate generalised anxiety disorder and mild depressive disorder and that his mental health may significantly deteriorate in the event of his deportation. He currently enjoys motivational and protective factors in the form of his relationships in the UK. He does not currently present a high risk of suicide but the risk of suicidal ideation or the risk of acting on any suicidal thoughts and a deterioration in his mental health will increase if he is removed from the UK. It is also correct, as Mr. Tufan pointed out, that the appellant has not received any treatment for his mental health condition whilst in custody or at liberty. We consider the effect on his mental health if deported to be a relevant factor which amounts to an obstacle to his reintegration in Portugal.

25. Considering the length of the appellant’s residence in the UK, his limited ability to speak Portuguese and the effect on his mental health of separation from his family, the position in the event of his deportation to Portugal would be dismal. However, he would have at least financial support from his mother on arrival and would not face a significant language barrier. He would be able to access healthcare in Portugal if he required it. Overall, we conclude that while the obstacles to the appellant’s integration in Portugal would be real, we do not consider that they would be very significant in the terms set out in *Kamara* and *NC v SSHD* [2023] EWCA Civ 1379 at [20]-[26].

Exception 2

26. The focus of the appellant's argument on this ground was whether the effect of his deportation would be unduly harsh on C. As noted above, the parties agreed that the appellant has a genuine and subsisting relationship with C and that C is a British citizen and is therefore a 'qualifying child' for the purposes of section 117D(1)(a) of the 2002 Act. For completeness, we record that Mr. Lee did not argue on the appellant's behalf that the effect of his deportation would be unduly harsh on his partner.

27. The relevant legal principles which we apply are set out in *HA* (Iraq) [2022] UKSC 22 and *KO* (Nigeria) in which the Supreme Court endorsed what the Upper Tribunal's decision in *MK* (section 55 – Tribunal options) [2015] UKUT 223 (IAC), holding [at 46] that 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*.' The Supreme Court also endorsed the finding of the Court of Appeal in *HA* that undue harshness should not be evaluated with reference to the distress that 'any child' might face when their parent is deported as to apply such a notional comparator would be contrary to s55 of the Borders, Citizenship and Immigration Act 2009.

28. Mr. Lee's submissions for the appellant submissions focused on the relatively young age of the appellant and his partner, they are both 20 and co-parent their child. Ms. Charles-Williams' evidence to the First-tier Tribunal was that she would not be able to move to Portugal to live with the appellant if he was deported. This would leave C without a proper relationship with the appellant and would have a negative impact on Ms. Charles-Williams and C.

29. For the Respondent Mr. Tufan submitted that C is yet to receive a formal diagnosis, the appellant is not living with C, although there is clearly a parental relationship. His absence from the UK would not reach the very high threshold of unduly harsh. In *HA* the Supreme Court upheld that very high threshold at [41], approving what was said in *MK*.

30. The Respondent's decision letter of 26 July 2023 accepts at [20] that it would be in C's best interests for the appellant to be allowed to remain in the UK to allow their relationship to continue.

31. We remind ourselves that the error of law decision preserved the First-tier Tribunal Judge's findings, summarised at [16] above, as the starting point for our consideration of this issue, although the appellant was not precluded from submitting further evidence.

32. The appellant has submitted further evidence in support of this ground and both he and his mother gave oral evidence before us. That evidence is of significance to our determination of this ground and we set it out in detail below.

33. We heard oral evidence from the appellant and his mother regarding the role he plays in C's life. In his written statement the appellant records that C's nursery have become concerned about C's development and have made referrals to the NHS speech and language therapy team in Barnet and have referred C for diagnostic assessment in relation to their development. The appellant continues to play a critical role in C's life. He looks after C with regularity and takes C to nursery and to the Early Years Special Educational Needs centre which C attends one day a week. In his oral evidence the appellant confirmed that he spent all of

the previous week with C and he was trying to spend as much time with C as he could. We accept that evidence

34. It is correct that Ms. Charles-Williams did not give oral evidence to this Tribunal, although we do formally receive her statement. Her statement includes the fact that one of the issues that will be investigated in relation to C is whether C meets the criteria for a diagnosis of autism. Her statement records that C's health professionals have said that C has displayed signs of autism since the age of 1. Although Ms. Charles-Williams did not give live evidence to us, her evidence regarding C's developmental delays was corroborated by the evidence of the appellant's mother Ana Guita. She works full time for her local council in their social services department and at weekends as a family support worker. She is also, of course, C's grandmother. We accept that she is well placed to give factual evidence on C's needs, development and behaviour.

35. Ms. Guita's evidence was that it is difficult to set boundaries for C, who does not play like a normal child, C won't play with a doll or sit on a scooter. C will sit in front of the TV for a few minutes and then will be walking or running, the family have to be constantly around C to make sure they are safe. C is non-verbal. While Ms. Guita is close to C and helps to take care of C when she can, she works both a full time and a part time job and has a 12 year old daughter, the appellant's sister, to take care of. She is therefore limited in the assistance she can give the appellant and C. This evidence was not substantially challenged in cross-examination and we accept it.

36. The NHS letters of 19 June 2024 and following a meeting on 11 June 2024 confirm that C has been accepted for assessments by the Developmental Paediatrics team, for speech and language therapy and by the Barnet Early Years SEND advisory team. It is clear from these documents alone that the concerns raised by C's nursery were of sufficient seriousness to merit those referrals which were accepted.

37. The observation report prepared by Barnet Early Years SEND Advisory team provides further detail on the concerns raised regarding C's development and the strategies to be used to help with those concerns. Those concerns include that C is not yet initiating or responding to verbal interactions with their peers and adults, C finds it challenging to share attention with others. C is reliant on adults understanding their needs and wants. The report suggests both the nursery setting and C's family will be responsible for implementing strategies for C's areas of needs.

38. We accept that there have been two important developments in the evidence as it relates to C since the First-tier tribunal's decision. The first is that the appellant's relationship with his child has developed and continued. Over 11 months have passed since that hearing and the appellant has played an active and important role in his child's life. He and Ms. Charles-Williams have joint parental responsibility for C and he plays an active and important role in C's care. We accept, as we must, that that care and his role were interrupted by the appellant's imprisonment for a further offence of driving whilst disqualified which separated him from his child for a little over a month between 19 November 2024 when he was arrested and 20 December 2024 when he was granted immigration bail. That moderates to an extent the weight we can place on this factor when considering the impact on C were he to be deported.

39. The second important development since the hearing before the First-tier tribunal are the concerns raised regarding C's developmental delays. It is apparent that C is delayed in their speech and language development as well as having a limited or no sense of danger and risk. From these referrals and the observation report we conclude that C is highly likely to need high degree of parental supervision, care and support to ensure their well-being and to help with their development and education. That is an important factor which was not in evidence before the First-tier tribunal, simply because these issues had not been identified at that time.

40. The First-tier tribunal concluded that it would be unduly harsh for C to relocate to Portugal with the appellant. We consider that conclusion is correct and remains unaltered by the evidence and submissions that we heard. Our focus is therefore on whether it would be unduly harsh for C to remain in the UK with their mother but without the appellant. The First-tier tribunal concluded that for C to remain in the UK without the appellant for at least 10 years would be severe or bleak but it would not be unduly harsh.

41. Taking C's interests as a primary consideration, we are satisfied that it is in C's best interests for the appellant to remain in the United Kingdom to enable their relationship to continue to develop and for the appellant to provide care and support to C in their development.

42. While the harm envisaged which C will suffer by the appellant's deportation is emotional harm, as the Court of Appeal explained in *MI* (Pakistan) [2021] EWCA Civ 1711 at [159] this is this is as significant as other forms of harm. At [49] the Court of Appeal rejected the proposition that psychological injury was required for the unduly harsh test to be made out.

43. Taking the decision of the First-tier Tribunal as our starting point, we accept that evidentially matters have moved on since then which require us to decide for ourselves whether the appellant's removal to Portugal would be unduly harsh on his child. The evidential developments summarised above are of critical important to our assessment of this question. It is correct that the appellant was separated from C when he serving the custodial part of the 12 month sentence of detention he received in January 2023, when C was only three months old, as well as for a month in November 2024 following his subsequent conviction. Since his release from his sentence of detention in 2023 and aside from his imprisonment for a month in November to December 2024, the appellant has maintained a strong bond with C. He has played an active and involved role in C's upbringing. Due to their developmental needs C requires an additional level of care and attention than a neurotypical child of her age. That is not to compare C's situation with a child without developmental delays but is an illustration of C's needs and is highly relevant to the impact on C if the appellant is deported. In those circumstances he will be separated from his child and C will be deprived of his care as well as his emotional, practical and financial support. The family life he has established since his release from his sentence of detention will be brought to an end. On the specific evidence relating to C's developmental needs and in the particular circumstances of this case, we attach particular weight to the emotional harm that C will be caused if the appellant's regular and near-daily in person contact care for C were to come to an end.

44. Giving full and appropriate weight to the public interest in the deportation of foreign criminals we conclude on the evidence before us that the appellant's deportation to Portugal and his separation from C renders the effects of the

appellant's deportation on his child unduly harsh. Exception 2 in section 117C(5) of the 2002 Act is made out.

45. It follows that we conclude that to deport the appellant would be disproportionate and a breach of Article 8 ECHR.

Very compelling circumstances

46. Mr. Lee accepted that his argument under section 117C(6) of the 2002 Act was a fall back in the event that his submissions on exceptions 1 and 2 under section 117C(4) and (5) failed. In light of our conclusion on exception 2 it is not necessary for us to decide this ground of appeal and we do not do so.

Notice of Decision

The appeal is allowed on human rights grounds.

D Sternberg

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

23 January 2025

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email