Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/00883/2020 (V)**

THE IMMIGRATION ACTS

Heard remotely from Field House
On the 16th June 2021

Decision & Reasons Promulgated
On the 29th June 2021

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

UNA [R-D]
(ANONYMITY DIRECTION NOT MADE)

Respondent

The hearing was conducted on Microsoft Teams

Representation:
For the appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the respondent: Ms U Uwaezuoke, Legal Representative from IAS

DECISION AND REASONS

Introduction

1. For ease of reading, I shall refer to the appellant in these proceedings as the Secretary of State and to the respondent as Mrs R-D.

2. This is an appeal against the decision of First-tier Tribunal Judge Loke ("the judge"), promulgated on 14 December 2020. By that decision, the judge allowed Mrs R-D's appeal against the Secretary of State's decision, dated 24 December 2019, refusing her human rights claim, which had been made in the context of deportation proceedings.

3. Mrs R-D is a citizen of Jamaica born in 1965. She came to United Kingdom as long ago as October 1998. Having then overstayed, she was subsequently granted two periods of discretionary leave. Prior to the expiry of that second period, Mrs R-D was convicted of benefit fraud, sentenced to 30 months' imprisonment, and made the subject of a confiscation order in the sum of approximately £20,000. On 25 July 2014, a deportation order was made against her pursuant to section 32(5) of the UK Borders Act 2007. An appeal against that decision was dismissed by the First-tier Tribunal Judge Afako on 17 March 2015 (DA/01612/2014) and this was upheld by the Upper Tribunal by a decision promulgated on 21 December of that same year.

4. Mrs R-D submitted further representations in 2017 and 2018, which were treated as an application to revoke the deportation order. Those representations were rejected under paragraph 353 of the Immigration Rules. Judicial review proceedings were threatened and the Secretary of State reconsidered her paragraph 353 decision and then refused Mrs R-D's human rights claim, giving rise to a right of appeal.

5. The essence of Mrs R-D's case on appeal was as follows. She was effectively a primary carer for her 16-year-old daughter, K, and her mother, who suffers from dementia. Her husband, Mr D, was an alcoholic who was incapable of fulfilling all familial responsibilities in her absence. An adult daughter, D-J, had a young child of her own and suffered from mental health problems. The family unit was being financially supported by an adult son, D, who was struggling to fulfil this role. It was said that Mrs R-D could either the exception set out in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), or the "very compelling circumstances" test set by section 117C(6) of the 2002 Act.

The decision of the First-tier Tribunal

6. Rather than set out the detail of the judge's decision at this stage, I propose instead to simply summarise her conclusions and the outcome. I will deal with the substance of her decision when addressing the various strands of the Secretary of State's challenge, below.

7. The judge concluded at [30] and [33] that it would not be unduly harsh for Mrs R-D to be deported to Jamaica whilst Mr D and K remained in the United Kingdom (the Secretary of State had accepted in her decision letter that it would be unduly harsh for K to go and live in Jamaica and this was confirmed by the judge at [31]).

8. Having taken a number of factors into consideration at [40]-[46], the judge went on to conclude that there were very compelling circumstances in the case, with the effect

that the Secretary of State's decision was disproportionate and therefore unlawful. She accordingly allowed Mrs R-D's appeal.

The grounds of appeal and grant of permission

9. The grounds of appeal are set out under the heading "Making a material misdirection in law/failing to provide adequate reasons on a material matter and/or omitting a material consideration." The main thrust of the grounds is the assertion that the judge failed to provide adequate reasons in respect of the factors relied on in arriving at her conclusion on the very compelling circumstances issue. In addition, it is said that the judge failed to take account of an individual called Kiesha (a niece of Mrs R-D) who are provided some assistance to the family, and failed to take account of Mrs R-D's evidence concerning remorse.

10. Permission to appeal was granted by the First-tier Tribunal on 14 January 2021.

Discussion and conclusions on error of law

11. At the end of the hearing and having taken a short break to reflect on the relevant issues, I informed the parties of my conclusion that the judge had not materially erred in law and that her decision should stand. My analysis of the issues and reasons for my conclusion are as follows.

12. As is really rather common in respect of grounds of appeal drafted on behalf of the Secretary of State, there is a somewhat bald assertion that the judge in question has "misdirected" himself or herself in law. All too often, the alleged misdirection (as opposed, for example, to reasons challenges or assertions that matters have not been taken into account) are not particularised, as is the case here. As I indicated to Mr Tufan at the hearing, I found it difficult to detect any legal misdirection on the judge's part. She plainly had the appropriate statutory framework in mind throughout her consideration, namely section 117C of the 2002 Act. She correctly began with the exception under section 117C(5) and then moved on to the very compelling circumstances test under section 117C(6). As regards the importance of the public interest in deportation cases, she referred to SS (Nigeria) [2013] EWCA Civ 550 and paragraph 46 of Hesham Ali [2016] UKSC 60. The judge herself stated on two occasions (at [27] and [36]) that there was a "high" public interest in the present case by virtue of Mrs R-D's offending. In respect of the very compelling circumstances test, the judge correctly directed herself to NA (Pakistan) [2016] EWCA Civ 662 and HA (Iraq) [2020] EWCA Civ 1176 as regards the relevance of all factors, including those which have been considered under either of the two exceptions in sections 117C(4) and (5). I am satisfied that the judge was fully aware of the stringency of the very compelling circumstances test, and indeed nothing in the grounds asserts the contrary.

13. In respect of the point sought to be made at paragraph 6 of the grounds of appeal, there is no inconsistency between the judge's conclusion that the unduly harsh test was not met the one hand, and her subsequent conclusion that very compelling circumstances existed. As is clear from the case-law to which the judge specifically directed herself, all factors in a case, including those relevant to one or both of the exceptions, can also be taken into account when considering section 117C(6). The fact that there was no "near miss" in respect of the unduly harsh test does not somehow preclude consideration of to that issue being put into the balancing exercise along with others.

14. The judge dealt with the previous decision of Judge Afako properly and in accordance with the Devaseelan principles. Indeed, she dedicated a specific section of a decision to this and made numerous references to Judge Afako's decision when setting out her own findings and conclusions. The judge clearly stated that there was new evidence and/or further developments within the family which permitted her, in respect of certain issues, to depart from the previous findings/conclusions. There is no error here.

15. In summary, I conclude that the judge directed herself correctly in law as to all relevant matters in the appeal before her.

16. I turn to the reasons challenge. In my judgment, the points raised in paragraph 8(a)-(e) of the grounds of appeal do not disclose a lack of adequate reasons by the judge and are, in truth, simply a disagreement with her analysis. The judge addressed a number of factors, not all of which related to the unduly harsh issue, as she was entitled to do. The reasons set out at [40]-[46] are sustainable. Importantly, at [43], the judge emphasised that she was considering the factors "in their entirety" and having regard to their "holistic effect". By contrast, the grounds of appeal appear to me to be artificially separating out the relevant considerations.

17. Whilst the position of Mrs R-D's adult son, D, might not have attracted as much weight as other matters, in my view the judge made it sufficiently clear that it was Mrs R-D's "crucial role "in the family dynamic *as a whole* which led to her ultimate conclusion on the very compelling circumstances issue. This included the important emotional role she played in respect of her mother's dementia. Thus, the possibility of social services input, whilst relevant, did not go to undermine the judge's reasoning. In respect of Mr D, the judge was not simply relying on his relationship with Mrs R-D, but on his inability to take on the wider familial responsibilities in her absence. D-J's situation was also adequately reasoned and the judge was entitled to conclude support provided by Mrs R-D was a relevant consideration, amongst a number of others.

18. The grounds of appeal make reference to Mrs R-D's niece, Kiesha, suggesting that the judge erred by specifically failing to consider what she might be able to do for the family in the future. I note that this individual did not feature in the considerations of Judge Afako in his 2015 decision, nor does she appear in the Secretary of State's decision letter. It is apparent that it was not regarded as representing a significant

individual as regards the overall familial environment. Further, I see that she was mentioned by Mr D in oral evidence before the judge. I am satisfied that the judge had all relevant evidence in mind when reaching her conclusions. Even if the judge should have specifically considered Kiesha (about whom there seemed to be virtually no evidence), I am satisfied that it could not have had a material bearing on the outcome. The judge's overall conclusion was based on a number of interlinking factors relating to practical care and emotional support provided by Mrs R-D to at least four other family members, including a minor and a mother with dementia.

19. The final point raised in the grounds of appeal relates to the issue of the risk of reoffending. It is said that the judge placed weight on a low-risk assessment undertaken in an OASys report, but in doing so failed to have regard to the fact that Mrs R-D had continued to deny full responsibility for her offending.

20. This challenge is misconceived. At [35], the judge make specific reference to the Sentencing Judge's remarks and the actual nature of Mrs R-D's involvement in the fraud. In the next paragraph the judge went on to state:

> "36. While I note that [Mrs R-D]'s acceptance of her guilt goes beyond what the evidence was before IJ Afako, I note there were still aspects of her evidence which indicated she did not accept the sentencing judge's views, specifically regarding the length of her offending and the benefit she received. I do not go behind the sentencing judge's view of the offences and I find that the public interest in her deportation is high."

She could not have been much clearer.

21. The complaint raised in the grounds of appeal is that the judge failed to follow this through when considering the relevance of an assessed low risk of reoffending and courses undertaken in prison. However, [46] reads as follows:

> "46. I also give some regard to the Oasys assessment of [Mrs R-D] which assessed her at a low risk of reoffending. I take into account the positive work she completed while in custody and the courses she undertook. Although these matters are certainly not definitive or can be regarded as carrying material weight, they are of some relevance."

22. A sensible reading of that paragraph is that the judge was not placing "material" weight on these matters. The reference to "some relevance" can only, again on a sensible reading, lead one to the conclusion that the matters did not have a material impact on the judge's overall conclusion. When [46] is read together with what the judge said at [35] and [36], I am satisfied that all relevant matters were considered, no irrelevant matters were left out of account, and the judge did not her in the manner claimed in the grounds of appeal.

23. There is a final matter to be considered. During the course of his submissions, Mr Tufan appeared to be trying to introduce a rationality challenge against the judge's decision. When I pressed him to clarify his position, he indicated that this was in fact the case and that such an error "jumped out from the papers". I took this to mean

that he was making a formal application to amend the Secretary of State grounds of appeal. I refused that application for the following reasons.

24. It was far too late in the day for such an application to be made. I make no criticism of Mr Tufan personally, but the Secretary of State must ensure either that grounds of appeal are initially drafted so as to cover all proposed challenges, or that, on reflection, and *prior to a hearing*, an application to amend the grounds is made to the Tribunal and with the other party put on notice.

25. Further, if indeed a perversity challenge was as obvious as suggested by Mr Tufan, it is very difficult to see why the author of the original grounds did not include it.

26. In any event, even if I had permitted reliance on an additional perversity ground, I would have rejected it. Whilst other judges may have come to a different conclusion on the same facts, the judge in the present case was entitled to find that very compelling circumstances existed: that was within the range of rational responses. A generous approach does not necessarily equate with a legally erroneous approach.

27. In light of the foregoing, there are no errors of law in the judge's decision.

Anonymity

28. The First-tier Tribunal did not make an anonymity direction and I have not been asked to make one at this stage. In all the circumstances, I see no need to make such a direction.

Notice of Decision

29. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law.

30. The decision of the First-tier Tribunal shall stand.

Signed: *H Norton-Taylor*
Upper Tribunal Judge Norton-Taylor
Date: 17 June 2021