Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03127/2019 (V)

THE IMMIGRATION ACTS

Heard Remotely via Field House **Decision & Reasons Promulgated**
On 5th February 2021 **On 2nd March 2021**

Before

UPPER TRIBUNAL JUDGE RIMINGTON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

MR RHOMAINE [M]
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr Berry instructed by Wilson Barca LLP
For the Respondent: Mr T Melvin, Senior Home Office Presenting Officer

DECISION AND REASONS

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings. I make this direction because minors are involved and the sensitive nature of their medical conditions.

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1. The application for permission to appeal was filed by the Secretary of State but nonetheless for the purposes of this decision I shall describe the parties as they were before the First-tier Tribunal.

2. The appellant appeals, with permission, against the decision of First-tier Tribunal Judge Malone promulgated on 4th February 2020, allowing the appellant's appeal against the refusal by the Secretary of State on 4th February 2019 of the appellant's human rights claim against a deportation decision under Section 32(5) of the UK Borders Act 2007. The appellant is a citizen of Jamaica born on 4th August 1979, and on 6th October 2006 was convicted and sentenced to 30 months imprisonment for possession with intent to supply a class A drug. He had previously been convicted, on 22nd August 2006, of re-entering the UK in breach of a deportation order and sentenced to 10 weeks in prison. He had entered the UK on 18th May 2000, was arrested and was served with a notice as an illegal overstayer in 2004 and was removed to Jamaica in 2006.

3. The appellant was married in 2002 (now divorced) and had a child namely Tr, a British citizen born on 29th August 2001 (now at university). In 2003 he began a relationship with Ms M, and they have two children Ke, a British citizen born on 17th November 2005 and Ta, a British citizen, born on 25th May 2008. Ms M and children live with the appellant. Additionally JJ, the appellant's nephew is British born on 12th April 2013 (now nearly 7 years old) and lives with the family as the result of a Special Guardianship Order made in favour of Ms M. The mother (Ms M's sister) was an alcoholic and is out of the picture. The appellant and Ms M live in a home she owns with a mortgage, and she runs her own business part-time. He is not permitted to work but cares for the children. These facts were found by the First-tier Tribunal.

4. The application for permission to appeal, submitted that the judge had erred in law by failing to give adequate reasons for findings on material matters, made a misdirection in law and made findings which were irrational. In effect the approach to the assessment of the impact of deportation on the appellant's children was flawed with reference to Section 117C of Nationality, Immigration and Asylum Act 2002.

5. The grounds for permission to appeal filed by the Secretary of State set out that the judge relied on the special relationship with JJ but had given inadequate reasons why Ms M could not care for the three children. She worked 16 hours per week at the surgery and spent the rest of her time trading cosmetic products on eBay. It was noted that she suffered from rheumatoid arthritis and chronic asthma but there was no finding that she would be unable to spend more time with the children. The judge placed more onus on her earning power than care. There was no indication that the appellant played a significant medical role. It was accepted that the judge had directed himself to the high threshold test required on undue harshness, but the underlying facts of the appeal did not reveal

circumstances that came close to the relevant test. The grounds cited **SSHD v PG (Jamaica)** [2019] EWCA Civ 1213, which identified the issue was whether there was evidence on which it was properly open to the judge to find that the deportation of the appellant would result in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation. The children would face great distress but those were the likely consequences of any deportation.

6. The grounds added that the judge had relied on the same facts when coming to the conclusions on undue harshness and very compelling circumstances.

7. Permission to appeal was granted by Upper Tribunal Judge Martin.

8. At the hearing Mr Melvin acknowledged that the case law had moved on, but he submitted, the facts found in this decision could not fulfil the requisite tests. The judge had made no reference to the independent social worker's report. Mr Melvin observed that Ta was said to be a child with autism and yet attended mainstream school.

9. Mr Berry submitted that there was no question of a misdirection on the law. **HA (Iraq**) **v SSHD** [2020] EWCA Civ 1176 had clarified the law on the test of undue harshness and the judge had clearly identified the correct standard and directed himself/herself properly. On the findings and the assessment of the evidence the threshold was clearly met with regards undue harshness and additionally, on very compelling circumstances. The judge considered the circumstances of all the children.

10. At paragraph 60 the judge set out the test in law citing **KO (Nigeria)** [2018] UKSC 53. When assessing the evidence, the judge considered all the children, JJ has foetal alcohol syndrome, he regards the appellant as his parent, and he calls him dad. The judge assessed the role the appellant played in the context that the partner is self-employed part time. The finding at paragraph 63 in relation to JJ was that deportation would have a particular impact on him because he had profound special needs and was under a Special Guardianship Order. That order was made in the circumstances that the appellant would be living with the family. The alternative is that the child would be in care.

11. The partner has rheumatoid arthritis and Ta is autistic. There were particularly tragic circumstances in that Ms M's previous child N died from chronic asthma. The variety of problems was explained by the judge in the decision. It was open to the judge to make the findings he/she did. Additionally the judge finds the very compelling reasons test was met and the assessment of facts was well within the reasoning of the Judge.

Analysis

12. The Court of Appel in **<u>Lowe v SSHD</u>** [2021] EWCA 62 referred to and repeated the judgment of Lewison LJ in *Fage UK Ltd. v Chobani UK Ltd.* <u>[2014] EWCA Civ 5</u> at paragraph 114 as follows:

> *"Appellate courts have been repeatedly warned, by recent cases at the highest level, not to interfere with findings of fact by trial judges, unless compelled to do so. This applies not only to findings of primary fact, but also to the evaluation of those facts and to inferences to be drawn from them. The best known of these cases are: Biogen Inc v Medeva plc [1977] RPC1; Piglowska v Piglowski <u>[1999] 1 WLR 1360</u>; Datec Electronics Holdings Ltd v United Parcels Service Ltd <u>[2007] UKHL 23</u> <u>[2007] 1 WLR 1325</u>; Re B (A Child) (Care Proceedings: Threshold Criteria) <u>[2013] UKSC 33</u> <u>[2013] 1 WLR 1911</u> and most recently and comprehensively McGraddie v McGraddie <u>[2013] UKSC 58</u> <u>[2013] 1 WLR 2477</u>. These are all decisions either of the House of Lords or of the Supreme Court. The reasons for this approach are many. They include.*
>
> *i) The expertise of a trial judge is in determining what facts are relevant to the legal issues to be decided, and what those facts are if they are disputed.*
>
> *ii) The trial is not a dress rehearsal. It is the first and last night of the show.*
>
> *iii) Duplication of the trial judge's role on appeal is a disproportionate use of the limited resources of an appellate court and will seldom lead to a different outcome in an individual case.*
>
> *iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.*
>
> *v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence).*
>
> *vi) Thus even if it were possible to duplicate the role of the trial judge, it cannot in practice be done".*

13. The Upper Tribunal cannot thus merely substitute its own decision simply where that decision would be different decision. There must be an error of law.

14. Subsequent to the decision by Judge Malone and the formulation of the grounds for permission, the Court of Appeal in **<u>HA (Iraq) v SSHD</u> [2020] EWCA Civ 1176,** explained **<u>KO (Nigeria)</u> [2018] UKSC 53**, and at paragraph 56 [my underlining] and identifies that:

> *"the risks of treating KO as establishing a touchstone of whether the degree of harshness goes beyond "that which is ordinarily expected by the deportation of a parent". Lord Carnwath does not in fact use that phrase, but a reference to "nothing out of the ordinary" appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold "acceptable" level. It is not necessarily wrong to describe that as an <u>"ordinary" level of harshness</u>, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. <u>However, I think the Appellants are right to point out that it may be misleading if used incautiously.</u> There seem to me to be two (related) risks. First, "ordinary" is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of "undue" harshness may not occur quite commonly. Secondly, <u>if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern</u>. That would be dangerous. <u>How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness"</u>. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child".*

15. The FTT judge in this case had had the benefit of hearing the witnesses' evidence and reached a broad evaluation decision based on the relevant facts. As required by **<u>HA(Iraq)</u>**, the judge considered the particular circumstances of the children individually and jointly, and considered whether for those children, there would be undue harshness. Each child will differ. The judge, as submitted by Mr Berry, made a series of relevant and apposite findings on the children who have a variety of difficulties and needs.

16. From paragraph 20 onwards, the judge appropriately set out the legal tests with reference to undue harshness and very compelling circumstances and understood that it was open to him when considering very compelling circumstances to factor in the findings in relation to undue harshness. That said, the judge was aware that he was applying Section 117C and the relevant exceptions engaged. At paragraph 61 the judge

acknowledged that 'unduly' harsh threshold was a very high one. A careful reading of the decision shows that the judge proceeded to apply properly those legal tests.

17. None of the findings is perverse, indeed that was not properly asserted, and they are made for cogent reasons. The failure to cite the independent social worker report is not material because it only supported the findings the judge made on the children. The judge found and factored in that Ta was autistic and referred to the specialist medical reports therein at [45] – [47]. Her asthma was relevant and that included the circumstances of the tragic death of the previous child through asthma. The judge was aware that K was a child with no health issues. The judge noted that Tr was also very attached to the father owing to her troubled upbringing with her mother but the judge identified that she was 18. The approach was balanced.

18. The judge clearly found that the appellant had a pivotal role in the family, that the mother had never looked after all the children alone, has her own health issues and was the major breadwinner The judge did not find in favour of the appeal because the mother was the sole breadwinner (although no doubt this would have a significant impact on the children if the source of income were removed) and clearly was cognisant of the role that the appellant played as father in supporting the children as carer and cook and that he had long been central to their lives. It was relevant that Ms M owned and paid the mortgage on the family's accommodation.

19. From [48] onwards the judge considered the circumstances of JJ, now seven years old, a child of the family with a Special Guardianship Order made knowing that the appellant was part of the family. The judge described his Foetal alcohol syndrome, that he was already behind at school and that he spent most of his time with the appellant. JJ came to the family after the appellant was released from prison [52].

20. At [56] the judge found

> *'I am satisfied that Ms M… and the appellant have defined roles. Ms M is the "breadwinner", while the appellant is the "home maker". He does the housework and the shopping. He prepares and cooked nearly all of the family meals. Ms M helps when she can, but he is responsible for the laundry and cleaning'*.

21. At [58] the judge, however, also found that Ms M… had a debilitating illness (which would in turn affect the interests of the children and their care) but was aware that the relationship had commenced when the status of the appellant was unlawful and thus had limited weight but also found at paragraph 59

> '*two of the three children living at home suffer from severe disabilities. Ta is autistic and asthmatic. JJ has Foetal Alcohol Syndrome and a 'shadow; over the brain. Both will experience*

challenging problems ahead. The absence of the appellant from their lives would mean a major change in their family life…Were the appellant to be deported he [JJ] would think he was losing his only parent. The appellant is also his primary carer and has been for as long as JJ can remember'.

22. It was thus open to the judge, on all the findings which cannot be described as perverse, to conclude that the separation would indeed by unduly harsh on the children, particularly JJ and Ta. That decision was very far indeed from the high threshold of perversity. Notwithstanding his findings the judge proceeded to consider 'very compelling circumstances'.

23. At paragraph 63 the judge encapsulated the problems faced by JJ and at paragraph 64 the conclusion was reached that was he had always been cared for by the appellant.

24. Finally at paragraph 70 the judge stated

'As I have found the appellant's removal would be unduly harsh for JJ, K and Ta, this appeal must be allowed. It must also be allowed on the basis that I have found there are very compelling circumstances over and above the exception set out in 'sub paragraphs (4) and (5) of s.117C of the 2002 Act'.

25. As it was written, the conclusions of the First-tier Tribunal were entirely open to the judge on both the test of unduly harsh and very compelling circumstances. Even if there was no reference to the 'medical' role that the appellant undertook this omission does not undermine the judgment overall. Mr Melvin observed that Ta was not at a special school even though she had autism. The longstanding educational policy of inclusion means that frequently, children with special education needs will attend mainstream school. The findings of the judge therefore cannot be undermined on the basis that the child Ta did not attend a special school. On the evidence the findings and conclusions were open to the judge.

26. The determination of the First-tier Tribunal cannot be described as having materially erred in law by reason of misdirection in law, inadequate findings or irrational findings. The determination will stand.

Anonymity direction is made.

Signed Helen Rimington Date 8th February 2021

Upper Tribunal Judge Rimington