Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/07184/2019 (V)**

THE IMMIGRATION ACTS

Heard at Field House via Microsoft Teams	**Decision & Reasons Promulgated**
On Tuesday 13 July 2021	**On Thursday 05 August 2021**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

-and-

JAR (COLOMBIA)
Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Mr D Chirico, Counsel instructed by Elder Rahimi solicitors

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity order was made by the First-tier Tribunal. As this appeal involves minor children, I consider it is appropriate to continue that order. 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, amongst others, to both parties. Failure to comply with this direction could lead to contempt of court proceedings.

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DECISION AND REASONS

BACKGROUND

1. This is an appeal by the Secretary of State. For ease of reference, I refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Atreya promulgated on 15 April 2020 ("the Decision"). By the Decision, the Judge allowed the Appellant's appeal against the Respondent's decision dated 9 April 2019, refusing his human rights claim founded on Article 8 ECHR based on his family and private life. The claim was made in the context of a decision to deport the Appellant as a foreign national offender.

2. The Appellant is a citizen of Colombia. He says that he arrived in the UK with his mother on 31 July 1987. Whether or not that is correct, he came to the UK as a child. He is now aged forty-one years. He was granted indefinite leave to remain ("ILR") on 25 July 1996 whilst still a child. He has lived in the UK for over thirty-two years.

3. The Appellant has a number of criminal convictions. The index offence is one of conspiracy to defraud in which the Appellant first became involved in 2016. He was convicted following a guilty plea on 24 July 2017 and sentenced to four years' imprisonment.

4. The Appellant is in a relationship with a British citizen. They have two children now aged nine and two years respectively. The youngest child has a congenital cardiac problem and other physical health conditions and remains under the care of Great Ormond Street hospital. The Appellant's partner has two adult children from a previous relationship. One of those children lives with the Appellant and his partner. He is on the autistic spectrum and is vulnerable. The Appellant also has two adult children of his own who live independently but with whom he retains contact.

5. The Judge found that the Appellant had lived half his life lawfully in the UK. She also found that the Appellant is socially and culturally integrated in the UK notwithstanding his criminal offending. She also accepted that there are very significant obstacles to integration in Colombia. In relation to the impact of deportation on the Appellant's partner and children (including stepchildren), the Judge concluded that it would be unduly harsh for them to go with the Appellant to Colombia and that it would be unduly harsh for them to remain in the UK without him. The Judge recognised however that it was not sufficient for the Appellant to meet the two exceptions in the Immigration Rules ("the Rules") and Section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). She referred to the need for the Appellant to show that there are very compelling circumstances over and above the exceptions which render his deportation disproportionate. She concluded however that, balancing the interference with the Appellant's family and private life against the public interest, the decision to deport the Appellant was indeed disproportionate.

6. The Respondent sought permission to appeal from the First-tier Tribunal on five grounds which can be summarised as follows:

   Ground one: the Judge erred by concluding that the best interests of the children were the most important consideration.

   Ground two: the Judge erred by failing to have proper regard to the public interest in particular by failing to identify any circumstances over and above the exceptions which could be considered to be very compelling. Reference was made to various cases in support of the test said to be applicable.

   Ground three: the Appellant's partner and children had coped without the Appellant during his period of imprisonment and there was no evidence to show that the impact had been any more than that suffered by any partner or child separated from the other partner/parent. Again, various cases are cited.

   Ground four: the Judge erred by placing weight on the Appellant's rehabilitation in the absence of evidence that he had reformed (given the OASys assessment that the Appellant was at medium risk of non-violent reoffending).

   Ground five: the Judge failed to provide adequate reasons for his conclusions particularly in relation to the finding that there would be very significant obstacles to the Appellant's reintegration in Columbia.

7. Permission to appeal was refused by First-tier Tribunal Judge Lever on 10 May 2020 in the following terms so far as relevant:

   > "... 3. The Judge had noted that the Appellant had been in the UK for a considerable period of time and had settled status. He had previous convictions going back some years although no evidence the Respondent had sought to deport him then which may well have been an easier prospect. The judge had taken account of all the evidence. Inevitably in this case given the presence of children and their respective medical and emotional problems they featured heavily in the judges consideration of the evidence.
   >
   > 4. He set out in considerable detail the relevant law applicable and the case law relevant and recent in these types of cases. He quoted extensively from the case law and indeed referred to cases referred to by the Respondent in the grounds. It is clear that the judge was aware of the public interest and the very high threshold applicable in the Appellants case. Essentially the Respondents grounds amount to a disagreement with the judges findings which is hardly surprising as this is a deportation case. It cannot be said that every judge would have reached the same conclusion as this judge but nor can it be said that the judge was in error in his interpretation of the law and the principles within the case law. It is inevitably a judgement call and one made by the judge who heard all the evidence and saw witnesses giving evidence. His decision was not wrong in law nor unreasonable.
   >
   > 5. There was no arguable error of law in this case."

8. The Respondent renewed her application for permission to appeal to this Tribunal, relying on the same grounds and making additional points in relation to grounds one and two taken together under the heading of material misdirection of law and ground three under the heading of inadequate reasons and/or failure to resolve a conflict of opinion.

9. Permission to appeal was granted by Upper Tribunal Judge Rimington on 18 August 2020 in the following terms:

> "... All grounds are arguable – albeit the Judge set out the law at length between paragraphs 76 to 90, it is arguable the Judge failed to apply it or to give adequate reasoning for finding 'very compelling circumstances.'"

Judge Rimington also gave directions that the error of law issue should be determined at a remote hearing absent objection from the parties. Neither party objected.

10. So it is that the hearing came before me. The hearing was conducted via Microsoft Teams. There were no technical issues affecting the conduct of the hearing.

11. The Appellant has filed an extensive rule 24 reply dated 25 September 2020. Unfortunately, although that was filed again (with a chronology) on the day before the hearing before me, Mr Tufan did not have it. I therefore invited Mr Chirico to deal with this in detail in his oral submissions to allow Mr Tufan to consider it and reply. In addition to those documents, I had before me a bundle of the core documents including the Respondent's bundle and the Appellant's bundle before the First-tier Tribunal,

12. The matter comes before me to determine whether the Decision contains an error of law and, if I so conclude, to either re-make the decision or remit the appeal to the First-tier Tribunal to do so. Following the parties' submissions, I indicated that I found there to be no error of law in the Decision and upheld it. I indicated that I would provide my reasons in writing which I now turn to do.

DISCUSSION

13. Mr Tufan adopted the Respondent's pleaded grounds. He submitted that, in relation to the exceptions, it was not clear how the Judge had found there to be very significant obstacles to the Appellant's reintegration in Colombia. Although he accepted that two of the children suffer from physical and other health conditions, Mr Tufan said that it was not clear how that met the high threshold of undue harshness, particularly since the family had coped during the Appellant's time in prison. They had not had to turn to social services for assistance then but could do so in future if needs be. That option had not been considered by the Judge. The Judge had also failed to take into account the risk of reoffending when considering rehabilitation. I deal with those points individually by reference to the Respondent's initial pleaded grounds as supplemented by

the grounds to this Tribunal and taking into account the Appellant's rule 24 reply and Mr Chirico's oral submissions.

Grounds One and Two: Material Misdirection in law

14. The Respondent's grounds in this regard can be summarised as a complaint that the children's best interests have been elevated to a paramount consideration and that the Judge did not have regard to the very high threshold implicit in the need to show that there are very compelling circumstances over and above the exceptions which apply. The grounds to this Tribunal refer to what is said in LE (St Vincent and the Grenadines) v Secretary of Ste for the Home Department [2020] EWCA Civ 505 about the need to show something going "beyond the degree of harshness which would necessarily be involved for any child or partner of any foreign criminal faced with deportation". As Mr Chirico points out, that is no longer good law following the Court of Appeal's judgment in HA (Iraq) and RA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 ("HA (Iraq)"). The question for the Judge to determine is the impact on these children.

15. As Mr Chirico rightly submitted, the Decision has to be read as a whole. Although the Judge's findings are to be found in the last section of the Decision, what is there said must be read with the previous sections setting out the law, the submissions and the evidence. I turn then to look at how the Judge determined the appeal in the context of the mis-directions of which the Respondent complains.

16. Having cited the relevant parts of the Rules and Section 117 as well as the principles which apply by reference to case-law at [76] to [90] of the Decision, the Judge opened the section setting out her findings with the following self-direction:

> "91. As set out above, the appellant's length of sentence means that neither paragraphs 399 or 399A which contain exceptions to deportations applies to the appellant because of the length of his sentence. They are nevertheless relevant to determining whether or not he can show very compelling circumstances over and above those set out therein. He can only resist deportation if he can show on the balance of probabilities that there are very compelling circumstances over and above the exceptions to deportation and/or exceptional circumstances that would rent [sic] his deportation disproportionate. In considering this I have had regard to the provisions of sections 117B and 117C of the 2002 Act"

That is an impeccable self-direction in relation to the relevant parts of the Rules and statute.

17. When applying that test, the Judge considered first whether the exceptions were met. At [104] to [107] of the Decision, the Judge considered the Appellant's family life and concluded that the exception was met in that regard. At [108] of the Decision, the Judge found that the exception in relation to the Appellant's private life was met. The Judge then moved on

to consider whether there were very compelling circumstances over and above those exceptions at [109] to [110] as follows:

> "109. I find that there will be very significant obstacles to integrate in Colombia because of the personal characteristics of the appellant and the overall picture of the evidence presented to me are that there are very compelling circumstances over and above described in the Exceptions 1 and 2 because the vulnerabilities of the children ([F], [A] and [K]) who both have particular needs and are dependent on the care of both parents who co parent them as well as the vulnerability of his partner's son who has autism as well as the vulnerability/compromised health/disability of his partner. The appellant has always been and continues to be an active and involved father and the independent social worker whose evidence was not challenged by the respondent demonstrates to me the importance of the appellant's involvement, parenting, touch and support for the psychological well being and development of the children. I do not accept the respondent's suggestion that the appellants children can approach social services if extra help is needed after the appellant is deported or that occasional visits and skype/face time contact will work for children under ten who need continuity of contact and physical touch.
>
> 110. I am further concerned about the adverse impact of the appellant's deportation on her and the children and confirms at paragraphs 27-28 that 'Our world will be devastated. I do not feel that I have the physical, psychological or emotional resources or resilience now to provide the level of care and support that the children will all need to negotiate the loss of their father and in the case of [K] the loss of the father figure in his life. [F] is at an age where losing his father will have a devastating impact and [A] will grow up never knowing her father…I won't be able to fund regular visits to Colombia…'
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> 111. Striking the balance as between the public interest in deportation of a serious criminal offender who has been sentenced to over four years for a serious offence and the history of the appellant's criminal offending and I find that it was a serious criminal offence but that the appellant has rehabilitated himself, overall is on the low risk of reoffending, addressed his behaviour by courses and demonstrated to me the impact on family members of his criminal offending risk overall is low. I find that there are very compelling circumstances which outweigh the public interest in deportation in this particular case."

18. I accept that the interests of the children lay at the heart of the Judge's conclusions. Although it appears within the summary of the parties' submissions, the Judge directed herself at [64] of the Decision in relation to those interests in the following way (also reiterating the "very compelling circumstances test"):

> "In relation to Article 8 ECHR there have to be very compelling circumstances over and above the exceptions to immigration rules. The best interests of the children are relevant but not a paramount consideration. They must be balanced against the very strong public interest in deporting the appellant. Some of the children are leading independent lives. Kieran has a job offer to take up work as a life guard. Two of the appellants children do not live with him and the

others can continue contact with facetime and modern forms of communication."

19. When assessing the evidence, the Judge, as she was required to do, considered whether the impact of deportation on those children was unduly harsh. She set out her findings in that regard at [105] to [107] of the Decision as follows:

> "105. The appellant has a genuine and subsisting parental relationship with [F] who is a qualifying child. I accept he is vulnerable on account of his age and his documented emotional difficulties which has led to recognition at school and adaptations for his emotional needs. I accept that the appellant is close to his child and that the appellant has always been a hands on father as evidenced by his involvement since he was a baby and doing most of the school drop offs and pick ups.
>
> 106. The appellant has a genuine and subsisting relationship as a parent with [A] who is a qualifying child and is vulnerable on account of her physical health and under the care of Great Ormond Street Hospital. [A] was born in December 2018 when the appellant was in prison but I accept he has worked hard to bond with his youngest child and the appellant is able to put his child to bed at night.
>
> 107. The appellant also has a genuine and subsisting relationship as a parent with [K] who is a young adult with autism and lives with the appellant. He is a young vulnerable adult and has been a part of the appellant's household for the entirety of his life although the appellant is not the biological father I accept it is a parental relationship. All three children ie [F] (SEN pupil passport 41), [A] and [K] (autism diagnosis at page 45) have special needs and I find it would be unduly harsh for them to leave the UK with the appellant and or lose their father who supports them on a daily basis and is an active and involved parent. Taking into account the detailed measured and balanced expert evidence of the Independent Social Worker I do not find that the respondent can make good the submission that the appellant's partner can get help from social services to parent her children. The importance of their father in their lives to touch them, play with them and develop cannot be underestimated as identified by the ISW at pages 10. I accept it would also have an adverse impact on the appellant's partner who is struggling herself at the current time with disability and grief following the loss of her mother. I find it would be unduly harsh for the children who depend on their father as a co parent save for the periods he was in prison which does not amount to the majority of their lives to lose an active and involved father given the recognised importance of fathers to the development of boys ([F]) (page 10) who is vulnerable and has been recognised to be vulnerable by his school (SEN passport) and [A] who needs her father's support because of her health. The ISW's unchallenged evidence was that '[F] *and [A] have a close friendship with their father [J] …should [J] be deported to Colombia it is my professional opinion that this will be detrimental emotionally to his children.*'"

20. As I have already noted, the Court of Appeal has now made clear in HA (Iraq) that whether the impact on a child is unduly harsh is not to be

measured against what might be expected to occur in the normal run of things, but on the basis of what that impact will be in the case at hand. That is the exercise which the Judge performed. There is no mis-direction in that regard.

21. It is also suggested in the Respondent's grounds that the Judge failed properly to give weight to the public interest. In that regard, the Judge directed herself at [100] of the Decision as follows:

> "I must give weight to the public interest in the appellant's deportation. I have taken account of all the evidence before me in carrying out an evaluative exercise in which I have balanced the public interest in deportation of foreign criminals together with the need to make a proportionate assessment of any interference with Article 8 rights. I have had regard to the fact that the public interest includes not only protection of the public but also the need to deter others from committing offences and the social revulsion at the nature of the crime."

That is an accurate self-direction as to the nature and extent of the public interest which applies in deportation cases. As Mr Chirico also pointed out, the Judge made reference at [68] and [69] of the Decision to the "very strong weight attached to the public interest" and the Appellant's concession that the Appellant's offence was a very serious one. The Judge clearly had in mind the strength of the public interest which applied and made no error in that regard.

22. As Mr Chirico summarised it, the very compelling circumstances were the fact of three vulnerable children with varying physical and mental health needs. The Appellant's partner who is the carer of those children is also a carer for her aunt and has her own physical and mental health problems. She was also grieving the loss of her mother. In addition, the Appellant had lived in the UK since he was a child and had only visited Colombia for a short period of weeks. Mr Chirico fairly accepted that the Judge could have reached different conclusions but she had the correct test in mind, assessed the evidence she heard (most of which was not challenged) and reached a conclusion which was open to her. As Mr Chirico submitted and I accept the very compelling circumstances over and above the exceptions do not need to be something different to those exceptions but can be formed of the particular strength of the factors within the exceptions in the particular case. That is the Judge's assessment in this case.

<u>Ground three: Failure to provide adequate reasons for the "unduly harsh" finding</u>

23. I have set out the Judge's findings in this regard at [19] above. It is suggested in the Respondent's grounds that "significant disruption is an accepted consequence in any case where a parent is being removed from a family unit" and is not therefore a "very compelling circumstance". The Respondent says that "there is nothing contained within the evidence that suggests the appellants family would be more adversely affected by

removal than any other family in similar circumstances". As I have already pointed out by reference to HA (Iraq) that is not the test. The assessment for the Judge was whether the impact reaches the threshold of undue harshness in this case.

24. The grounds to this Tribunal repeat that point and seek to suggest that the family would cope in the absence of the Appellant. However, the complaint made is an inadequacy of reasoning. The Judge has explained why she concluded that the impact of the Appellant's deportation would be unduly harsh for his partner and children. The points made at [5] of the grounds to this Tribunal are no more than an attempt to re-argue the case in that regard. As Mr Chirico submitted and I accept, they are no more than a series of factual disagreements.

25. The other complaint made is that the family coped without the Appellant whilst he was in prison. I assume the complaint is either that the Judge has failed to consider that or has failed to provide reasons why the family could not cope again either with or without social services support. First, as Mr Chirico pointed out, the Judge considers this argument in any event at [109] of the Decision but rejects it. She was entitled to do that. As Mr Chirico also pointed out, there is a distinction to be drawn between a family coping with a short term separation caused by imprisonment and where the Appellant at least remains in the UK and a permanent one caused by deportation. The position also had to be considered at date of the hearing. The Appellant's youngest child ([A]) was born whilst the Appellant was in prison and the Appellant's partner's mother had since died.

26. If and insofar as the Respondent seeks to take issue in the grounds with what is said by the Independent Social Worker's report, as Mr Chirico pointed out, and the Judge observed on a number of occasions, that report was not challenged by the Respondent before Judge Atreya. The Judge was entitled to place weight on that evidence.

Ground four: Relevance of rehabilitation

27. The Judge set out her reasons for finding the Appellant to be rehabilitated at [102] of the Decision as follows:

> "…I also accept that the appellant has 'battled with demons' in prison and has undertaken courses in prison including drugs awareness, stoicism, family courses and tried to address the root courses [sic] of his depression and has made progress with the probation officer which had led to monthly meetings."

28. As Mr Chirico pointed out, the Judge had evidence about the relevance of the need to engage with mental health services and also had evidence from the probation services. Based on that evidence, the Judge was entitled to make the finding she did. The complaint made in the grounds amounts to a challenge to the weight which the Judge gave to that

evidence but identifies no error of approach. The Judge has reached a finding open to her on the evidence and has provided reasons therefor.

29. As it transpires, the Judge's faith in the Appellant's rehabilitation may have been misplaced. Mr Tufan informed me that if there were to be a resumed hearing, the Respondent would need to place reliance on an updated PNC report showing that the Appellant has been convicted of a further offence in 2020 albeit as I understand it a lesser offence and one which did not culminate in a sentence of imprisonment. As Mr Tufan accepted, however, the issue for me is not whether the Judge was wrong to reach this finding with the benefit of hindsight but whether she erred in her conclusion at the time. There is no error in this regard.

Ground five: Lack of reasons for the "very significant obstacles" finding

30. The finding that there are very significant obstacles to the Appellant's integration in Colombia is included at [109] of the Decision set out at [17] above. That follows on from what is said at [108] that "he [the Appellant] has been living and working in the community living and working and identifies with UK society as opposed to Colombian society which was evident by his temporary three week holiday in Colombia…". The finding at [109] also has to be read with the evidence set out at [39] to [41] which, broadly summarised, is that the Appellant has visited Colombia only once since he left and only for a period of three weeks in 2016, has no family there and all his family are in the UK. At [45] of the Decision, the Judge records that the Appellant speaks only broken Spanish. Those are all factors which the Judge was entitled to consider.

31. In any event, though, on my reading of [109] of the Decision, the conclusion of the Judge is based on the Appellant's family life rather than his private life. The reasoning may be brief but it is not inadequate. There is no error of law.

CONCLUSION

32. For the foregoing reasons, I am satisfied that there is no error of law in the Decision. I therefore uphold the Decision with the result that the Appellant's appeal remains allowed.

DECISION

The Decision of First-tier Tribunal Judge Atreya promulgated on 15 April 2020 does not involve the making of an error on a point of law. I therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

Signed: L K Smith

Upper Tribunal Judge Smith

Dated: 22 July 2021