Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-000995**
HU/09754/2019

THE IMMIGRATION ACTS

Heard at Bradford IAC
On the 7 September 2022

Decision & Reasons Promulgated
On the 24 January 2023

Before

UPPER TRIBUNAL JUDGE LANE

Between

MARK NELSON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Schwenk
For the Respondent: Ms Young, Senior Presenting Officer

DECISION AND REASONS

1. The appellant is a citizen of Jamaica who was born on 30 January 1979. He appealed to the First-tier Tribunal against a decision of the Secretary of State dated 31 May 2019 refusing his human rights claim following a decision to deport him as a foreign criminal after he received a sentence of 42 months imprisonment for the cultivation of cannabis, 15 months concurrent for the abstraction of electricity and a consecutive sentence of

6 months for an unrelated racially aggravated public order offence. The First-tier Tribunal, in a decision promulgated on 17th November 2021, dismissed his appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. There are three grounds of appeal.

Ground 1

3. Ground 1 asserts that the judge 'has misdirected himself in law when considering the unduly harsh test.' The judge sets out the statutory provisions in section 117C of the Nationality, Immigration and Asylum Act 2002 and the 'unduly harsh test' at [5]:

> Article 8: additional considerations in cases involving foreign criminals
>
> (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 (c) 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 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.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

4. The First-tier Tribunal's decision was promulgated after the judgment of the Court of Appeal in *HA (Iraq)* [2020] EWCA Cave 1176 but before the subsequent judgment of the Supreme Court in that case ([2022] UKSC 22). The Supreme Court had dismissed the linked appeals of the Secretary of State against the judgment of the Court of Appeal. It expressly rejected the argument that unduly harshness should be considered by reference to

any notional comparator of 'acceptable' harshness. At [29-31], the Supreme Court held:

> 29. Mr Pilgerstorfer submitted that the Court of Appeal in HA/RA wrongly failed to follow the proper approach set out in KO (Nigeria), as confirmed in subsequent Court of Appeal cases such as PG (Jamaica). By deciding that Lord Carnwath's test "cannot be read entirely literally" the court provided guidance which departed from it and amounted to a contradictory gloss. The court disapproved of comparing the degree of harshness that would be experienced by a qualifying child to that which would necessarily be involved for any child, and wrongly lowered the threshold approved in KO (Nigeria). Further, aspects of the court's reasoning reinstate the link (disapproved by this court in KO (Nigeria)) between the seriousness of the offending and the level of harshness required to meet the section 117C(5) test.
>
> 30. I reject these submissions on a number of grounds.
>
> 31. First, I consider that far too much emphasis has been placed on a single sentence in Lord Carnwath's judgment and that if his judgment is considered as a whole it is apparent that he was not intending to lay down a test involving the suggested notional comparator. It is correct that in para 23 of his judgment Lord Carnwath was recognising that the unduly harsh test involves a comparison, but the comparison made was between the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is connoted by the requirement of "unduly" harsh. As Underhill LJ pointed out, Lord Carnwath was not seeking to define the level of harshness which is "acceptable" or "justifiable". Had this been his intention he would have addressed the matter in considerably more detail and explained what the relevant definition was and why. Similarly, if he had been intending to lay down a test to be applied in all cases by reference to the suggested notional comparator he would not only have so stated but he would have explained the nature of and justification for such a test. The reference to the harshness which would be involved for "any child" is to be understood as an illustrative consideration rather than a definition or test.

5. Mr Schwenk, who appeared for the appellant before the Upper Tribunal at the initial hearing, adopted Ms Patel's grounds of appeal. He submitted that the judge had, contrary to *HA,* adopted a comparator test. However, the grounds do not advance that argument. Ground 1 at [14] asserts that the judge 'has set too high a hurdle when considering the unduly harsh test'; Ground 1 does not assert that the judge applied a comparator. The passage of *HA* in the Court of Appeal highlighted in the grounds at [14] is paragraph [52]: 'However, while recognising the "elevated" nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of "very compelling circumstances" in section 117C (6)…..' Ground 1 identifies a number of the judge's findings which, the appellant submits, the judge failed to take properly into account, thereby applying too high a threshold including: that the appellant is a 'regular fixture in the children lives; that 'the Appellant had a close and involved relationship with his children'; that 'the

Appellant's daughter is particularly close to him and keenly felt the separation when he was in prison and that his son's behaviour 4 deteriorated whilst he was in prison'; that 'the children would lose part of their connection to their cultural heritage with their father.'

6. Whilst noting the failure of the grounds as pleaded to raise any argument that the judge wrongly employed a notional comparator, I accept that the Supreme Court judgment in *HA* states the law existing as it existed at the time the First-tier Tribunal's promulgated its decision. However, the Court of Appeal had reached the same conclusion as regards the use of comparators with which the Supreme Court subsequently agreed. It is significant, therefore, that the grounds cite the Court of Appeal judgment to support an argument different from that advanced at the Upper Tribunal initial hearing by Mr Schwenk.

7. In any event, I find that the judge did not fall into error, either as asserted in Ground 1 or as submitted by Mr Schwenk. First, the fact that the judge does not refer to *HA* in his decision (or, indeed, to other case law) is not an error of law. What is important is that a Tribunal applies the law as elucidated by the senior courts; if it does so, it matters not that particular cases are or are not cited. Secondly, Ground 1 underlines that fact that the judge properly addressed all relevant factors in reaching his decision. He took into account all the matters I have noted above and still concluded that the deportation of the appellant would not have unduly harsh consequences for the children. Ground 1 simply seeks to disagree with that finding, which was patently neither perverse nor irrational. Thirdly, I do not accept that the judge has applied any notional comparator. Mr Schwenk submitted that the offending paragraph of the judge's decision is [53]:

> 53. I find that the children would endure a difficult experience in the removal of their father from the UK. This would be expected in relation to any child who lost the active day-today involvement of their father. This strikes me as an example of harsh consequences, but not rising to the elevated threshold of undue harshness which is what the legislation requires for this exception to deportation to be satisfied. The implications for the children are, of course, very sad indeed, but I find myself in agreement with the respondent's submissions that there is nothing in the circumstances of this case which go beyond harsh.

8. That paragraph does not seek to invoke any comparator. Rather, it notes that the statute involves the application of an 'elevated threshold of undue harshness' which is what *HA* in the Court of Appeal and Supreme Court confirmed.

9. <u>Ground 2.</u>

10. Ground 2 is brief. It reads as follows:

> *GROUND TWO: Failure to properly consider the Independent Social Worker Report of Ms Buckley in his assessment of unduly harsh test.*

> The FTTJ considers the ISW Report of Ms Buckley at paragraphs 31 and 32 of his decision but fails in his findings to consider the contents of that report when applying the unduly harsh test.

11. The grounds are incorrect in asserting that the judge only addresses the report of Ms Buckley, the independent social worker, at [30-31]. The judge sets out the principal findings of the independent social worker in those paragraphs in some detail but he also explains at [50] that he accepted her evidence 'save for 2 matters':

> … The first related to [Ms Buckley's] seemingly blind acceptance of the appellant's self-serving and exculpatory account of how he came to engage in serious criminality in the shape of putting in place a large-scale cannabis farm. The sentencing judge rejected the very same account that she appeared to accept at face-value. This background information was not the focus of her task which was to assess the nature and quality of his relationship with his children, but it did betray a lack of objectivity in that she either prepared to voice an opinion without details of the full circumstances of his offending or chose to disregard the findings of the sentencing judge in favour of the assertions of the appellant. I also found it difficult to understand the basis on which it was suggested that the children would suffer irreparable and long-standing harm because of his deportation. This finding did not properly take into account their apparent resilience in continuing to do well socially, educationally and developmentally despite the extended period of absence they suffered when the appellant was serving the custodial part of his sentence. She described the children as "happy, seemingly secure young children" which does not suggest that they have already suffered damage from the extended absence of their father while he was in prison. However, it is also plain that the children are doing well and happy currently, at a time when their father is heavily involved in their lives.

12. Those findings regarding the independent social worker's report were, in my opinion, open to the judge. Consequently, Ground 2 offers not only an inaccurate account of the judge's analysis but also amounts to nothing more than a disagreement with his findings. Ground 2 reveals no error of law on the part of the judge.

Ground 3

13. Ground 3 reiterates the arguments advanced in Ground 2 concerning Ms Buckley's report. It also raises the matter of the appellant's rehabilitation which the appellant argues should have been relevant in the human rights analysis (se *HA* at [52]).

14. The Supreme Court considered the relevance of rehabilitation at [54-56]:

> 54. That [rehabilitation] is a relevant factor is borne out by the Strasbourg jurisprudence. The time elapsed since the offence was committed and the applicant's conduct during that period is one of the factors listed in Unuane, drawing on the ECtHR's earlier decision in Boultif. This is also supported by domestic authority - see, for example, Hesham Ali (per Lord Reed at para 38); NA (Pakistan) at para 112 and,

more generally, Danso v Secretary of State for the Home Department [2015] EWCA Civ 596.

55. In RA the Upper Tribunal stated as follows in relation to the significance of rehabilitation:

> "As a more general point, the fact that an individual has not committed further offences, since release from prison, is highly unlikely to have a material bearing, given that everyone is expected not to commit crime. Rehabilitation will therefore normally do no more than show that the individual has returned to the place where society expects him (and everyone else) to be. There is, in other words, no material weight which ordinarily falls to be given to rehabilitation in the proportionality balance … Nevertheless, as so often in the field of human rights, one cannot categorically say that rehabilitation will never be capable of playing a significant role … Any judicial departure from the norm would, however, need to be fully reasoned." (para 33)

56. In Binbuga v Secretary of State for the Home Department [2019] EWCA Civ 551; [2019] Imm AR 1026 at para 84 I cited and agreed with that passage. The Secretary of State submitted that this approach was correct and should be endorsed as, whilst it acknowledges that rehabilitation can be relevant, in terms of weight it will generally be of little or no material assistance to someone seeking to overcome the high hurdle of the very compelling circumstances test.

57. In the RA appeal, the Court of Appeal, while agreeing that rehabilitation will rarely be of great weight, did not agree with the statement that "rehabilitation will … normally do no more than show that the individual has returned to the place where society expects him … to be". They considered that it did not properly reflect the reason why rehabilitation is in principle relevant, namely that it goes to reduce (one element in) the weight of the public interest in deportation which forms one side of the proportionality balance.

15. In my opinion, the First-tier Tribunal judge has addressed the matter of the appellant's offending adequately, including what was submitted on his behalf in respect of both rehabilitation and his apparent lack of remorse at [54]:

> 54. Ultimately, I must balance the public interest in the deportation of foreign criminals, informed by the seriousness of the offending, against the appellant's Article 8 private and family rights. In assessing the seriousness of the offence, I must bear in mind that he belatedly pleaded guilty to the most serious offences of playing a significant role in a commercial cannabis growing facility. This was organised and sophisticated criminality as reflected in the value of the drugs that were being produced by him and the sentence he received which amounted to 3 and a half years imprisonment. This is objectively serious criminal offending by any measure. There is a powerful public interest in his deportation. The submissions made on his behalf, that he is not likely to find himself before the criminal courts in the future, must be balanced against his tendency to downplay his own wrongdoing. He has shown a willingness to minimise his role in the face of judicial findings to the contrary made when the appellant declined to

> give evidence in support of the mitigating factual claims he had advanced. I am bound to assess the seriousness of his crimes in keeping with the judicial findings reached in the Crown Court, that he played a significant role in the upper reaches of that range in a sophisticated, commercial cannabis growing operation which was likely to yield profits in the tens of thousands.

16. I am not persuaded that the judge has fallen into error in this or any part of his analysis of the various factors relevant to the 'unduly harsh' and wider human rights assessment. The same is true of the judge's consideration of the best interests of the children. I am satisfied that the judge's analysis of the evidence, including that of Ms Buckley in [50], addresses the children's best interests adequately.

17. In all the circumstances, I find that the appeal of the appellant should be dismissed.

Notice of Decision

The appeal is dismissed.

Signed Date 1 November 2022
Upper Tribunal Judge Lane