IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000953

First-tier Tribunal No: HU/18318/2019

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 3 April 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DWAYNE ANDRE DESILVA
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr C Avery, Senior Presenting Officer
For the Respondent: Ms G Capal, Counsel, instructed by Migrant Legal Action

Heard at Field House on 12 January 2023

DECISION AND REASONS

Introduction

1. For the ease of reference I shall refer to the parties a they were before the First-tier Tribunal: therefore, the Secretary of State is once again "the Respondent" and Mr Desilva is "the Appellant".

2. This is an appeal by the Respondent against the decision of First-tier Tribunal Neville ("the judge"), promulgated on 21 February 2022, following a hearing which took place on 15 April 2021. By that decision the judge allowed the Appellant's appeal against the Respondent's refusal of his human rights claim, a claim made in the context of deportation.

3. The Appellant is a citizen of Jamaica born in 1992. He came to the United Kingdom in 2000 at the age of 8 and was granted indefinite leave to remain in August 2009 at the age of 17. Between 2009 and 2015 and again in 2017, the Appellant accumulated a number of convictions. The last of these related to

possession with intent to supply Class A drugs, for which he was sentenced to 4 years' imprisonment. This initiated deportation proceedings, which ultimately resulted in the refusal of the human rights claim which was the subject of the appeal before the judge.

4. In 2014 the Appellant began a relationship with Ms K. She gave birth to the couple's twins in September 2015, but the relationship broke down the following year. In 2017 the Appellant began a relationship with Ms P, which subsists to date. The Appellant's human rights claim was predicated on both private life and family life under Article 8 ECHR ("Article 8"). In respect of the former, he relied on the length of time he had been in the United Kingdom, the age at which he arrived here, his lawful status for much of the time and what was said to be very significant obstacles to him reintegrating into Jamaican society. In respect of family life he relied on his relationship with Ms P and that with his two children from the relationship with Ms K. He claimed to have a significant relationship with the twins and spent a good deal of time with them. In refusing the human rights claim, the Respondent essentially concluded that:

(a) the twins and Ms P could relocate to Jamaica together with the Appellant without this being unduly harsh;

(b) the Appellant could be deported alone and the split with Ms P and the twins not having unduly harsh consequences;

(c) the Appellant's private life could not satisfy the requirement of Exception 1 under Section 117C(4) of the NIAA 2002; and

(d) there were no very compelling circumstances in the case.

The decision of the First-tier Tribunal

5. The judge produced a very detailed decision and I do not propose to set it out in great detail here. The parties are both well-aware of its contents. By way of summary only, the judge:

(a) directed himself at length to the relevant legal framework;

(b) concluded that the Appellant had not spent at least half of his life lawfully in the United Kingdom;

(c) concluded that the Appellant was culturally and socially integrated in this country;

(d) concluded that the Appellant would not face very significant obstacles to reintegrating into Jamaican society;

(e) concluded that the Appellant could not therefore satisfy Exception 1;

(f) concluded that it would be unduly harsh for the Appellant's children to relocate to Jamaica;

(g) concluded that it would also be unduly harsh for the children to be separated from the Appellant;

(h) concluded that therefore the Appellant could satisfy Exception 2, but this was not sufficient for him to succeed in his appeal; and

(i) concluded that there were, on a cumulative basis, very compelling circumstances in the case which did entitle the Appellant to succeed.

The grounds of appeal

6. The Respondent put forward three grounds of appeal. First, it was said the judge failed to give adequate reasons for finding that the Appellant was culturally and socially integrated into the United Kingdom. This ground of appeal was subsequently abandoned following the grant of permission (see the Respondent's skeleton argument).

7. Second, under the heading "Making a material misdirection of law/Failing to give adequate reasons for findings: Undue harshness", the Respondent asserted that the judge had "failed to have adequate regard to the established thresholds" in respect of the unduly harsh assessment, that "the evidence simply does not support" the judge's conclusions, that "the effect on the appellant's children does not go beyond the emotional upheaval to be expected when a parent is deported", and that the judge's "reasoning that the appellant's deportation would result in undue harshness … simply does not establish that the high threshold … is made out."

8. Third, and again under a heading referring to material misdirection of law and a failure to give adequate reasons, the Respondent claimed that the errors in the first two grounds infected the judge's assessment of very compelling circumstances, and that the judge failed to give adequate reasons as to why the Appellant's circumstances met the high threshold.

9. Permission to appeal was refused by the First-tier Tribunal but then granted by the Upper Tribunal in a decision dated 20 May 2022.

Post-permission matters

10. Following the grant of permission the Appellant provided a rule 24 response in which it was said that the Respondent's grounds amounted to simple disagreement or unparticularised perversity challenges which had no merit.

11. In October 2022 the Respondent provided a skeleton argument. As mentioned previously, this abandoned the first ground of appeal. In respect of the second ground (relating to the judge's conclusions on undue harshness) the skeleton argument appeared to raise challenges to the judge's factual findings based on the evidence. I shall address this point in more detail, below. For the present purposes, I observe that these matters were not raised at all in the ground of appeal, either expressly or by necessarily implication. The skeleton argument did not include an application to amend the original grounds. In respect of the third ground, the thrust of the skeleton argument was essentially that the judge "wholly failed to explain beyond mere length of residence and age on arrival what was so compelling about the quality of the Appellant's life at the date of hearing …" that it could have amounted to very compelling circumstances or indeed to have been afforded "great weight".

The adjourned hearing

12. This appeal was originally listed for an error of law hearing on 27 October 2022 before a panel comprising Lang J and Upper Tribunal Judge Norton-Taylor. However, due to the relevant Senior Presenting Officer being taken ill at very short notice, the case had to be adjourned.

The hearing on 12 January 2023

13. Mr Avery confirmed the withdrawal of the first ground of appeal and relied only on the second and third of these, together with the skeleton argument. He confirmed that the Respondent's challenge was based on inadequacy of reasons by the judge and not perversity. He stated that the Respondent had no "quibble" with the legal directions set out by the judge. The focus of the submissions in respect of the second ground (relating to undue harshness) was [61] of the judge's decision. Mr Avery submitted that it simply was not clear on what basis the judge had concluded that it would be unduly harsh on the two children if the Appellant were to be deported to Jamaica. He suggested that the inability of the children to see the Appellant's side of the family who resided in the United Kingdom was a matter of choice for relevant family members and not a consequence of the Respondent's refusal of the human rights claim. In respect of the third ground of appeal (very compelling circumstances) Mr Avery submitted that the conclusions set out in [79] were brief, the judge had not adequately addressed the effect of the Appellant's offending on the weight attributable to his family and private life, and that the ability of the Appellant to reintegrate into Jamaican society had not been properly taken into account either.

14. Ms Capel relied on the rule 24 response. In essence, she submitted that the Respondent's challenges were simple disagreements and that the judge was plainly entitled to conclude as he did, both in respect of the undue harshness test and the very compelling circumstances assessment. Ms Capel helpfully provided me with numerous references to the background evidence on which the judge based his decision, including the unchallenged report of an independent social worker, Mr Horrocks. She pointed out that there had been no substantive challenge to any of the relevant evidence at the hearing before the judge. The Respondent had not claimed perversity and in any event, there was nothing remotely irrational about the judge's assessment and conclusions.

15. At the end of the hearing and having risen for a short time to consider my decision, I announced to the parties that I was dismissing the Respondent's appeal and that the decision of the judge would stand. I set out my reasons for this, below.

Discussion and conclusions

16. I begin by emphasising the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, particularly where that has involved the assessment of a wide variety of evidential sources and evaluative judgments such as those relating to undue harshness and very compelling circumstances. In this regard, I bear in mind numerous exultations from the Court of Appeal on the point: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, at paragraph 19.

17. I confirm that I have considered the judge's decision holistically and sensibly, bearing in mind that every item of evidence considered or step in the analytical

process need not be expressly stated and that there is no requirement for reasons for reasons for reasons.

18. It is beyond doubt that the judge correctly directed himself in law as to all relevant matters with which he was concerned and the Respondent has not sought to argue the contrary. The point is nonetheless of some relevance because, as it appears to me, aspects of the Respondent's challenge appear to suggest that the judge failed to direct himself as to the correct law. The grounds make reference to an alleged failure to have regard to "established thresholds" and relevant well-known aspects of the tests relating to undue harshness and very compelling circumstances. Not only do these aspects of the grounds have no merit, but I struggle to see why the author of the grounds thought it reasonable to include them in the first place. The judge's legal self-directions were exemplary and this was apparent from the face of his decision. If I were to give the benefit of the doubt to the Respondent, it may be that certain aspects of the challenge were the consequence of poor drafting, but whatever the case, it does nothing to assist the Respondent's challenge. Grounds of appeal should be clear, based on identifiable errors of law, and particularised. The judge was plainly well-aware of the nature of the Appellant's case, the relevant background and a large amount of evidence in support.

19. I am entirely satisfied that he had regard to all the evidence when reaching his findings on all the matters which were in play. I am also satisfied that there was no substantive challenge to any of the relevant evidence at the hearing.

20. I am concerned by the contents of the Respondent's skeleton argument, in which there appears to be challenges to the evidence and the findings based thereon. My concern extends to the fact that these matters were not in any way included within the grounds of appeal and there has been no application to amend those grounds, notwithstanding the significant passage of time since permission was granted. Greater care should be taken in drafting skeleton arguments/written submissions in order that they are consistent with the grounds of appeal or, if amendment is sought, that this is made clear in an application (or at the every least at the outset of a skeleton argument/written submissions. It is simply not good enough to produce what are, in effect, new grounds in the body of a skeleton argument and expect them just to in some way become part of a party's case.

21. I turn to the substance of the second ground of appeal and undue harshness. As eluded to previously, the judge was plainly aware of the high threshold applicable to the test and he undoubtedly had "adequate regard" to that threshold. To the extent that the ground contains a poorly drafted perversity challenge, I reject it entirely. There is nothing remotely irrational about the judge's assessment of the evidence and conclusions thereon.

22. [61] of the judge's decision was the focus of Mr Avery's submissions before me. I read this passage in the context of the impeccable legal direction set out previously in the decision, together with the judge's consideration of the unchallenged evidence. The judge concluded that the consequences of the Appellant's separation from his children, as established by the evidence, would in fact materialise upon deportation.

23. Of "particular significance" in the judge's view, was the depth of connection the Appellant's children have with their paternal family and the Appellant's current

partner, Ms P. There was, he reasoned, a double blow, as it were; namely separation from their father and from his side of the family. It is clear to me that the reasons for the conclusion reached were based on the judge's prior assessment of the evidence before him, as set out in [50], [52], [54] and [56] (which itself was based in large part on Mr Horrocks' report). That evidence, as I have said, was not challenged by the Respondent at the time. In addition, I reject the attempts made in the skeleton argument to now try and raise such challenges by way of what is in effect a new ground of appeal. In any event, what is said in the skeleton argument discloses no error of law, rather it is just an example of disagreement with a carefully fact-specific analysis undertaken by the judge based on the evidence as a whole.

24. In [61] the judge was not required to give reasons for reasons; he was entitled to assume that the informed reader would be considering his conclusions in light of everything stated at that point, but also previously. I conclude that Mr Avery's suggestion that any difficulties faced by the children in respect of not having contact with the Appellant's side of the family were a matter of "choice", was misconceived. The references made by Ms Capel to aspects of the evidence on which the judge relied amply demonstrated that he was to conclude that a severing of contact would in fact have occurred. That is a fact-specific analysis and not one which is susceptible to an error of law challenge, at least not as put forward by the Respondent in this case.

25. In light of the above, I reject the Respondent's second ground of appeal. The judge was entitled to conclude that the "stay" scenario in respect of the unduly harshness assessment favoured the Appellant (the "go" scenario was also concluded in his favour, but this has not been the subject of the challenge).

26. The judge was of course correct to state that the satisfaction of Exception 2 was not sufficient for the Appellant to succeed, given the 4 years' sentence imposed in 2017.

27. I turn to the third ground of appeal and very compelling circumstances. In terms of the written grounds, there is no merit in the assertion that any errors in respect of the first and second grounds infected the assessment of very compelling circumstances. The first ground had of course been conceded long before the hearing and I have concluded that there are no errors in respect of the second ground. I reiterate that the judge was plainly aware of the very high threshold applicable to very compelling circumstances, this being emphasised at numerous stages in his decision.

28. The Respondent's challenge is very much based on reasons. Mr Avery submitted that [79] was "brief". With respect, that does a disservice to the judge. His assessment of very compelling circumstances in fact began at [64]. It related to a variety of factors, both for and against the Appellant. The overall conclusion stated in [79] must be read in light of what preceded it. That is what is meant by a holistic and sensible reading of a decision. At [78] the judge made it abundantly clear that he was viewing the factors on a cumulative basis: "… there is no substitute for a full evaluative exercise taking into account all the relevant factors". One such factor was the effect on the children and the undue harshness issue. The judge had concluded that that particular threshold had been met only by a narrow margin. Nonetheless, the authorities make it clear that he was entitled to take the circumstances relating to the children into

account when assessing very compelling circumstances; see for example HA (Iraq) [2022] 1 WLR 3784 and NA (Pakistan) [2017] 1 WLR 207.

29. What the judge described as the "profound" emotional harm that would be suffered by the children on separation was in no way inconsistent with his conclusion that the undue harsh threshold had only just been crossed. Nor was it in any way inconsistent for the judge to have placed very significant weight on the Appellant's private life, notwithstanding the fact that Exception 1 was not satisfied. The judge expressly considered the age at which the Appellant arrived in the United Kingdom (8 years old) and the amount of time he had resided in this country, albeit not entirely lawfully. He placed "some weight" on rehabilitation. He was entitled to do so and there has been no challenge in respect of this. The authorities relating to the length of residence cited by the judge at [72] were relevant. It is simply not sensible to suggest that the judge had in some way forgotten about his conclusion that the Appellant could reintegrate into Jamaican society. Finally, it is important to note (and this was beyond doubt given what the judge in fact said at the end of [79]) that neither the private life or family life aspects of the case would, taken in isolation, have justified a positive conclusion on very compelling circumstances. The point is that the judge considered them cumulatively.

30. Ultimately, the Respondent's challenges, in their various forms, amount to disagreements without disclosing any errors of law.

31. I reiterate the concerns expressed earlier in this decision as regards the nature of the challenge brought. The judge's decision was beyond doubt conscientious and carefully constructed. The Respondent might well have been unhappy with the outcome and may have felt it to be too generous. However, if challenges are to be made, it seems to me as though very careful attention must be given to the drafting of grounds and any subsequent written arguments, and that the merits of an appeal post-permission should be reviewed with care prior to error of law hearings, particularly in light of the appropriate restraint which should be shown by the Upper Tribunal when considering first instance decisions. If it is thought that amendments to the original grounds are required, an application to that effect should be made in good time.

Notice of decision

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

The appeal to the Upper Tribunal is accordingly dismissed and the decision of the First-tier Tribunal stands.

H Norton-Taylor
H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber

7 February 2023