IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-002295
First-tier Tribunal No: HU/54028/2022
LH/00746/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 18 September 2023

Before:

UPPER TRIBUNAL JUDGE GILL
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

L.E. Appellant
(ANONYMITY ORDER MADE)

And

The Secretary of State for the Home Department Respondent

Representation:

For the Appellant: Ms D Revill, of Counsel, instructed by Turpin Miller LLP.
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 18 August 2023

We make an order under r.14(1) of the Tribunal Procedure (Upper Tribunal) Rules 2008 prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the original appellant or members of his family. No report of these proceedings shall directly or indirectly identify him or members of his family. This direction applies to both the appellant and to the respondent and all other persons. Failure to comply with this direction could lead to contempt of court proceedings. We make this order because of the evidence mentioned herein concerning the appellant's eldest daughter.
The parties at liberty to apply to discharge this order, with reasons.

DECISION AND REASONS

1. The appellant, a national of Nigeria born on 25 May 1968, appeals against a decision of Judge of the First-tier Tribunal Hena (hereafter the "judge") who, in a decision promulgated on 28 February 2023 following a hearing on 2 February 2023, dismissed his appeal on human rights grounds against a decision of the respondent of 20 June 2022 to refuse his further submissions (of 25 February 2018, 15 March 2018 and 15 March 2021) as to why his deportation would be in breach of his human rights.

2. Deportation action was commenced against the appellant following his conviction on 8 April 2016 at Warwick Crown Court of distributing an indecent photograph or pseudo photograph of a child. He had forwarded an indecent photograph or pseudo-

photograph of a child to one person who reported it to the police. He was sentenced to 18 months' imprisonment and required to sign on the Sex Offenders' Register for ten years.

3. A deportation order was made against the appellant on 16 August 2016 and reasons given in a letter dated 17 August 2016 for refusing his human rights claim. The appellant appealed on human rights grounds on the basis that he had a wife and two children in the United Kingdom. The appeal was dismissed by Judge of the First-tier Tribunal Grimmett in a decision promulgated 6 March 2017. At paras 19-20 of her decision, Judge Grimmett said:

> "19. I am not satisfied the appellant understands that his offence was one which causes danger to children. In his witness statement, he said that he had sent the picture of a child being subjected to sexual activity from an adult male to his female friend to show her how horrible it was and not for sexual gratification. The [sentencing] Judge, however, after a Newton hearing, included *[sic]* that he sent it for his sexual gratification and the intended sexual gratification of his online sexual partner.
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> 20. Before me the appellant was asked repeatedly if he accepted that he was guilty of the offence of which he was charged and he merely said that his solicitors told him to plead guilty. He said that he pleaded guilty to obtain a lower sentence and did not send a photograph for sexual gratification. I am satisfied that he poses a continuing risk to children because of the requirement to sign the Sex Offenders' Register for a period of 10 years and because he does not understand or refuses to accept the harm to children resulting from photographs such as that he possessed."

4. The appellant's further submissions were to the effect that circumstances had changed since his previous appeal. In summary, restrictions that had been placed upon him concerning the type of contact that he could have with his children no longer applied and he was now living in the family home with his wife and children. His eldest daughter had a history of self-harm when he was away from the family home and she was at risk of self-harm again if he is deported. His youngest child was now of an age where she had formed a strong attachment to him and the impact upon her of his deportation would be unduly harsh. He had rehabilitated and his risk of re-offending was now low. In support of his claim as to his low risk of re-offending, the appellant relied upon the three documents mentioned at para 13.(iv)(c) below which (the grounds contend) the judge either failed to consider or failed to give adequate reasons for rejecting.

5. The issues before the judge were whether the impact of the appellant's deportation would be unduly harsh on his family and, if not, whether there were very compelling circumstances over and above the exceptions specified in s.117C of the Nationality, Immigration and Asylum Act 2002.

The judge's decision

6. The judge concluded that the appellant's deportation would not be unduly harsh on his children, for reasons which she gave at paras 18-27. She found that there were no very compelling circumstances over and above the exceptions, for reasons which she gave at paras 28-31. In considering these issues, the judge said that the threshold was "*high*" but did not say anything else that suggested that she appreciated that the thresholds for the 'unduly harsh' test and whether there were very compelling circumstances over and above the exceptions were not the same. This is the subject of ground 1.

7. Having made these findings, the judge proceeded to consider para 390 of the Immigration Rules and whether there were exceptional circumstances for the revocation of the deportation order against the appellant. This is the subject of ground 5.

8. We now set out certain extracts from the judge's decision.

9. At para 17, the judge said:

> "17. … In respect of the case law I can only depart from the first-tier decision should the situation and evidence have changed. I find that in respect of the appellant's circumstances this has changed, **however in respect of the first-tier's findings as to the appellant's offence they remain the same, as no new evidence has been presented as to the offence since the first hearing**."
>
> (our emphasis)

10. In relation to the risk of re-offending, the judge said at para 29:

> "29. It was confirmed again that the appellant denies the offence and despite this a report was completed as to his risk to re-offending, which is low. I note the findings of the First-tier Tribunal with regards to concerns over his lack of acceptance of his offence. Just because the social services accepted that he was not a risk to his daughters and could be in the family home again it does not mean he does not pose a risk to others. The appellant himself gave evidence to say he was unable to enter his children's school due to him being considered a risk to children."

11. In relation to the evidence of the risk of self-harm by the appellant's eldest daughter, the judge said at para 23:

> "23. I do not accept that the appellant being away from the family home is the cause of his eldest daughter's self-harm. It was a symptom of the fact her father committed a crime and as described by the appellant's wife, they were deserted by their friends because of the nature of the appellant's crime. This sudden change in family circumstances, due to a particularly horrible crime, would have had a negative impact."

12. In relation to the evidence of the appellant's wife, the judge said at para 26:

> "26. I found the appellant's wife to be a strong and compelling witness, she was honest in saying that they lost all their friends due to what happened and the struggles she has faced."

The grounds

13. There are five grounds which in summary are as follows:

(i) Ground 1: The judge failed to direct herself as to the meaning of 'unduly harsh'. All she said (at para 22) was that it was a "*high threshold*" which was not met in the appellant's case. It is impossible to understand whether, in reaching this finding, she had applied the test as set out in HA (Iraq) v SSHD [2022] UKSC 22 or whether she had in practice required an impact equivalent to 'very compelling circumstances' which was a higher threshold than the threshold for the 'unduly harsh' test. The fact that the judge had also described at para 28 the threshold for 'very compelling circumstances' as a "*high threshold"* suggested that she had conflated the two tests.

(ii) Ground 2: The judge gave no reasons for her finding that the risk of self-harm by the applicant's eldest daughter was unconnected to the prospect of separation

from the appellant. This finding "*flies in the face of the evidence*". The appellant's wife, who the judge had described as a "*compelling witness*", gave evidence in her witness statement at para 34 (AB/19) that the eldest daughter had self-harmed as a result of the stress and sadness she had felt on discovering that the appellant faced deportation. The eldest daughter had said in her own witness statement at para 9 (AB/25) that she had harmed herself *"because of [her] emotions about her dad being in prison and maybe being deported"*. The judge did not explain why she had rejected this testimony.

(iii) Ground 3: In reaching her finding that there were no very compelling circumstances over and above the exceptions, the judge failed to assess the strength of the public interest. She failed to conduct any balancing exercise. She failed to identify the factors in the appellant's favour such as the best interests of the appellant's children and the impact on his wife's mental health of his deportation.

(iv) Ground 4: In reaching her finding that the appellant continued to pose a risk of re-offending, the judge erred as follows:

(a) She erred in rejecting that the appellant posed a low risk of re-offending because of a supposed denial of the offence when he had accepted his guilt to the offence but denied the motivation that had been attributed to him.

(b) She erred in concluding that there was a continuing risk of re-offending on the basis that the appellant was excluded from his daughter's school when exclusion was automatic on account of his being a registered sex offender. The fact that he was on the Sex Offenders' Register was itself an automatic requirement following his conviction of the offence in question.

(c) The judge erred by failing to mention and therefore failing to consider the following evidence which (the grounds contend) was material evidence:

- a letter from Detective Constable Matthew Jones, a police officer responsible for managing registered sex offenders, which indicated that the appellant was considered low risk, had always complied with officers, and had never raised any concerns (AB/87);

- the expert report of clinical psychologist Dr Sue Ryan which was only mentioned by the judge in order to dismiss it because she considered it inconsistent with the appellant's alleged denial of guilt notwithstanding that Dr Ryan was fully aware of the appellant's attitude towards the offence (AB/12); and

- the evidence that the appellant had completed a Lucy Faithful Foundation course (AB/145) which Dr Ryan had stated may reduce the risk posed (AB/135) and which social services had accepted that the appellant had engaged with and learnt from (AB/115-116).

(v) Ground 5: The judge erred in applying the threshold of '*exceptional circumstances*" in para 390 and 390A of the Immigration Rules instead of the threshold of '*very compelling circumstances over and above the exceptions'* in s.117C(6) contrary to Binaku (s.11 TCEA; s.117C NIAA; para 399D) [2021] UKUT 34 (IAC).

ASSESSMENT

14. We have carefully considered the grounds, the respondent's Rule 24 Reply, the appellant's response thereto and the parties' submissions.

Ground 2

15. At para 34 of her witness statement, the appellant's wife said:

> "34. … [The appellant's eldest daughter] found it particularly difficult when [the appellant] was gone. Over time she came to understand the fact that [the appellant] was facing deportation and she self-harmed as a result of the stress and sadness she felt…."

16. At para 9 of her witness statement, the appellant's eldest daughter said:

> "9. There were a couple of times where I harmed myself because of the emotions I felt about my dad being in prison and maybe being deported. I had an initial meeting with CAHMS to get some support, but I never went back again. I had a support worker at college for a while named [T] and she really helped me talk about my dad's situation. There is now another person called [A] who I can speak to at college if I need."

17. Mr Tufan submitted that, in the absence of any medical evidence, the judge was entitled to conclude that the daughter's self-harm was "*a symptom of the fact that her father had committed a crime*" and that "*they were deserted by the friends*". He submitted that, in the absence of any medical evidence and given that the witness statements of the appellant's wife and eldest daughter mentioned her self-harm only in passing, it could not be said that the judge's finding was irrational.

18. We are conscious of the fact that the witness statements of the appellant's wife and eldest daughter do not provide any indication of when the episode or episodes of self-harm took place; the lapse of time since the most recent episode; and the impact that the support that she had received, as she had explained in her witness statement, had had on her thoughts of self-harm. Importantly, there was no evidence from the individuals she mentioned at para 9 of her witness statement from whom she said she had received support and no medical evidence about her current mental health. There was no evidence from an independent suitably-qualified third party concerning the current risk of self-harm if the appellant were to be deported and whether these could be adequately addressed by, for example, professional counselling or other medical intervention. Plainly, these were shortcomings in the appellant's evidence as presented to the judge.

19. However, the difficulty is that these were not the reasons that the judge gave for reaching her finding as to the cause of the appellant's eldest daughter self-harming. When this fact is considered together with the fact that the judge found the appellant's wife to be a "*strong and compelling witness*" (para 26 of the judge's decision), we are satisfied that it was incumbent upon her to engage with the evidence that the appellant's wife had given in her witness statement and explain why she rejected it, if she did.

20. For the reasons given above, we are satisfied that the judge did err in law by failing to give any or any adequate reasons for reaching her finding on a material issue, whether the appellant's eldest daughter had self-harmed due to the appellant's possible deportation. We stress that we have reached this decision in view of the judge's finding that the appellant's wife was a "*strong and compelling witness*". Our decision may well have been different otherwise, given what we have said at para 18 above.

21. Ground 2 is therefore established.

Ground 4

22. Notwithstanding the fact that the three documents listed at para 13.(iv)(c) above post-dated the decision of Judge Grimmett, the judge said at para 17 of her decision that no new evidence had been presented as to the offences since the hearing before Judge Grimmett and that her findings "*remain the same*".

23. We are satisfied that, in reaching her finding as the risk that the appellant posed of re-offending, the judge erred in law as follows:

    (i) She failed to engage with the report of Dr Ryan who, as the grounds contend, was aware that the appellant maintained that his motivation in committing the offence was not as had been found by the sentencing judge and who nevertheless concluded that the appellant presented a low risk of re-offending. The bare mention of Dr Ryan's report in the first sentence of para 29 of the judge's decision was plainly insufficient to amount to reasons (let alone adequate reasons) for rejecting Dr Ryan's opinion as to the risk of re-offending.

    (ii) She failed to mention at all the other two documents listed at para 13.(iv)(c) above.

24. The judge's errors of law, as explained at (i) and (ii) above, taken together with her observation at para 17 that no new evidence had been presented as to the offences since the hearing before Judge Grimmett and that her findings "*remain the same*", leave us in no doubt that she failed to consider *all three documents* listed at para 13.(iv)(c) above, notwithstanding the bare mention of Dr Ryan's report at para 29 of her decision.

25. Mr Tufan relied upon para 58 of HA (Iraq) and submitted that, even if the appellant was completely rehabilitated, this would be of little or no material weight in the proportionality balancing exercise.

26. However, in our judgment, the errors explained at paras 22-24 above, taken together with ground 2, are capable of making a difference to the outcome. We are satisfied that, taken together, the errors are material to the outcome.

27. For the reasons we have given above, we set aside the judge's decision in its entirety.

Ground 1

28. Strictly speaking it is unnecessary for us to consider the remaining grounds. However, we will deal with ground 1.

29. As the Court of Appeal said in Assad v SSHD [2017] EWCA Civ 10 (at para 27), decisions of judges should be read on the assumption that, unless they had demonstrated the contrary, they knew how they should perform their functions and which matters they should take into account. That said, the reader of any judicial decision must be reassured from its content that the court or tribunal has applied the correct legal test to any question it is deciding.

30. In the instant case, it is plain that the judge erred in considering para 390 and the test of exceptional circumstances for the revocation of a deportation order. As the Upper Tribunal stated in Binaku (s.11 TCEA; s.117CNIAA; para 399D) [2021] UKUT 34 (IAC),

the structured approach to be undertaken by a tribunal considering an Article 8 appeal in the context of deportation begins and ends with Part 5A of the 2002 Act (para 91).

31. Although Ms Revill accepted that ground 5 was not material on its own because the judge had separately made findings on the question whether there were very compelling circumstances over and above the exceptions, we are satisfied that the judge's error in considering para 390 is relevant to ground 1. Given her plain error in approach by her consideration of para 390 of the Immigration Rules, we cannot be reassured that the judge was aware that the thresholds for the 'unduly harsh' test and whether there were very compelling circumstances over and above the exceptions are not the same, bearing in mind that she used the same word or phrase (*"high threshold")* to describe both thresholds and her failure to indicate, in terms, that she was aware of the difference between the two thresholds.

32. Ground 1 is therefore also established. Taken on its own, it is material to the outcome.

Disposal

33. None of the findings of the judge are retained. Having considered the evidence that was before the judge, we are satisfied that this case falls within para 7.2(b) of the Practice Statements for the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal, i.e. that the nature or extent of the judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2, it is appropriate to remit the case to the First-tier Tribunal.

34. We therefore remit this appeal to the First-tier Tribunal for a fresh hearing by a judge other than Judge of the First-tier Tribunal Hena.

35. The appellant would be well advised to produce evidence that addresses what we have said at para 18 above.

Decision

The making of the decision of the First-tier Tribunal involved the making of any error of law sufficient to require it to be set aside in its entirety.

The appeal is remitted to the First-tier Tribunal for a fresh hearing on the merits on all issues by a Judge of the First-tier Tribunal other than Judge Hena.

Signed
Upper Tribunal Judge Gill Date: 31 August 2023

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent:
2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**
3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**
5. **A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.**
6. **The date when the decision is "sent' is that appearing on the covering letter or covering email**