IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001687
First-tier Tribunal Nos:
HU/58279/2021
LH/00180/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 June 2024

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

S K B
(ANONYMITY ORDER MADE)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Mr A Eaton, Counsel instructed by Irving & Co Solicitors
For the Respondent: Ms A Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 3 July 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant. Failure to comply with this order could amount to a contempt of court.

I make this order, confirming a similar order made by the First-tier Tribunal, to protect the children involved in this appeal, including a child with a propensity to self-harm.

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DECISION AND REASONS

1. This is an appeal against the decision of the First-tier Tribunal dismissing the appeal of the appellant against the decision of the respondent on 20 December 2021 refusing him protection and leave to remain on human rights grounds.

2. Permission to appeal was granted by Upper Tribunal Judge Jackson and although I have read all of her reasons, the following two paragraphs, I find, summarise particularly well the points in the appeal and I set them out below:

> "The grounds of appeal are that the First-tier Tribunal erred in law in (i) dismissing evidence of the Appellant's daughter's self-harming as not meeting the 'necessary high level' without sufficient reasons and on the evidence, perverse to find that she was able to cope when the Appellant was in prison and with evidence that the problem would likely escalate on deportation; (ii) failing to give sufficient weight to the expert social worker report concluding that deportation would result in a clear and significant detrimental impact on the children that would amount to serious harm and in finding that the report does not assist in considering whether deportation would be 'unduly harsh' on the children; and (iii) fails to consider the impact of the health of Ms M on Ms T's ability to cope with the children in the Appellant's absence, perversely concluding that she would be able to continue to work.
>
> The threshold for perversity is a high one and there are not strong grounds in support of this in the grounds of appeal. However, it is arguable that the First-tier Tribunal has not provided adequate reasons for the findings in relation to whether deportation would be unduly harsh particularly on his daughter, when this is dealt with in one short paragraph without any explanation as to why self-harm did not meet the 'necessary high level'. It is also arguable that the First-tier Tribunal has not properly taken into account the social work report as relevant evidence when assessing the children's best interests, likely impact of deportation and therefore whether deportation would be unduly harsh."

3. Against that background I consider the First-tier Tribunal's Decision and Reasons.

4. This notes that the appellant is a national of Jamaica who was born in 1976. He entered the United Kingdom, he says, when he was about 15 or 16 years old. He started to live with his grandmother and obtained work as a carpenter for an uncle.

5. In 2009 he met Ms T who became his partner. Ms T has a child by a previous relationship who is identified as D and was born in 2007 and the appellant and Ms T have a daughter P, who was born in February 2010, and a son S, who was born in January 2016. The appellant, with his partner and the three children of the family live together.

6. The children D and P are British citizens and the child S is entitled to register as a British citizen.

7. The appellant has criminal convictions. The First-tier Tribunal Judge did not purport to set out all of the convictions but found particular relevance in the appellant being sent to prison for sixteen months in 2010 and being subject to a deportation order in 2011. He appealed and the appeal was dismissed and a deportation order was made against the appellant in a different name of D L M, which was described as "one of several aliases he has used".

8. Further submissions were made and in April 2012 the respondent decided not to revoke the deportation order. He appealed, eventually unsuccessfully and his appeal rights were exhausted in November 2015.

9. On 8 September 2016 he was convicted on seven counts of supplying class A drugs and he was sentenced to four years' imprisonment concurrently on each count.

10. In October 2017 he made further submissions on asylum and human rights grounds. His applications were refused and he appealed unsuccessfully.

11. In January 2019 he made further submissions on protection grounds and they were unsuccessful. He appealed unsuccessfully and his appeal rights were exhausted in June 2019. On 24 August 2020, having been released on licence from the sentence four years' imprisonment imposed in September 2016 he was arrested and recalled to prison. He made further submissions against deportation that were rejected leading eventually to the decision complained of.

12. At paragraph 30 of his decision and reasons, the judge said:

> "As far as revocation of the deportation order is concerned, the appellant recognises that, applying the decision in the appeal of **Binaku [2021] UKUT 34**, the appellant must fulfil the requirements of 117C of the nationality, immigration and asylum act 2002. By subsection (6) as he is a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless, in the circumstances of the present case, he falls within exception 2 in subsection (5), and there are very compelling circumstances over and above those referred to in the exception."

13. The judge then recognised that Exception 2 applies where the effect of deportation on a child or partner would be unduly harsh.

14. The judge then noted that the appellant did not pursue his claim for international protection and the case was about the children, with whom there was a genuine and subsisting parental relationship. It was not suggested that the children or indeed the appellant's partner should remove from the United Kingdom and the judge said, correctly, at paragraph 35:

> "The issues in the appeal are therefore whether the appellant's removal would be unduly harsh in respect of the children; and whether there were compelling circumstances over and above that."

15. The judge then outlined the appellant's case. It came from the appellant's own testimony and the evidence of his partner and family members and the report of an independent social worker, a Ms J Bartlett.

16. It was the appellant's case that he, his partner and their children had established a stable and happy family life. The judge said at paragraph 40:

> "For a period from January 2021 until January 2022, their family was joined, with the approval of the local authority children's services, by Ms M's two daughters aged 14 and 17 years old because Ms M was suffering from psychosis. They have been requested to remain on standby in case of future need should Ms M suffer further difficulties."

17. The judge then noted that all of the children had formed a close attachment to the appellant and that life was difficult for the appellant's partner when the appellant was in custody and away from the family. The unhappiness was particularly acute in the case of P, who self-harmed. She cut the soles of her feet

with a nail clipper. She said that the impact on the children would be "very severe indeed" if the appellant left.

18. The judge noted that Ms T works part-time for between twenty and forty hours a week and it was her case that she would not be able to keep her job without the appellant's support.

19. The judge noted the independent social worker concluded with the observation:

> "… I extremely strongly recommend that it would be in the best interests of [the child] for [the appellant] to be granted legal status to remain in the UK where he can continue to provide parenting care to [the children]."

20. The judge then noted the Secretary of State's case which was to the effect that there were no compelling circumstances and indeed the likely consequences would not be unduly harsh.

21. The judge made findings.

22. The judge identified the important question as whether there would be proportionate interference with the private and family life of all those involved.

23. The judge considered the children individually. The child D was in contact with his natural father and although wanted the appellant to continue to live within the family, the judge did not find any "feature of his life which would render the departure of the appellant a matter still higher than an already elevated standard of harshness".

24. The judge then considered the child P. He said there was "no medical evidence as to the degree of seriousness which [her self-harming] might pose". He noted that she was doing well at school and had coped although she was distressed with her father being absent when he was in prison. Again, the judge found that he was looking for an elevated standard and did not find any.

25. The child S, the judge found, showed no level of distress sufficiently high to satisfy the test. He was in good health and coping with school and had not been "sufficiently seriously affected by his father's absence while in custody".

26. The judge found the general success of the children to be a credit to their mother rather than much to do with the father. The judge acknowledged that Ms T had been under "great strain" when the appellant was in custody, but also noted that she had been able to cope. She had been supported by Ms M and although there were question marks about Ms M's health there was "no evidence that it is likely to fail in the foreseeable future".

27. The judge noted that it was "common" for single parents to struggle with childcare and employment.

28. The judge directed his mind very precisely to the social worker's report. Again, I find it helpful to set out quite large quotations from the First-tier Tribunal's Decision and Reasons. The judge said:

> "65. I have considered the report of the independent social worker, which include the following in paragraph 5.1 :- '… It is my professional opinion that young people who have experienced the degree of disruption, loss and trauma that D, P and S are increasingly encountering, are highly likely to find themselves drawn to antisocial groups and behaviours; this is a bigger risk in inner cities. Their resilience in this respect will be founded in their early parenting comprising of consistent nurturer, steady boundaries, consequences and structure, which S and M have provided. His children

and partner describe how much they need S because they love him, he is pivotal to the security of the family and their relationships and he bears the key primary care task. S is maintaining his efforts in the parental role and Ms M's instincts to abandon her employment, after all of her achievements, would be a sound parenting decision in her husband's absence, as she would need to be constantly available and alerts the children are different emotional needs, should they lose the relationship with their father, as they rely upon it now…'

66. In paragraph 5.4 the report states:- 'D, P and S's reported difficulties demonstrate that their key protective systems have been disrupted and harmed by their experiences thus far; particularly from enduring their father's detentions, with the ever present threat of his removal. Thereafter having to rely upon Michelle and each other more for their stability, whilst confused at being left by their father; what might they have done to deserve it? As a measure of their loss, confusion and trauma, D, P and S's emotional reactions have affected their moods, attitudes, relationships, social and educational behaviours and their emotional wellbeing. It is my view that Michelle would find the loss of her partner to be beyond her emotional capacity. She could struggle to cope and to stay emotionally safe herself, her well-being could deteriorate and she may not be able to be present and strong to effectively reassure and support her grieving children. For these reasons I conclude that there is a strong likelihood that they will be further seriously harmed by their father's removal."

29. The judge made further comments on the report and said at paragraph 71:

"71. I am conscious that the findings I am making cannot do other than increase significantly the hardships of life for this family, and particularly for Ms T who has coped very creditably with bringing up her children, and helping Ms M's children, despite obstacles which have been put in her way by the conduct of the appellant. However, I find the legal authority which is binding in this case can lead to no other conclusion than that the test of undue harshness has not been met."

30. The judge then also reminded himself that there was the additional requirement in a case of a person who had been sent to prison for at least four years before and appeal can succeed on article 8 grounds and found that the appeal had to be dismissed.

31. The judge also noted that the appellant had been out of trouble for some but had been motivated to criminal behaviour by a lack of money and the judge found that if temptation arises he was not satisfied it would be resisted. He then reminded himself of the sentencing remarks in the Crown Court. These pointed out to the appellant that he had decided to be a drug dealer and had to face the consequences.

32. The judge dismissed the appeal.

33. The grounds of appeal were settled by Mr Eaton who appeared before me and before the First-tier Tribunal. The gist of the grounds has already been, if I may respectfully say so, summarised well by Upper Tribunal Judge Jackson, but I find ground 1 needs further specific reflection in this Decision and Reasons. The grounds set out part of Ms T's evidence in which she was "obviously extremely upset and afraid" at P self-harming. She was concerned about the child and also concerned how the authorities might act if she looked for help but she recognised

that she had to obtain the assistance of professionals. She thought that the propensity to self-harm would escalate. I do realise the grim implications of that observation. There are degrees of self-harm far worse than those so far shown by P. There is also an observation from the social worker quoted saying that P:

> "did not demonstrate the urgent emotion I often observe in these situations, presenting as emotionally unresponsive. Her presentation concerned me therefore, because I believe her emotion remains unexpressed, leaving her vulnerable to the use of alternative, secret and potentially harmful coping mechanisms, as before. **P knows what it feels like to lose her father and cannot avoid anticipating the same emotional pain that is likely to have traumatised the children of this family in the past**."

34. Before me Mr Eaton relied on his grounds and then elaborated them in oral submissions.

35. Mr Eaton had much to say about why the effects of removal would be unduly harsh. This is a case where one child has already started to harm herself and there are reasons to fear that this is the beginning rather than the end of her self-harm and these things are going to be compounded by the appellant's removal.

36. Although Ms Ahmed resisted any criticisms of the findings and argued that they were all open to the judge, I am not so sure. The First-tier Tribunal Judge was directed expressly to the decision of the Supreme Court in **HA v SSHD [2022] UKSC 22** but I hope I might be permitted to say uncontroversially that it was rather new when it came to the judge's attention and he had already started to take a view on the case. I incline to the view that he was wrong to say that the consequences are not unduly harsh. This is not a matter of disagreement. Rather it is a recognition of the test in **HA**. If I may presume to paraphrase, it is not a question of being unusually severe but a question of being too severe, there being consequences that just are not right on the facts of a particular case. Removing a parent, typically a father, from the life of children *can* be a matter of complete indifference or positive benefit to everyone's peace of mind but in many cases it is an extremely grave step that is sometimes necessary. If this were not so, many people who deserve to go to prison would not go to prison. Here there was very clear evidence of particularly serious harm that was likely to get worse as the impact of absence began to make itself known and the mother's financial resources would diminish still further. Although the judge appears to have directed himself correctly, given the kind of harm that has already happened and the clear evidence of it being likely to increase, I cannot see that he was right about that.

37. However the judge was entitled to say that there was no medical evidence to support the social worker's concerns about P self-harming.

38. Similarly I find that the Judge was entitled to conclude that the appellant's partner would cope without him as she had done when he was in prison and would be able and willing to access social service support if necessary.

39. As is recognised throughout the Decision and Reasons, it is not enough for the appellant to establish undue harshness because he has been sentenced to at least four years' imprisonment. I remind myself of the test that Parliament requires. It is "the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2." Clearly it cannot be the case that undue harshness of itself establishes such circumstances but there is no reason at all why the facts that established the circumstances do not also establish "very compelling circumstances" and indeed

I suspect that apart from those rare cases where the very compelling circumstance are of a different kind altogether in most cases where there are "very compelling circumstances" they will be the circumstances that also support a finding of something being unduly harsh. However, the test must not be conflated. It is clear that Parliament intended there to be something rather more than undue harshness before a foreign criminal, subject to a prison sentence of at least four years, could be allowed to remain. This is where I find the judge cannot be criticised. This is something that was emphasised by Ms Ahmed and on reflection I find that she is right. The judge was aware of the findings and largely accepted what was feared although saw it in a slightly different context. He was entitled to say that the family would manage although it is a fair point that managing when the appellants can be returned to the family is different from not being able to anticipate his return at all and the fact they are managing now does not assist the respondent at all because it tends to prove the appellant's case that he is needed. Although I was not referred to it in argument, I do remind myself of the decision of the Court of Appeal in **<u>BL (Jamaica) v SSHD</u> [2016] EWCA Civ 357** which in many ways was very similar on his facts. It concerned family that was effectively being held together by a person subject to deportation following a sentence of imprisonment of more than four years. However, that case emphasised the need for correct form and proper consideration of what was required. Here, the judge reminded himself of paragraph 49 of **<u>HA</u> (Iraq)** and referred to the need for a "very strong claim indeed" and how the "countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State".

40. The judge clearly had that in mind and I do not see how he can be criticised for concluding that this is not such a case.

41. Cases of this kind can be agonisingly difficult. The people most impacted by the decision are children who cannot be blamed for any of the matters that have led the appellant to be in the predicament in which he has placed himself. However, whilst I recognise that, I also recognise the clear public interest, which is so emphatically underlined in statute law and great respect must be given to it. Whilst I can see how the First-tier Tribunal Judge was probably wrong to say that the effect of removal was not "unduly harsh" I cannot accept that he was wrong to say that the consequences were "very compelling circumstances, over and above" undue harshness. Deportation often has bad consequences. People need to reflect on that before they commit crimes.

42. I have come to the conclusion that I must and do dismiss the appeal.

<u>Notice of Decision</u>

43. This appeal is dismissed.

Jonathan Perkins

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 June 2024