IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003496

First-tier Tribunal No: PA/01206/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

9th January 2024

Before

UPPER TRIBUNAL JUDGE HANSON
DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

IPS
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr. Z. Jafferji of Counsel
For the Respondent: Mr. P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 19 December 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.

DECISION AND REASONS

1. This is an appeal by the Appellant against a decision of First-tier Tribunal Judge Khurram (the "Judge"), promulgated on 16 February 2023, in which he dismissed the Appellant's appeal against the Respondent's decision to refuse his protection and human rights claim. The Respondent intends to deport the Appellant to Jamaica, his country of origin.

2. Given the Appellant's claim for protection, and the involvement of children in his human rights claim, we make an anonymity order.

3. Permission to appeal was granted by First-tier Tribunal Judge G. Clarke in a decision dated 29 March 2023 as follows:

> "It is arguable that the Judge made inadequate findings in respect of the Child T, in light of the Independent Social Work report. It is also arguable that the Judge failed to make adequate findings regarding the impact of the Appellant's deportation on contact between the siblings, given the conclusions of the Independent Social Worker that the mothers of the children are unlikely to facilitate contact in his absence. Finally, it is arguable that the Judge failed to make adequate findings for rejecting the findings of the Independent Social Worker that the needs of the Child R would not be met by the child's mother if the Appellant is deported."

The hearing

4. The Appellant and his partner attended the hearing.

5. At the hearing we stated that the decision involved the making of material errors of law, as submitted in the grounds. We set the decision aside and remitted it to the First-tier Tribunal to be reheard afresh. We set out our reasons below.

Error of law

6. The first ground relates to the Judge's treatment of the section 72 certification. It is submitted that, while the Judge concluded that the Appellant constituted a danger to the community of the United Kingdom, the evidence before him showed that the Appellant had been assessed as posing a low risk of harm and reconviction. The Judge accepted that the Appellant had not committed any further offences since his release from detention in 2015 but failed to take account of the OASys assessment and the probation service assessment. The expert report also assessed him as presenting a low risk of re-offending. It was submitted that the Judge's assessment was irrational "in light of the lengthy period without any offending, the Appellant's current personal circumstances, and the uniform assessment by various professionals that the Appellant presented a low risk of re-offending and a low risk of harm".

7. At [33] to [35] the Judge states:

> "33. I turn to consider whether the appellant constitutes a danger to the UK community. The appellant's 2013 convictions relate to the appellant's second set of Class A drugs offences, I have made allowance for his age at the time of the 2002 conviction. I have considered the Judge's sentencing remarks dated 05/08/2013, which state the appellant played a significant role in a category 4 case, with sentence reduced marginally because the appellant pleaded guilty at a very late stage. The Judge is of the view that the appellant was motivated by financial or other advantage. Furthermore, Judge Osborne in the 2015 FtT decision, considered the appellant's NOMS 1 report, which assessed him as a low risk of serious harm to the public but also expressed concerns about lifestyle and associates. The appellant

had been assessed on the ORGS as a low risk of reconviction within 2 years of sentence; low risk of reconviction of an offence of violence; and medium risk of general reoffending.

34. The appellant has not committed any further offences since his release. I consider the passage of time alone to insufficiently dispel the s.72 presumption. In particular where the appellant's second conviction also had a significant gap of 10 years from the first. I note at the time he committed his most recent offences; he had been made aware of his liability to deportation for the drugs offences committed in 2002. I attach little weight to the appellant's claimed rehabilitation in prison, as it is commonplace, Danso [2015] EWCA Civ 596. The appellant is now 38 years old, living in a committed relationship with a partner who works; and their daughter for whom he cares. However, I am not satisfied even taking the above factors together that the appellant has discharged the burden and rebutted the presumption. At the time of the appellant's second offence, he was similarly in a committed relationship since 2010 and had a child born 25/11/2012.

35. I consider the appellant comes within the statutory provisions of s72 given his length of sentence and has failed to rebut the presumptions that he has been convicted of a particularly serious offence or that his continued presence in the UK would constitute a danger to the community here. Accordingly, the asylum and humanitarian protection grounds of appeal must both be dismissed (section 72(10)(b) and 339D)."

8. The Judge finds that the passage of time is insufficient to dispel the section 72 presumption. However, these paragraphs contain no consideration of the evidence from the OASys assessment, from the Appellant's probation officer, or from the forensic psychologist, Dr. Trent. This evidence all pointed to the Appellant being a low risk of harm and having a low risk of re-offending, and is evidence which should have been taken into account. The Judge has not assessed this evidence and concluded that less weight should be attached to it, but has simply not referred to it. We find that the Judge's failure to take this evidence into account when assessing whether or not the Appellant constituted a danger to the community in the United Kingdom is a material error of law.

9. The second ground of appeal relates to the Judge's consideration of the Appellant's protection claim. It is asserted that the Judge failed to identify the core of the Appellant's account to which he was referring when he stated that he considered the Appellant not to have been truthful "about the core of this narrative account" [37]. It was further submitted that the Judge had erred in attaching weight to the fact that the protection claim had not been pursued in the Appellant's previous appeal, that he had failed to scrutinise the evidence properly, in particular the alleged discrepancies referred to by the Respondent, that he had placed limited weight on the statements from friends and family rather than assessing each one individually, and that he had failed to take into account evidence from the lawyers in Jamaica relating to DC. He had further failed to take into account the evidence of the expert, and his consideration of the protection claim was "cursory and entirely inadequate".

10. The Judge considers the protection claim from [36] to [38]. He gives three reasons at [37] for not finding the Appellant's claim credible, and it is on this basis that the appeal is dismissed. The first reason at [37(a)] is that the Appellant did not pursue his asylum claim in his previous appeal. He attaches "significant weight to this".

11. At [37(b)] he gives his second reason: “The inconsistencies identified by the respondent in the refusal at paragraphs 53, 55, 59, 60 and 61, which I found to be well-founded and cogent criticisms.” The Judge states that the Appellant had not addressed them in his witness statement. However, he has not examined the alleged inconsistencies himself, nor given reasons for his finding that they were “well-founded and cogent”. He then states that he places “limited weight on the numerous statements from family and friends, which I consider were likely written at the behest of the appellant and not to be objective”. As set out in the grounds, we find that there is no consideration of these statements and the evidence contained in them.

12. In relation to DC the Judge states at [37(c)]:

> “There is no objective evidence whatsoever, to support the notoriety of ‘DC and his alignment with the PNP, which I would have expected in the circumstances. Nor sufficiently reliable evidence that the appellant is related to him as a half-brother, as considered (b) above.”

13. However, as set out in the grounds, there was evidence before the Judge from DC’s lawyers in Jamaica which he failed to take into account. We agree with the grounds that the Judge’s consideration of the protection claim is inadequate. He has failed to give anxious scrutiny to the evidence before him and has discounted the witness statements as a group without giving them any further consideration. We find that this is a material error of law.

14. The third ground relates to the treatment of the evidence relating to the Appellant’s children when considering the Appellant’s human rights claim. It is submitted in the grounds that the Judge’s assessment of whether it would be unduly harsh for each of the Appellant’s children to remain in the United Kingdom without him failed to take any proper account of the Independent Social Worker’s report, with particular reference to T and R. It was further submitted that the Judge had failed to assess the impact on each child of the loss of family life with their siblings.

15. At [41] the Judge states:

> “I have, in particular, considered the independent social work assessment by Neil Beaumont, which sets out the familial position in some detail. I bear in mind that it remains my duty to test and evaluate the evidence. Therefore, the findings of fact remain with the Tribunal, and it is the function of the fact-finding Tribunal to assess the facts as found against the relevant legal standards.”

16. Despite stating that his duty was to “test and evaluate the evidence”, the Judge has not done this. Neither has he stated that no weight can be attached to this report. In relation to T, the Judge finds at [42]:

> “I accept that stress and anxiety affect [T], however, the effects of the most recent separation from the appellant have not been documented and without more I am not satisfied it amounts to undue harshness.”

17. We agree with the grounds that this is not the correct test. We find that the Judge has not considered the impact on T of the Appellant’s deportation but rather “the most recent separation”. Further he has failed to take into account the evidence of the effect on T of the deportation, set out at [12] of the grounds of appeal.

18. In relation to R, the evidence from the Independent Social Worker was that her needs would not be met by her mother (as set out at [17] of the grounds of appeal). However, at [43] the Judge finds:

> "I consider [the appellant's partner] to have a network of practical and emotional support that can assist her to manage her difficulties to a sufficient extent. The medical evidence does not in itself support the contention that she is specifically reliant on the appellant to care for their daughter. In terms of R who is now 2 years old. I find it in her best interests for the appellant to remain here. However, I consider [the appellant's partner] to be capable of caring for R without the appellant."

19. This finding runs contrary to the evidence in the Independent Social Worker's report. The same is true of the evidence regarding sibling contact in the absence of the Appellant. The Judge finds at [44]:

> "I accept here that the appellant is a 'hub' for the family network. However, the children will remain living with their respective mothers who can facilitate contact between them. The appellant and [his partner] can encourage and facilitate such meeting over the course of time."

20. The evidence from the Independent Social Worker was that there was no relationship between the mothers of the children and that it was "unlikely that sibling contact would continue in the event of [the Appellant] being deported. The sibling bond would ultimately break down".

21. We find that this ground is made out. We find, as submitted in the grounds that the Judge failed properly to take into account the detailed evidence before him, in particular the Independent Social Worker's report which addressed the impact on the Appellant's children in the event of his deportation. It was evidence that the Judge should properly have assessed before coming to the conclusion that he could not depart from the findings of Judge Osborne. We find that this is a material error of law.

22. We find that the Judge's failure to properly assess the evidence in relation to the children infects his findings on section 117C(6). Further, we agree with the grounds that the consideration under section 117C(6) is again cursory. There is no reference to the expert report of Dr. Lohawala and the evidence of the Appellant's own mental health. We find that this failure to take the evidence into account is a material error of law.

23. We find that the decision is vitiated by material errors of law. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade we have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
>
> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their*

case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."

24. We have carefully considered the exceptions in 7(2)(a) and 7(2)(b) when deciding whether to remit this appeal. The Judge failed properly to consider the evidence before him with the result that the Appellant has not had a fair hearing. We therefore consider that it is appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

25. The decision of the First-tier Tribunal involves the making of material errors of law and we set the decision aside. No findings are preserved.

26. The appeal is remitted to the First-tier Tribunal to be reheard.

27. The appeal is not to be listed before Judge Khurram or Judge Osborne.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
30 December 2023