IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-003639
First-tier Tribunal No:
HU/52698/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

21st February 2024

Before

UPPER TRIBUNAL JUDGE KEBEDE
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

ANDREW WAYNE HUNT
[ANONYMITY DIRECTION REMOVED]

Respondent

Representation:
For the Appellant: Ms A Nolan, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph, Counsel instructed by Aylish Alexander Solicitors

Heard at Field House on Thursday 15 February 2024

DECISION AND REASONS

BACKGROUND

1. This is an appeal brought by the Secretary of State. For ease of reference, we refer to the parties as they were before the First-tier Tribunal. The Respondent appeals against the decision of First-tier Tribunal Judge Clarkson promulgated on 21 July 2023 ("the Decision") allowing the Appellant's appeal against the Respondent's decision dated 26 June 2020 refusing his human rights claim.

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2. This is the Appellant's third appeal, the first and second having been dismissed in 2005 and 2017 respectively.

3. We begin with the anonymity direction which we have removed in this decision. That followed discussion with the parties at the hearing. Mr Joseph was unaware why an anonymity direction had been made in the First-tier Tribunal. He thought that may be because, at some time in the past, the Appellant may have made a protection claim. It may also have been in order to protect the identities of the Appellant's current and former partners and his children. We are satisfied however that this can be done by referring to those partners and children by initials as was done by Judge Clarkson. In those circumstances, we indicated at the conclusion of the hearing that we would be removing the anonymity order and we do so.

4. In relation to the factual background to this case, the Appellant is a Jamaican national. He came to the UK as a visitor in 2001. Following several refusal decisions and two appeals, the Appellant was granted leave as a student from 22 October 2003 to 22 August 2004. He has had no leave since.

5. Following a criminal conviction for money-laundering, associated with drug dealing in the UK in November 2004, the Appellant was made the subject of a deportation order in July 2005. His first appeal was against that decision. He was deported to Jamaica in April 2006 but returned to the UK illegally. He was discovered in April 2008 and deported again in May 2008. He re-entered the UK again illegally apparently in early 2010. He was again deported to Jamaica in Jun 2010. He re-entered illegally again in July 2012.

6. On that last occasion, the Appellant brought himself to the attention of the authorities. He sought revocation of the deportation order based on his family circumstances with which we deal below.

7. On 8 May 2015, the Appellant was convicted of possession with intent to supply a Class A drug (cocaine) and of possession with intent to supply a Class B drug (amphetamine). On 12 June 2015, he was sentenced to 3 ½ years in prison. He completed that sentence on 30 September 2016 but was detained under immigration powers and remained detained at the time of his second appeal which was dismissed by First-tier Tribunal Judge Hodgkinson by a decision promulgated on 2 February 2017 ("the Previous Appeal Decision"). The Previous Appeal Decision was against a previous refusal of a human rights claim dated 19 October 2016.

8. This appeal centres on the Appellant's family circumstances. The Appellant has at least four former partners and a current partner. He

has six children, two now adults. The details of his relevant family relationships are as follows (adopting the same initials as used by Judge Clarkson):

TH – the child of the Appellant whose mother, another Jamaican national, came to the UK with T in 2002. T was born in February 1999. T is now a British citizen. She has her own son. The Appellant is estranged from TH's mother but retains contact with TH and her son (his grandson).

JWH – born in the UK to the same mother as TH, JWH was born in November 2003. He too is a naturalised British citizen. The Appellant remains in contact with JWH.

KDC - the Appellant's child with his former partner LC who is a British citizen. KDC was born in May 2008. The Appellant is estranged from LC but remains in contact with her and KDC. KDC suffers from juvenile idiopathic arthritis, hyper mobility syndrome, chronic pain and IBS. It has been said that she is possibly on the autistic spectrum although there is no formal diagnosis in that regard.

NHC – also born in 2008 to a different mother in the UK. The Appellant was not involved with NHC at the beginning of her life as he was unaware of her existence. He is estranged from NHC's mother but claims to retain contact with NHC herself.

MMMB – born in December 2013 to the Appellant's current partner, PMB. MMMB has what are described by Judge Clarkson as "additional educational and behavioural needs" ([70] of the Decision).

AJMMB – born in December 2014 to PMB. The Appellant lives with PMB, MMMB and AJMMB.

9. The essential findings of Judge Clarkson are that it would be unduly harsh for KDC and MMMB to remain in the UK without the Appellant ([89] and [91] of the Decision). It was not suggested by the Respondent that any of the children should return to Jamaica with their father should he be deported. The Judge allowed the appeal on the basis of her conclusions in relation to KDC and MMMB.

10. Judge Clarkson considered whether there were very compelling circumstances above the two exceptions contained in the Immigration Rules and section 117C Nationality, Immigration and Asylum Act 2002 ("Section 117C"). She did so in a single paragraph ([93]) but there noted that she had "not proceeded in any further analysis of [the Appellant's] claim" in that regard as her conclusion in relation to undue harshness was determinative of the appeal. Had she done so, she said that she would have found in the Appellant's favour.

11. The Respondent appeals on what can be separated into two grounds as follows:

<u>Ground 1:</u> the Judge failed to take into account material matters/make findings on material matters/gave inadequate reasons. That is then sub-divided into complaints made about the Judge's findings in relation to, first, PMB, MMMB and AJMMB, second, NHC and finally LC and KDC.

<u>Ground 2:</u> the Judge made an inadequate assessment of the public interest when determining whether there were very compelling circumstances over and above the two exceptions in Section 117C. She had ignored the findings in the Previous Appeal Decision and had not paid "adequate regard to the established history of offending and blatant disregard to the deportation order in force".

12. Permission to appeal was granted by First-tier Tribunal Judge SPJ Buchanan on 30 August 2023 for the following reasons so far as relevant:

> "..3. It is arguable, as contended by the respondent at #2, and by reference to the findings at #69-72 of the Decision, that the FTTJ fails to give adequate reasons for concluding that *'I was unable to hear evidence from his mother in this regard, but accept that the appellant has a genuine and subsisting relationship with both boys and that he provides additional support and care to MMMB'.* The source of evidence, and findings arising from those sources concerning the nature of the relationship is arguably not explained by adequate reasoning.
> 4. It is arguable, as contended by the respondent at #4 that there are inadequate reasons given at #68 of the Decision for concluding that the appellant has a genuine and subsisting relationship with NHC; whereas there appears to be evidence of ongoing contact, the nature and extent of what happens during any contact between appellant and NHC is not subject to any detailed discussion. It is arguable that the leap between ongoing contact and the conclusion that there is a genuine and subsisting relationship arising out of that contact is not adequately reasoned.
> 5. It is arguable, as contended by the respondent at #10, that with the degree of support already provided to KDC by others as recorded by the FTTJ, that there are inadequate reasons given for concluding that it would be unduly harsh to deport the appellant.
> 6. It is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal."

13. We had before us an indexed bundle of documents running to 729 pages, which included the documents relevant to the appeal and challenge to the Decision, the Appellant's evidence before Judge Clarkson and the Respondent's bundle before the First-tier Tribunal. We refer below to documents (so far as necessary) by reference to the pagination in that bundle.

14. The matter comes before us to determine whether the Decision contains an error of law. If we conclude that it does, we must then consider whether to set aside the Decision. If we set aside the Decision, we must then either re-make the decision or remit the appeal to the First-tier Tribunal to do so.

15. Having heard submissions from Ms Nolan and Mr Joseph, we indicated that we would reserve our decision and provide that in writing which we now turn to do.

DISCUSSION

16. It is convenient to take the Appellant's grounds together as we understood it to be accepted that if we found no error under the first ground, then any error under the second ground could not make any difference.

17. Ms Nolan adopted the grounds but made the overarching submission that the Judge had failed to take into account when considering the credibility of the Appellant's evidence his previous immigration history which was in blatant disregard for immigration control. Ms Nolan submitted that the Judge, at [41] of the Decision, when setting out the test she had applied to considering the credibility of the evidence, had failed to include the Appellant's immigration history as one of the factors.

18. By way of an example of the Judge's reliance only on the evidence of the Appellant himself, Ms Nolan drew our attention to the assessment in relation to MMMB at [91] of the Decision which was based on findings at [70] of the Decision based only on the Appellant's evidence and without medical evidence in support.

19. Ms Nolan also referred us to the social worker's reports of Ms Julie Meeks at [177] and [191] (paragraphs [6.6] and [8.8]). She submitted that the opinion there stated that the Appellant's deportation would have a "significant detrimental emotional and physical impact on his children and grandson" did not meet the elevated threshold contained in the test of undue harshness.

20. Ms Nolan did not take us through the pleaded grounds but drew our attention to findings which she said disclosed an error. We deal with those, and the grounds as pleaded when we come to the Judge's reasoning below.

21. Taken as a whole, Ms Nolan submitted that the Judge had made inadequate findings and failed to take into account material matters.

22. Mr Joseph submitted that the Decision had to be read as a whole and taking into account all the evidence. As he pointed out, the

evidence before Judge Clarkson was not simply that of the Appellant but included also the evidence of the Appellant's adult children (TH and JWH) and LC who gave evidence remotely. The Judge had regard to the Appellant's previous immigration history set out at [50(iii)] by adoption of the Respondent's decision. The Judge also had full regard to the Previous Appeal Decision and had correctly applied the Devaseelan guidance in that regard. Although the Appellant's appeal was dismissed on that occasion, as Mr Joseph pointed out, some six years had passed since, the Appellant was now released from detention and was living with PMB and their two sons.

23. Mr Joseph also pointed out that the Judge did not rely solely on the witness evidence. She also had not just one but three reports of Ms Meeks. There were also medical records and letters from the children's schools. The Judge had referred to all the evidence.

24. Mr Joseph submitted that the Judge had carefully analysed the consequences of the Appellant's deportation for each of the children. She had accepted only that deportation would have unduly harsh consequences for KDC and MMMB. He drew our attention to the reasons for those findings at [87] to [89] (for KDC) (based on the evidence set out at [58] and [67]) and [91] (for MMMB) (based on evidence at [69] to [72]).

25. Mr Joseph submitted that the grounds put forward by the Respondent were simply a disagreement with the Judge's findings and the outcome of the appeal. For the reasons which follow, we agree with that submission (at least in relation to ground one when that ground is taken as a whole).

26. The Judge found that the Appellant's deportation would have unduly harsh consequences for two of the children only (KDC and MMMB). The grounds challenging the findings in relation to NDC therefore do not need to be considered since the Judge found at [90] of the Decision that the Appellant's deportation would not have unduly harsh consequences for that child.

27. The Judge properly directed herself as to the test which applies in relation to undue harshness including as to the elevated threshold ([81] to [83] of the Decision). The Judge properly took into account the findings in the Previous Appeal Decision but reached a different conclusion due to a change in circumstances.

28. Dealing then with the Judge's reasoning, we look first at KDC. The Judge assessed her situation at [87] to [89] of the Decision as follows:

> "87. In relation to KDC I found that she is a vulnerable child who has been put on the child protection register as her emotional needs may not be being met and has complex physical health care needs. Given her constant pain and physical impairments I conclude that she is likely to have greater than average emotional needs and that her conditions may

affect her mental health making her potentially more vulnerable. I have accepted that her father has a genuine and subsisting relationship with her. I note that the independent social worker in 2022 recorded at para 5.2 of her report that '[KDC] stated that she can talk to her dad, she can talk to him about how she is feeling that its important for her she can talk to him over the phone but it's not the same as seeing him'.

88. I concluded that as KDC is a qualifying child I need to consider the effect of the Appellant's deportation on her. I consider her to be particularly vulnerable due to her various health conditions. She regards her support from her father as important to her. I place significant weight on the Appellant's emotional support of his child as her emotional needs are possibly not being met or not consistently met by her mother, that she has a propensity to withdraw and I note that she considers the face to face contact to be important to her. Should she be on the autistic spectrum this may be of particular importance to her. I also note that although the Appellant's face to face contact is limited it is of particular significance as without it KDC may not engage with necessary health care and he is likely to be able to provide support in relation to racism that her mother may not be able to. I weigh all of these issues together and find that they make her relationship with her father particularly important and therefore the lack of support would be unduly harsh.

89. I note the contact between the Appellant and KDC via telephone but accept that due to her various conditions her value on face to face contact is objectively justified. I place significant weight on the fact that disabilities make her needs in regards to parenting greater than average and as her physical conditions are degenerative consequently her needs are likely to increase. I have considered whether her mother can meet those needs without KDC suffering undue hardship and have concluded that her mother has her own difficulties that have already resulted in concern as to whether KDC's needs are being met. I therefore conclude that the absence of face to face contact, despite it not being that regularly, with her father would have unduly harsh consequences on KDC who is a particularly vulnerable young woman."

29. That assessment is based on the findings made at [58] to [67] of the Decision. We do not set out those findings in full. They fully support the Judge's assessment regarding KDC's physical ill health which it is noted at [58] of the Decision is not disputed.

30. In relation to emotional needs, it was suggested by Ms Nolan that there is an inconsistency in the evidence set out at [60] which records a decision in 2019 that KDC does not have autism and the Judge's reference to autistic spectrum at [88] of the Decision. We do not view that as an inconsistency. The Judge is referring only to the possibility that KDC may be on the spectrum in light of the other evidence recorded at [60] of the Decision that KDC receives support from "an educational psychologist, and counsellor and occupational therapist and an art therapist". Whatever the nature of KDC's emotional needs, there is ample evidence to support the assessment that those needs are enhanced.

31. The Judge takes into account the limited level of face-to-face contact which the Appellant has with KDC (who lives in Scotland) ([62]) but it is there also noted that the Appellant "assists LC in disciplining and managing KDC's behavior".

32. Issue is taken in the pleaded grounds with what is said to be an inconsistency between the Judge's finding at [63] of the Decision that LC's evidence was credible and [67] of the Decision where the Judge preferred the evidence of a social worker over that of LC when considering the emotional support which LC is able to offer her daughter. However, as Mr Joseph submitted and we accept, the point being made at [67] of the Decision is that LC does not have insight into her own caring abilities for KDC. At [63], the Judge was accepting as credible LC's evidence in relation to bullying and racial abuse which KDC was suffering at school. Those were separate issues. There is no inconsistency in those findings as pleaded.

33. Ms Nolan also drew our attention to the other support which LC has to assist with the parenting of KDC. That is referred to at [64] of the Decision. However, as the Judge there noted, LC's evidence, which she accepted, was that her parents were not able to assist her and that the Appellant "was a shoulder to cry on" and helped her to manage KDC.

34. In any event, as Mr Joseph pointed out, the vulnerabilities of KDC and support which the Appellant gives in that regard were not the only reasons why the Judge found the Appellant's deportation to be unduly harsh for KDC. At [65] of the Decision, the Judge considered the difficulties which KDC and the Appellant have in communicating remotely due to their different accents. The Judge took that into account when considering whether remote contact would suffice. The Judge also took into account at [66] of the Decision that KDC would be unlikely to be able to visit her father given her health conditions. LC's evidence was that she would not accompany her daughter to visit the Appellant in Jamaica due to her own health problems and financial difficulties.

35. As Mr Joseph also submitted and we accept, the Judge took into account at [63] of the Decision to which we have already referred the racial abuse which KDC has suffered at school and that the Appellant could give KDC more help in that regard given her mixed heritage.

36. When [87] to [89] of the Decision are read as a whole, we consider that the assessment amply explains the Judge's reasoning for her conclusion that the Appellant's deportation would have unduly harsh consequences for KDC. That reasoning is not inconsistent with the findings made in relation to the evidence about this child and her mother at [58] to [67] of the Decision. The Judge was entitled to

reach the conclusion she did on the evidence she had about KDC and LC and based on her findings.

37. We observe that the impact of the Appellant's deportation on KDC appears to be the central reason for the Judge's allowing of the appeal. Having upheld that conclusion, strictly we do not need to go further. The finding that deportation would have unduly harsh consequences for just one of the children is sufficient reason to allow the appeal under the family life exception in Section 117C.

38. Nevertheless, we go on to consider the Respondent's other criticisms under the heading of ground one.

39. In relation to NHC, as we have already noted, the Judge found that the Appellant had a continuing relationship with this child but did not find that the Appellant's deportation would have unduly harsh consequences for her. Any challenge to the finding that the relationship is subsisting does not therefore affect the outcome of the appeal.

40. In relation to MMMB, the Judge's assessment is at [91] of the Decision as follows:

> "In relation to MMMB and AHMMB I accept that their father lives with them and it will obviously be harsh on them for him to no longer be part of their lives. This would be expected in relation to any child with a subsisting parental relationship with their father. Whether it would be unduly harsh, and more than an inconvenience but severe or bleak I find that it would be in relation to MMMB as he is a child with learning and emotional difficulties that require extra parental impute and his mother is already stretched with basic care needs and suffers from mental health difficulties. I therefore conclude that without the physical presence of the Appellant is required for the child to reach his full potential and his absence would not just have an impact on him emotionally and developmentally but that lack of support would be likely to have an unduly harsh impact on this child's learning and development due to his specific disabilities."

41. The basis for the assessment about MMMB's difficulties appears at [70] of the Decision as follows:

> "The Appellant's evidence was that since his release from detention in September 2017 he has been living with them and been an active parent taking them to school and cooking for them. His statement sets on the MMMB [sic] has been diagnosed with Irlen syndrome, dyslexia, memory recall difficulties and hypermobility and behavioral issues. The bundle contains a letter recording treatment by a chiropractor and he uses colored lenses to improve his reading ability. The Appellant also believes that MMMB has ADHD. Whilst the medical evidence in the bundle does not provide confirmation of these diagnoses I accept that this is something which is unlikely to be fabricated and note that claim of exceptional difficulties are only made in relation to one of the boys. I accept on the

balance of probabilities that MMMB has additional educational and behavioral needs."

42. We have some sympathy with Ms Nolan's submission that it is difficult to see how the assessment of MMMB's health issues is made having regard to the absence of medical evidence in support and reliant largely on the Appellant's own evidence. We do not accept the submission that the Judge was not entitled to rely on the Appellant's evidence. His past convictions for drugs offences and disregard for immigration control do not necessarily make him an unreliable witness of fact. However, the absence of medical evidence does not mean that the Appellant would be fabricating the evidence but rather that he is giving evidence about something which is not within his knowledge or expertise.

43. There is some limited medical evidence about the problems which MMMB is experiencing ([258-259] and [375]) but, as the Judge says, none provides a diagnosis of the problems which the Appellant identifies in his own evidence.

44. Issue is also taken in the pleaded grounds with the Judge's finding that the Appellant is in a genuine and subsisting relationship with PMB and the two children. Reference is made to the Judge's acceptance of the evidence of the two adult children ([2] of the grounds) but it is said that it was unclear how that evidence could assist on this point. It was pointed out that PMB did not herself attend the hearing and that her most recent statement was eight months old by that time. There was no medical evidence supporting her absence.

45. As Mr Joseph pointed out, Judge Clarkson dealt with PMB's absence at [18] of the Decision. Her absence due to mental health problems was consistent with other medical evidence which showed a history of such problems. In light of that, Judge Clarkson accepted that PMB's evidence should be considered but given less weight.

46. Mr Joseph also pointed out that the Respondent had accepted in the decision under appeal that the relationship between PMB and the Appellant (and therefore also with their two sons) was genuine and had subsisted since 2017. The Appellant was released on bail to the address where he lived with PMB and the two children. That the relationship between the Appellant and PMB was subsisting was also accepted by the Judge in the Previous Appeal Decision.

47. We do not find an error in relation to the Judge's finding that the Appellant remains in a genuine and subsisting relationship with PMB and their two sons. We have some concerns about the Judge's acceptance of the Appellant's own evidence about MMMB's emotional needs which are taken into account in the assessment at [91] of the Decision. Certainly, we would not have found that MMMB "is a child

with learning and emotional difficulties that require extra parental impute" [sic] on the evidence which we have seen. However, the Judge was aware that there was no medical evidence providing a diagnosis and must be seen to have found that MMMB had some issues based on the limited evidence which there is.

48. In any event, as in relation to NHC, the Judge's conclusion in relation to MMMB can make no difference to the outcome. As we have concluded, the Judge was entitled to make the assessment which she did in relation to KDC. She concluded that the Appellant's deportation would have unduly harsh consequences for KDC. There is no error in that regard. That was and is sufficient reason for the appeal to be allowed.

49. Having found no error in the Judge's allowing of the appeal under the heading of ground one, the Respondent's second ground can make no difference. We deal with it only for completeness.

50. The Judge went on to deal with very compelling circumstances over and above the two exceptions at [93] of the Decision as follows:

> "As the Appellant's claim is successful under exception 2 I have not proceeded in any further analysis of his claim but were I to have done so I would have found that the unduly harsh consequences on the children above, along with the support required by TH as a single parent, care giver, and the consequences of dropping out of university as well as the support required by PMB and LC accumulatively would have amounted to very compelling circumstances which despite the weighty significance of the public interest would have been outweighed."

51. The Respondent submits that the Judge has failed properly to assess the public interest. Had it been necessary for us to consider this point, we would have agreed. Although the Appellant has not offended again since his release from detention in 2017, it is recorded at [84] of the Decision that the risk assessment is "15% risk of reoffending within 2 years". Although the Judge was entitled to take into account that six years later the Appellant had not offended again, that needed to be considered against the factual background which included the Appellant making further submissions which ultimately led to the decision now under appeal barely a month after his previous appeal was dismissed. It was therefore in his interests not to offend whilst his case was under consideration for deportation and whilst his appeal was ongoing. He has also been on immigration bail throughout that period.

52. We recognise that the Judge stated at [84] that she did not "underestimate the importance of the public interest in this case". However, there is little recognition of that importance at [93] of the Decision nor is there any mention of the Appellant's previous

immigration history which, as the Respondent has pointed out, involved the blatant disregard for immigration control.

53. As it is, however, none of that makes any difference in circumstances where we have accepted that the Judge was entitled to allow the appeal on the basis of the reasons given at [87] to [89] of the Decision.

CONCLUSION

54. Whilst we have expressed concerns about the Judge's assessment at [91] of the Decision on the evidence before her, we accept that, for the reasons set out at [87] to [89] of the Decision, the Judge was entitled to allow the appeal. Any error in relation to [91] of the Decision cannot make any difference. Nor could any error in relation to [90] or [93] of the Decision affect the outcome of the appeal.

55. The conclusion reached in this appeal is not one which we would have been likely to have reached on the evidence, and we suspect that many Judges would have dismissed the appeal on the same evidence. Nonetheless, for the reasons set out above we cannot identify any error of law which is material to the outcome. The Judge was entitled to allow the appeal on the basis that the Appellant's deportation would be unduly harsh for KDC. There is no error in that conclusion.

NOTICE OF DECISION

The Decision of Judge Clarkson promulgated on 21 July 2023 did not involve the making of an error of law which could affect the outcome of the appeal. We therefore uphold the Decision with the consequence that the Appellant's appeal remains allowed.

L K Smith
Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 February 2024