Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-000856
HU/52150/2021; LP/00299/2021

THE IMMIGRATION ACTS

Heard at Cardiff Civil Justice Centre	**Decision & Reasons Promulgated**
On 11 August 2022	**On 4 October 2022**

Before

UPPER TRIBUNAL JUDGE GRUBB

Between

JRP
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr E Da Silva, Fountain Solicitors
For the Respondent: Ms S Rushforth, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order. Unless the Upper Tribunal or court directs otherwise, no report of these proceedings shall directly or indirectly identify the appellant. This direction applies to both the appellant and to the respondent and a failure to comply with this direction could lead to contempt of court proceedings.

Introduction

2. The appellant is a citizen of Jamaica who was born on 27 August 1999.

3. The appellant entered the United Kingdom on 23 April 2011. He was subsequently granted a period of discretionary leave between 6 July 2012 and 4 May 2015. The appellant's application for further leave was refused, thereafter, on 20 June 2016 and his appeal against that decision was dismissed on 20 September 2017. The appellant became appeal rights exhausted on 20 April 2018.

4. On 17 July 2019, the appellant was convicted of a number of drugs offences at the Bristol Crown Court – one count of possessing a controlled drug, Class A (cocaine) with intent to supply, two counts of possessing a controlled drug, Class A (heroin) with intent to supply, and one count of possessing a controlled drug, Class A (crack cocaine) with intent to supply – for which he was sentenced to a total of three years' imprisonment. The appellant did not appeal against his conviction or sentence.

5. On 7 July 2020, the appellant was notified that he was liable to deportation as a "foreign criminal" under s.32 of the UK Borders Act 2007. The appellant, thereafter, made representations on 22 July 2020.

6. On 10 May 2021, a deportation order was made against the appellant. On that date also, the Secretary of State made a decision refusing the appellant's human rights claim, in particular under Art 8 of the ECHR. The appellant relied upon his relationship with his partner ("Ms H") and his daughter, a British citizen, who was born on 14 April 2018. Ms H is her mother.

The Appeal to the First-tier Tribunal

7. The appellant appealed to the First-tier Tribunal relying upon Art 8 of the ECHR. In a decision dated 21 October 2021, Judge Lloyd-Lawrie dismissed the appellant's appeal. The judge dealt with the appellant's Art 8 claim set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 (as amended) (the "NIA Act 2002"), in particular s.117C of that Act.

8. Before the judge, it was clear that the appellant could not rely upon Exception 1 in s.117C(4) of the NIA Act 2002. The appellant could not meet the requirement in s.117C(4)(a) that he had been "lawfully resident in the United Kingdom for most of [his] life". The central issue before the judge was whether the appellant could succeed under Exception 2 in s.117C(5) which states that:

> "Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh".

9. The judge recognised (at [12]),that if the appellant could succeed under Exception 2 then the public interest did not require his deportation.

10. First, the judge accepted that the appellant had a "genuine and subsisting relationship" both as the partner of Ms H and also as a parent of his daughter (see [19] and [21] respectively).

11. Secondly, the judge found, however, that it would not be "unduly harsh" for the appellant's partner, Ms H to remain in the UK without the appellant (see [19]) and that it would not be "unduly harsh" for her to accompany the appellant (with their daughter) to Jamaica (see [20]).

12. Thirdly, in relation to the appellant's daughter, the judge found that it would not be "unduly harsh" for her to remain in the UK with Ms H if the appellant were deported even though it was in her best interest to be brought up by both her parents in the UK (see [22]-[23]). Further, the judge found that it would not be unduly harsh for the appellant's daughter, together with Ms H, to relocate to Jamaica with the appellant (see [24]).

13. As a consequence, the judge concluded that Exception 2 did not apply to the appellant.

14. Finally, the judge went on to consider whether the appellant could, nevertheless, succeed on the basis that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2" applying s.117C(6) of the NIA Act 2002 and found (at [26]) that there were not "very compelling circumstances" sufficient to outweigh the public interest in deporting the appellant as a foreign criminal given his serious criminal offending.

15. As a consequence, the judge dismissed the appellant's appeal on the single ground relied upon, namely Art 8 of the ECHR.

The Appeal to the Upper Tribunal

16. The appellant sought permission to appeal to the Upper Tribunal. Permission to appeal was initially refused by the First-tier Tribunal (Judge Grimes) on 1 December 2021. However, on 20 January 2022, the Upper Tribunal (UTJ Lindsley) granted the appellant permission to appeal.

17. The appeal was listed at the Cardiff Civil Justice Centre on 11 August 2022. I heard oral submissions from Mr Da Silva, who represented the appellant, and Ms Rushforth, who represented the Secretary of State.

The Grounds

18. Mr Da Silva relied upon the three grounds of appeal although, in the course of his submissions, he placed most emphasis upon some aspects of the grounds.

19. Ground 1 challenges the judge's finding that it would not be "unduly harsh" for the appellant's daughter if the appellant were deported. The ground raises two distinct points. First, the judge misdirected herself in para 22 by applying, as the yardstick of the test, a comparator of whether

the degree of harshness suffered by the appellant's daughter was "over and above the ordinary harshness that would be caused by deporting a parent". Secondly, in reaching an adverse finding on the issue of "undue harshness", the judge failed to have regard to the particular situation of the appellant's daughter, including having regard to Ms H's evidence of the impact upon the child of visits to the appellant in prison and that, as a result of the appellant's deportation, he and his daughter would be separated, in effect, for ten years.

20. Ground 2 challenges the judge's finding that it would not be "unduly harsh" for the appellant's partner, Ms H to relocate to Jamaica. In particular, it is contended that the judge failed to have regard to the evidence that the appellant's partner would be unable to afford the medication she requires for her health.

21. Ground 3 raises two points. First, the judge misdirected herself at para 25 in concluding that none of the exceptions (i.e. Exception 1 and Exception 2) applied because the appellant had committed serious offences. The judge is also criticised for relying upon para 399D of the Immigration Rules which, it is contended, was irrelevant to her decision in applying Part 5A of the NIA Act 2002. Secondly, it is contended that the judge failed to apply the "structured approach" required by Part 5A.

Discussion

22. I will take each of the grounds in turn.

Ground 1

23. This raises a challenge to the judge's finding that it would not be "unduly harsh" for the appellant's daughter to remain in the UK if the appellant were deported to Jamaica.

24. The essence of this challenge lies in the approach, at the time of the grounds, set out in the Court of Appeal's decision in HA (Iraq) v SSHD [2020] EWCA Civ 1176 and, more recently, in the decision of the Supreme Court on appeal in HA (Iraq) and Others [2022] UKSC 22. The Supreme Court rejected the Secretary of State's submission that, applying what was said by Lord Carnwath in KO (Nigeria) v SSHD [2018] UKSC 53 at [23], it was a correct approach to the "unduly harsh" test in Exception 2 in s.117C(5) of the NIA Act 2002 to apply a notional comparator, namely that the level of harshness must exceed "the degree of harshness which would necessarily be involved for any child faced with the deportation of a parent".

25. At [30]–[40], Lord Hamblen (with whom the other Justices agreed) rejected this "notional comparator test". Instead, the Supreme Court acknowledged that the statutory test was "unduly harsh" and that required a focus, as Ms Rushforth submitted, upon the particular circumstances of the child or, indeed, the partner of the appellant.

However, in applying that test, the Supreme Court, considered as "authoritative" the approval in KO (Nigeria) of the exposition of the test by the Upper Tribunal in MK (section 55 – Tribunal options) Sierra Leone [2015] UKUT 223 (IAC).

26. At [41]–[45] of HA (Iraq) Lord Hamblen said this:

> "41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
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> 42. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - ie it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).
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> 43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.
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> 44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.
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> 45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State."

27. As will be clear, the Supreme Court acknowledged that what was "unduly harsh" could not be equated with "uncomfortable, inconvenient, undesirable or merely difficult". Rather it was something that was "severe, or bleak" and which was the antithesis of "pleasant or

comfortable". That test imposed a "highly elevated threshold or standard" although not as high as that set by the "very compelling circumstances" test in s.117C(6) of the NIA Act 2002. Whether that "appropriately elevated standard" was reached was a decision to be made by the Tribunal making "an informed assessment" of the effect of deportation on the individual's child (or, if appropriate, partner) and required an "evaluative judgment".

28. In this appeal, the judge dealt with the issue of whether it would be "unduly harsh" for the appellant's daughter to remain in the UK if the appellant were deported at [22]–[23] as follows:

> "22. I first consider the best interests of the child.. I find that it is in the best interest of the child to be brought up by both of her parents in the UK, with the extended family that have cared for her from birth. However, as this is not a standard Article 8 claim but involves a deportation order, the public interest would require the Appellant's deportation, regardless of this finding, unless it is found that the effect on the child would be unduly harsh. The position on what is unduly harsh has been considered for some time to be that as set out in **KO (Nigeria) & Ors v SSHD (Respondent) [2018] UKSC 53**. I have considered the more recent case of **HA (Iraq) v SSHD [2020] EWCA Civ 1176** which some considered to have 'watered down' the something out of the ordinary approach from **KO**. However, **TD (Albania) v SSHD [2021] EWCA Civ 619** confirmed that the position was still that a relationship with children was not a trump card to the public interest and that the test of unduly harsh still meant that there had to be something over and above the ordinary harshness that would be caused by deporting a parent.
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> 23. I find that the Appellant's child will experience short term sadness if the Appellant was deported and that there will be, as stated in the Home Office guidance referred to, risk that the child will suffer some emotional problems when older for essentially growing up without a father, if the child remains in the UK without the Appellant. However, that is a risk to every young child whose parent is deported, it is not something out of the ordinary. The Appellant, though his choice to commit criminal activity, the last occasion when the police had already arrested in him in relation to the same crime just weeks before, has caused his child to already have been without him during a considerable part of her young life. The child was supported by her mother and her mother's family, during that time and still is. No evidence has been produced to show that it would be unduly harsh on the child to have her father deported. It is not, for example, the case, that he has been her primary care giver since birth or that he is the only possible parent carer for the child. There has been no evidence produced to suggest that the child has any mental health or cognitive impairment which would render the result of her father's deportation harsher on her than on any other young child. I therefore find that it would not be unduly harsh for the Appellant's child to remain in the UK without him and could maintain contact by video calls and by visiting the Appellant".

29. Ms Rushforth accepted that the judge had set out the "notional comparator" test in the final sentence of [22] of her decision. However, Ms Rushforth submitted that that was not a material error as it was clear from [23] of the judge's decision that she had considered the particular circumstances of the appellant's daughter in reaching the conclusion that the impact upon her of the appellant's deportation would not be "unduly harsh".

30. It is unfortunate that the judge should refer to the "notional comparator" approach in [22] of her decision. However, I accept Ms Rushforth's submission that in [23], the judge plainly and adequately considered the impact upon the appellant's daughter of the appellant's deportation. Although, again, the judge referred to the appellant's daughter "essentially growing up without a father" as being a risk that "every young child whose parent is deported" faces and is "not something out of the ordinary", that, in my view, is no more than a statement that the effect of deportation is necessarily to cause a rupture or split in the relationship between a parent and a child who are living in separate countries. What the judge then went on to consider in [23] was what the evidence demonstrated would be the impact upon the appellant's daughter herself of that rupture or split in the relationship.

31. The judge accepted that the appellant had a genuine and subsisting relationship with his daughter, that he had not been her primary carer but that he was now actively involved in her day-to-day care (see [21]). However, as the judge noted, there was limited evidence concerning that impact in relation to her mental health or specific detriment to her. The judge also recognised, as she was entitled to do, that it would be in the best interests of the appellant's daughter if she were brought up by both her parents in the UK. The judge was plainly aware of the fact that the appellant's deportation would create the separation, as is the usual case, for a ten year period whilst the deportation order was in force. However, and it is not suggested in the grounds nor by Mr Da Silva in his submissions, that there was evidence from, for example, a social worker or other professional as to any specific impact that the separation of the appellant from his daughter would have on the latter. Mr Da Silva relied on the evidence, which as I understood it was given by Ms H in her oral evidence, that the appellant's daughter became distressed when she visited him in prison every two weeks and that this had to be reduced to once a month because she found it too distressing to be able to see the appellant but not be able to have any physical contact with him. That was, of course, evidence about the impact of contact (albeit in the specific context of prison visits) rather than the impact of the absence of contact due to separation.

32. Although the judge made no reference to the approach set out in MK (authoritatively approved in KO (Nigeria) and HA (Iraq)), nevertheless that, as the Supreme Court recognised in HA (Iraq), sets a "highly elevated threshold or standard". The judge's finding that the impact would not be "unduly harsh" was an evaluative judgment which she had to make on the

basis of all the evidence. An appellate tribunal, such as the Upper Tribunal, should exercise caution and restraint when such an assessment is challenged on appeal. The Supreme Court in HA (Iraq) identified the need for "judicial caution and restraint" in these circumstances at [72] as follows:

> "72. It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
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> (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
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> (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
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> (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

33. On the basis of all the evidence before the judge, which I am satisfied there is no proper basis to conclude that the judge failed fully to take into account, it was not Wednesbury unreasonable or irrational (indeed it was probably inevitable) for the judge to find that the "unduly harsh" test imposed by in Exception 2 – which sets a "highly elevated threshold or standard" - was not met.

34. For these reasons, I reject both points raised under ground 1.

Ground 2

35. Ground 2 challenges the judge's finding in [20] that it would not be "unduly harsh" for the appellant's partner to relocate to Jamaica. At [20], the judge said:

> "20. I also find that the Appellant could assist his partner and child in coming to visit him by living with his family members in Jamaica and working to help provide for his partner and daughter to visit him. I accept that the Appellant has the health condition she complains of but no evidence was presented to me to allow me to find, on the balance of probabilities, that it would not be possible

> to obtain her necessary medications in Jamaica. I therefore find that whilst the Appellant's partner could of course choose to remain in the UK, she could relocate with the Appellant to Jamaica and that it would not be unduly harsh for her to do so, considering the family support available to them to help them re-start their family life there".

36. Mr Da Silva submitted, relying upon the grounds, that it was wrong for the judge to say that there was "no evidence" that the appellant's partner would not be able to obtain the necessary medication she required for her health in Jamaica. He pointed to her witness statement dated 13 August 2021 in which she set out that she was receiving medical treatment in the UK:

> "as I suffer from severe asthma, multiple anaphylactic allergies and eczema. I am currently taking the following medication/treatment i.e., Omalizumab (injections), Fostair, Alvesco, Avamys, Diprobase, Zerocream, fexofenadine, Fucibet, Hydrocortisone 1%, Ventolin and Epipens".

37. As I pointed out to Mr Da Silva during the course of his submissions, the judge accepted the appellant's medical condition in [20] and para 5 of Ms H's witness statement does not address whether those treatments would be available in Jamaica or not. It simply addresses what her health condition is and what treatment she receives in the UK. Relying on the grounds, Mr Da Silva submitted that Ms H had said in cross-examination that she would not be able to obtain the necessary medications in Jamaica as she would not be able to afford them and no private medical insurance would cover her and that she knew this because she had looked into the options. Mr Da Silva was, however, unable to produce any record that that was Ms H's oral evidence at the hearing.

38. Ms Rushforth submitted that in [20], the judge had not said simply that there was "no evidence" but rather that there was "no evidence ... to allow me to find, on the balance of probabilities, that it would not be possible to obtain her necessary medication in Jamaica". Ms Rushforth submitted that the judge was entitled to make that finding, even taking into account what was now said to be Ms H's evidence given orally, in the absence of medical evidence or background evidence to support either the unavailability or unaffordability of any treatment in Jamaica. The judge was entitled to conclude that the appellant had not discharged the burden of proof, on the civil standard, to show that Ms H's treatments would not be available to her in Jamaica.

39. I accept Ms Rushforth's submission. Even though the judge made no reference to the evidence which is said to have been given by Ms H in para 9 of the grounds, and there was no attempt made by Mr Da Silva to establish that this was actually the evidence given, accepting for the present it was the evidence given by Ms H, the judge was reasonably and rationally entitled to conclude that in the absence of supporting medical evidence and/or background evidence as to the availability and

affordability of treatment in Jamaica, that her evidence alone was insufficient to establish on a balance of probabilities what the appellant claimed would be Ms H's circumstances in Jamaica.

40. For these reasons, therefore, I reject ground 2.

Ground 3

41. Ground 3 raises in essence three points.

42. First, it is said that the judge failed to apply the "structured approach" required by Part 5A of the NIA Act 2002. This contention is wholly without merit. In his submissions, Mr Da Silva was, in effect, unable to defend the contention made in the grounds. It is plainly the case, on reading the judge's decision, that she was fully aware that the appellant could succeed in his Art 8 claim if first, he could establish one of the exceptions in s.117C(4) or s.117C(5). Exception 1 was simply not made out as the appellant had not lived in the UK lawfully for "more than half of his life" (see [13]). Exception 2 raised the issues of whether it would be "unduly harsh" for the appellant's partner or his daughter to remain in the UK whilst he was deported or "unduly harsh" for them to relocate to Jamaica with him (and both would have to be established to meet the requirements of Exception 2), but the judge found that Exception 2 was not met on the evidence. As I have already made clear, those findings, to the extent that they are challenged, are legally sustainable. Further, the judge recognised, applying the correct structural approach in Part 5A, that even if the appellant could not succeed in establishing one of the exceptions in s.117C(4) and s.117C(5), nevertheless he could still succeed if there were "very compelling circumstances" over and above those in Exceptions 1 and 2 sufficient to outweigh the public interest applying s.117C(6). The judge carried out this assessment in [26] of her determination. As a consequence, she correctly applied the structural approach in Part 5A (see HA (Iraq)) at [2]–[5] per Lord Hamblen).

43. Second, Mr Da Silva did not pursue, in his oral submissions, the point raised in para 12 of the grounds that the judge wrongly applied para 399D of the Immigration Rules. Mr Da Silva was unable to point to any part of the judge's decision in which she referred to para 399D (which is concerned with revocation of a deportation order), let alone where she had wrongly applied it. The point raised in para 12, as a criticism of the judge, has no basis.

44. The final point raised in ground 3, and pursued by Mr Da Silva in his oral submissions, is that the judge wrongly took into account the public interest arising from the appellant's serious offending in determining that the Exceptions (in particular Exception 2) did not apply.

45. In [25], the judge said this:

> "25. In relation to section 117C of the NIAA 2002, I find that the Appellant committed serious offences. I find that there are,

> therefore, substantial public interests in deporting him. Based on my findings above, I find that none of the exceptions apply".

46. In paragraph [25], the judge made three distinct points. First, the appellant had committed "serious offences". That is correct. Second, the judge found that "therefore" there is a substantial public interest in deporting him. That is also correct applying s.117C(1) of the NIA Act 2002. Thirdly, the judge said that none of the Exceptions apply. But, unlike the wording of para 10 of the grounds, the judge did not say that she found that none of the Exceptions apply "*because*" the appellant has committed serious offences, rather she said that "none of the exceptions apply" and that was "[b]ased on my findings above". That has nothing to do with the previous two sentences in [25] of her determination concerned with the appellant committing serious offences and there being a substantial public interest in his deportation. None of the Exceptions apply because the judge found in [19]–[24] that it would not be "unduly harsh" for the appellant's partner or daughter to remain in the UK or, alternatively, for them to relocate to Jamaica. Those findings have nothing to do with the issues of whether the appellant had committed serious offences and there was a substantial public interest in deporting him. Those latter matters arose (and were correctly taken into account) only in relation to the judge's assessment in [26] of whether there were "very compelling circumstances" over and above those in Exceptions 1 and 2 sufficient to outweigh the public interest applying s.117C(6).

47. Consequently, I also reject ground 3.

Conclusion

48. For the above reasons, the judge did not materially in law in dismissing the appellant's appeal on the basis that he had not established that his deportation would breach Art 8 of the ECHR.

Decision

49. The decision of the First-tier Tribunal to dismiss the appellant's appeal did not involve the making of an error of law. That decision, therefore, stands.

50. Accordingly, the appellant's appeal to the Upper Tribunal is dismissed.

Signed

Andrew Grubb

Judge of the Upper Tribunal
25 August 2022