IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-005057

First-tier Tribunal No: HU/02126/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 7th of February 2025

Before

UPPER TRIBUNAL JUDGE O'BRIEN
DEPUTY UPPER TRIBUNAL JUDGE SMEATON

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ANTONIO MANUELL RODRIGUES

Respondent

Representation:
For the Appellant: Ms S Nwachuku, Senior Home Office Presenting Officer
For the Respondent: In person

Heard at Field House on 21 January 2025

DECISION AND REASONS

1. For ease of reference, we refer to the parties below as they were in the First-tier Tribunal.

2. The Secretary of State appeals with the permission of Upper Tribunal ('UT') Judge Khan against the decision of First-tier Tribunal ('FtT') Judge S Taylor. By his decision promulgated on 4 August 2024 ('the Decision'), Judge Taylor allowed the Appellant's appeal against the Respondent's decision dated 30 October 2023 to refuse his human rights claim and to make a deportation order under s.32(5) of the UK Borders Act 2007 ('the 2007 Act').

Background

3. The Appellant is a national of Portugal born on 31 January 1975.

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4. He claims to have arrived in the UK from the United States of America in 2007. It is not in dispute that the Appellant has a history of criminal offending dated back to August 2007. His most recent offence was one of causing actual bodily harm and battery. On 27 February 2023, the Appellant was sentenced for that offence to 23 months' imprisonment and a victim surcharge.

5. The Respondent wrote to the Appellant on 18 March 2023 notifying him that he was liable to deportation on the grounds that his deportation was conducive to the public good (s.32(5) of the 2007 Act) because he had been convicted of an offence for which he was sentenced to a period of imprisonment of less than four years but at least 12 months. The Appellant submitted representations in response on 28 March 2023.

6. On 30 October 2023, the Respondent refused the Appellant's human rights claim and made a deportation order under s.32(5) of the 2007 Act.

The appeal to the FtT

7. The Appellant appealed against the Refusal Decision to the FtT and his appeal was heard by FtT Judge Taylor ('the Judge'), sitting at Taylor House, on 29 July 2024. The Appellant appeared unrepresented. Mr Abercrombie (Presenting Officer) represented the Respondent. The Judge heard oral evidence from the Appellant and submissions from both the Appellant and Mr Abercrombie. He reserved his decision.

8. In the Decision allowing the appeal, the Judge:

    8.1. noted that the Appellant is a 'foreign criminal' as defined by the 2007 Act and liable to automatic deportation, unless one of the exceptions in s.33 apply;
    8.2. accepted that the Appellant has a genuine and subsisting parental relationship with his two British children;
    8.3. found that to deprive the children of the relationship with the Appellant would be 'harsh';
    8.4. found that the Appellant was unable to meet the requirements of s.117C(4)(a) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') because he has not lived in the UK lawfully for most of his life and is not socially integrated into the UK
    8.5. accepted that the Appellant had never been to Portugal and concluded that there would be significant difficulties for the Appellant to be deported to a country where he has never been, has no friends or family, and does not speak the dominant language
    8.6. concluded that, whilst the threshold for an article 3 ECHR claim would not be met, the difficulties the Appellant would face on return to Portugal would be exacerbated by his physical and mental conditions
    8.7. found that Exception 1 at s.117C(5) of the 2002 Act applies 'due to his relationship with his children' and that the exceptions at s.33 of the 2007 Act apply.

The appeal to the UT

9. The Respondent appealed to the UT on the basis that the Judge had failed to give reasons, or adequate reasons, for his findings on material matters and/or made a

material misdirection in law in relation to the ‘unduly harsh’ test set out in Exception 2 of s.117C(5) of the 2002 Act.

10. Permission to appeal was granted by UT Judge Khan on 21 November 2024 on all grounds and in the following terms:

    10.1. Whilst the reference to ‘harsh’ (instead of ‘unduly harsh’) appears to be a typographical error, the Judge fails to demonstrates anywhere in his reasoning that he has in mind the ‘highly elevated threshold’ that must be established to meet the test of unduly harsh.
    10.2. The Judge’s finding arguably falls short of demonstrating any evaluative judgment as to whether the elevated standard or threshold has been met on the facts and circumstances of the case.

11. The matter was listed for hearing before this Tribunal panel on 21 January 2025.

12. We heard submissions from both parties. We do not propose to rehearse the submissions made here, but will consider what was said during our analysis of the grounds of appeal.

Discussion/analysis

13. The grounds of appeal are overlapping and so are addressed together.

14. Guidance on the correct approach to the question of ‘undue harshness’ in s.117C(5) of the 2002 Act is set out by the Supreme Court in KO (Nigeria) v SSHD [2018] UKSC 53 and HA and RA (Iraq) v SSHD [2022] UKSC 22.

15. ‘Unduly harsh’ poses a considerably more elevated threshold than ‘uncomfortable, inconvenient, undesirable or merely difficult’. In determining whether that elevated threshold is met in any particular case, the tribunal is required to make an informed assessment of the effect of deportation on the qualifying child and an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case. The ‘unduly harsh’ test is a high one.

16. Even if it is right that the Judge’s reference to ‘harsh’ is no more than a typographical error (which is not clear), there is nothing in the substance of the Decision to suggest that the Judge applied the elevated threshold here. There is no informed assessment of the effect of deportation on the qualifying children and no reasons given for why, if such an assessment was carried out, the elevated standard was met on the facts and circumstances of the case. The focus is on the fact that the Appellant has a relationship with his children, which is supported by the children’s mother and by Cafcass. Beyond the finding that to deprive the children of that relationship would be ‘harsh’ there is no real engagement with the necessary test.

17. There is no dispute that the Appellant did not meet s.117C(5) of the 2002 Act (Exception 1) because he had not been in the UK lawfully for most of his life. Additionally the Judge found that he was not socially integrated into the UK given his history of offending. The parties agreed that the reference to Exception 1 at paragraph 26 was a typographical error and ought to have referred to Exception 2.

Conclusion

18. For all those reasons, we are satisfied that the Decision contained errors of law and must be set aside. The following findings only are preserved:

    18.1. the Appellant has a genuine and subsisting relationship with his two children; and
    18.2. the Appellant has not lived in the UK lawfully for most of his life.

Notice of Decision

19. The Decision involved the making of an error of law.

20. Save as to the factual findings preserved above, the Decision is set aside and remitted to the FtT to be heard by another judge.

J. SMEATON

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

31 January 2025