Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: UI-2022-000501
[HU/01030/2021]

THE IMMIGRATION ACTS

Heard at: Manchester Civil Justice Centre	**Decision & Reasons Promulgated**
On: 27th September 2022	**On: 20th November 2022**

Before

UPPER TRIBUNAL JUDGE BRUCE
DEPUTY UPPER TRIBUNAL JUDGE SILLS

Between

The Secretary of State for the Home Department

Appellant

And

GM Campbell
(no anonymity direction made)

Respondent

For the Appellant: Mr Bates, Senior Home Office Presenting Officer
For the Respondent: Mr Jagadesham, Counsel instructed by Cross Legal Services

DECISION AND REASONS

1. The Respondent is a national of Jamaica born on the 26th November 1972. On the 24th January 2022 the First-tier Tribunal (Judge Herwald) allowed his appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.

2. The Respondent Mr Campbell has lived in the United Kingdom since October 2000; he was granted indefinite leave to remain in 2004. The

Secretary of State however now wishes to deport him. That is because the Appellant is a 'foreign criminal': on the 8th December 2017 he was convicted of supplying Class A drugs (heroin) on the streets of Manchester and sentenced to 3 years 8 months in prison.

3. That sentence makes Mr Campbell a 'medium offender' under the scheme set out in s.32 and s33 of the UK Borders Act 2007 and Part 5A Nationality, Immigration and Asylum Act 2002. The consequence of that designation is that it is open to him to 'short cut' any argument about Article 8 ECHR if he is able to demonstrate that the impact of his deportation on a partner or qualifying child would be "unduly harsh". If that test is met, his deportation will be deemed by statute to be disproportionate and thus unlawful under s6(1) of the Human Rights Act 1998.

4. It was this 'shortcut' that Mr Campbell chose to take before the First-tier Tribunal. He relied, in particular, on the genuine parental relationships that he enjoys with his 9 British children. He submitted that for some or all of them, his deportation would have unduly harsh consequences. In his written decision of the 24th January 2022 Judge Herwald agreed, and allowed his appeal.

5. Before us the Secretary of State contends that in so doing Judge Herwald has made three errors of law:

    i) He has failed to give adequate reasons for departing from the *Devaseelan* findings of First-tier Tribunal Judge Buckley who had dismissed an appeal by Mr Campbell on the 5th August 2019. Judge Buckley had determined that it would not be unduly harsh for the children identified to him if their father were to be deported, and the Secretary of State contends that there was no good reason to conclude differently today;

    ii) Failing to take material matters into account;

    iii) Misdirected himself in law. Pursuant to the decision of the Supreme Court in KO (Nigeria) [2018] YKSC 53 the test of 'undue harshness' is not a balancing exercise, requiring the best interests of the child to be balanced against the public interest in removing an offender. The Secretary of State submits that passages within the decision of Judge Herwald appear to indicate that he did in fact conduct such a balancing exercise.

6. Although we have found it to be in the best interests of the children involved to anonymise their names, there is no reason to do so for the Appellant. There is therefore no order for anonymity but we shall refer to the Appellant's children as C1-C9, in accordance with the table drawn up in Judge Herwald's decision.

Discussion and Findings

7. It is convenient that we take the grounds out of order.

Ground (iii)

8. Ground (iii) did not feature in the grounds but occurred to Mr Bates prior to the hearing. There is no dispute that the correct legal framework to be applied here was as it is set out in KO (Nigeria): the test of undue harshness simply requires the Tribunal to examine the likely impact of deportation on the partner or child in question and evaluate whether it reaches a sufficient level of harshness to justify allowing the subject of the deportation order to remain in the UK. Mr Bates points to the following passages in the decision of Judge Herwald to submit that the Tribunal appears to have misunderstood this:

> "I have attributed significant weight to the public interest in deportation, nevertheless. I have given particular regard to Section 117C(2) and note that only a very strong Article 8 claim will defeat the public interest. I remind myself that the best interests of minor children are a primary consideration but can be outweighed by other factors. I remind myself that what might amount to "unduly harsh" upon a qualifying individual, must be weighed against the public interest, including the circumstances of the offence, aggravating factors and other factors, in deporting the Appellant". [at §27(2)]
>
> "I do not know how he does it, but he does seem to manage to juggle all the balls at once, and maintain meaningful relationships with the children who are aged between 4 and 19. I have weighed all this against the public interest, including the circumstances of the offence".
>
> [at §29(cc)]

9. Mr Bates further points to the Tribunal's consideration of the position of C1, an adult by the time of the hearing, to suggest that perhaps the Tribunal thought it was undertaking the global appraisal required by s117C(6) of the Nationality, Immigration and Asylum Act 2002. That is the only way the references to the public interest, and this adult child, make sense. If that was the case, argues Mr Bates, then it is not evident that the Tribunal applied the correct threshold to be surmounted by Mr Campbell under that provision.

10. We are satisfied that the First-tier Tribunal did misdirect itself. It was not required to balance anything against the public interest at the 'undue harshness' stage of the enquiry. We are not however persuaded that the conclusions Mr Bates extrapolates from that error are in any way justified. It is quite clear from its many and repeated

references to 'undue harshness' that this was the test that the Tribunal was applying. If it reached the findings that it did having erroneously weighed in the balance the public interest in deporting Mr Campbell, that is hardly a matter that can be said to have prejudiced the Secretary of State. As for the references to C1, these were not strictly speaking relevant, since C1 is no longer a "qualifying child", but were plainly relevant to the overall picture of family life that was set out before the Tribunal. Thus whilst we are satisfied that the passages cited do reveal an error in approach, it is not one material to the decision.

Ground (i)

11. This is the crux of the Secretary of State's appeal. When Judge Buckley had heard Mr Campbell's case in 2019 he had made careful and, it has to be said, sympathetic findings about the position that the children before him (C1-C3, C7 and C9) found themselves in. He had nevertheless concluded that the harm that would be caused to them by their father's deportation, albeit it significant, would not be sufficient to meet the very high threshold required by statute and the 'undue harshness test' . The Secretary of State now avers that she is unable to understand why Judge Herwald was able to conclude otherwise.

12. The reasons are straightforward.

13. First, as Judge Herwald notes [at his §22(a)(vii) and §24] there were recent Court of Appeal judgments which were capable of leading to a different outcome for this family. Those judgments were HA (Iraq) and RA (Iran) v SSHD [2020] EWCA Civ 1176 and AA (Nigeria) v SSHD [2020] EWCA Civ 1296, decisions recently upheld by the Supreme Court in HA (Iraq) [2022] UKSC 22. In the Court of Appeal Underhill LJ specifically addressed, and disavowed, the approach taken hitherto, which was to apply a 'notional comparator' to the question of whether the harshness to be experienced was 'undue'. The Court held that it is no longer correct to say, as it was in PG (Jamaica) [2019] EWCA Civ 1213, that the 'commonplace' distress caused by separation from a parent or partner is insufficient to meet the test: it could be. The focus should be on the emotional impact on *this* child: [Underhill LJ 44-56, Peter Jackson LJ 157-159]. The fact that other children might endure similar levels of distress was not capable of defeating the claim.

14. It is clear from the decision of Judge Buckley that it was the 'notional comparator' approach which he took in dismissing the appeal in 2019. In respect of C2, for instance, he set out the difficult circumstances faced by this child's mother in trying to control his disturbed behaviour, but concluded: "as a parent of a teenager, [she] will be confronted with many difficulties and have to face one or more of her children going through a 'difficult period' for one reason or

another (as stated in PG), however I do not find that such is not commonplace". Similar language is used in respect of the other children. Judge Herwald was obliged to treat the decision of Judge Buckley as his starting point, which he duly did, but it cannot sensibly be argued that he then had to consider himself bound by an approach to the legal analysis which has subsequently been declared by the higher courts to be mistaken.

15. The second reason that Judge Herwald considered himself able to depart from the findings of Judge Buckley was that he was making his assessment of the family some 3.5 years later and as he observed, that is a long time for young children. At the time of Judge Buckley's decision the Appellant was still in detention. At the time of Judge Herwald's decision he had been home and living with C1-C3 for well over a year; during that time he had frequent, regular and meaningful contact with the other children. That was plainly a relevant change in circumstances. By way of illustration, C3 was only 7 months old at the time her father went to jail. Judge Buckley was entitled to conclude from this that Mr Campbell had played a "very limited role" in her life at that point. However before Judge Herwald the evidence was that Mr Campbell had been living in the family home for well over a year, and had developed a close bond with his daughter. All of that is clearly set out in the decision.

16. The third reason is that there was a substantial body of evidence relating to four other children who were not drawn to Judge Buckley's attention. The reason for this omission was that Mr Campbell's then solicitor had advised him to focus on those children he lived with/ was closest to. Whether or not that was good advice is today immaterial, since it is expressly accepted that all of C1-C9 are Mr Campbell's biological children, and that he enjoys a genuine and subsisting relationship with each of them, conclusions which significantly temper the *Devaseelan* injunction to treat such new evidence with the "greatest circumspection".

17. For these reasons we reject the Secretary of State's assertion that Judge Herwald erred in his approach to Judge Buckley's *Devaseelan* findings.

Ground (ii)

18. The final ground is that the Tribunal has erred in failing to take material factors into account in reaching its conclusions on undue harshness. The grounds made several points about this in one single paragraph, and Mr Bates added some of his own, so it has been necessary for us to separate out each of the submissions made. Before we do so we take note of the facts underlying the decision of Judge Herwald. The Appellant has 9 children in the UK, of which all bar C1 were still minors at the date of decision. Six of those children are identified as having particular vulnerabilities:

- C2 (a 17 year old boy) has exhibited very challenging behaviour at home and at school which has shown a marked improvement since his father has come home from prison. Judge Herwald accepted his mother's evidence that she was very afraid of her son being preyed upon by gangs, and that the presence of a father at home would be an important safeguard against that risk

- C3 (a 5 year old girl) has been referred for speech and language difficulties and is being investigated for autism. Her mother told Judge Herwald that the Appellant attends all the appointments in relation to these referrals and that he and his daughter have become very close since he was released. When the child wakes up in the night she looks for her dad

- C4 (a 17 year old boy) is on one level doing well. He is a promising footballer who has gained a scholarship at a youth academy. He has however experienced significant trauma in his life. The stepfather he lived with as a young child inflicted both physical and emotional abuse on C4 and his mother, and C4 was himself violently attacked in his mid teens. He suffers from anxiety, panic attacks and insomnia. The Appellant sees C4 at least 2-3 times per week and is judged by C4's mother as being an important and stabilising influence in his life. The ISW believed that the Appellant's deportation would have "a profound impact on his emotional well being" and place his mental health at risk

- C6 (a 4 year old boy) is non-verbal. He has been assessed by numerous professionals and although it is too early for a formal diagnosis it looks as though he may be deaf and/or autistic. Again the Appellant attends all the appointments and is evidently committed to his son's welfare and development. Judge Herwald is "deeply concerned" about C6 and accepts that there is "no way" that he (or his sister C5) could use video calls to communicate with their father with whom they have regular contact (they live 5 minutes away). Their mother's assessment (incidentally shared by an Independent Social Worker whose views do not feature in Judge Herwald's reasoning) are that her children would be "devastated" by the Appellant being removed from their lives. She has suffered from ongoing physical and mental health issues and states that she is heavily reliant on their father for support, both practical and emotional

- C7 (an 11 year old girl) sees her father once per week. She has been diagnosed with learning disabilities and in the opinion of her mother, the ISW and her headteacher her father's deportation would have a "very detrimental effect" on her development. Her mother, a social worker with whom Judge

Herwald was “deeply impressed” as a witness, gave credible evidence that her daughter was unable to communicate by telephone and that her in-person contact with her father (between one and three times per week) was hugely important in building her confidence and self esteem

- C8 (a 10 year old boy) is also being investigated for autism. He has exhibited behavioural issues since he was 5, suffers from a lack of interpersonal skills and uncontrollable emotions. Although it emerged in evidence that C8 has a stepfather with whom he lives, Judge Herwald accepted the evidence of C5’s mother – a probation officer – that he has a particularly close relationship with his father whom he calls “his hero”. He concluded: “I am persuaded that the removal of the Appellant from [C5]’s life permanently and for a third time in short succession would have a further and even more detrimental impact on his development as a vulnerable child”.

19. Against that background we assess the submissions made by the Secretary of State. The first is this:

> “although Judge Herwald accepted the evidence of the vulnerability of some of the children as a result of learning and developmental issues, he failed to give adequate consideration to the support which is available to them, and to which they are entitled”.

20. The written grounds do not elaborate on what is meant by support, but we read them to include a reference to the various agencies that may be able to assist a single parent living alone with an child with special needs – social services, educational support etc. It is correct that these options are not investigated, but it is also right to note from paragraph 23 of the decision that this does not seem to have been an argument advanced before the Tribunal. We are not satisfied that this is a material omission. It is recorded by the Judge that some of the children are already engaged with such services. This is not something capable of impacting on the finding at the core of this decision, namely that it is emotionally and developmentally important to these children to have continued contact with their *father*. No doubt their mothers could access certain levels of professional support but this is not what the Tribunal was concerned with. Mr Bates elaborated the written grounds to question why other family members could not assist. He pointed to the stepfather present in C8’s life and argued that the Judge should have thought about him. In fact the evidence and reasoning on C8 is a good illustration of why this ground fails to establish an error. This is a child who has really struggled with his behaviour and relationships for most of his infancy. His mother emphasised that in her judgment C8’s emotional wellbeing and stability was substantially improved by the regular contact that he has with his ”hero”, his father.

21. The second point made in the written grounds is this:

> He also failed to identify any factors which would indicate that the care of the children will be anything other than safe and effective when the appellant is deported from the UK or that the appellant's presence is needed to prevent the children from being ill-treated or their health or development being impaired…

22. The test of undue harshness is a high one, but we think it stops short of requiring actual physical harm to a child before it can be met. We reject this ground because we are satisfied that the approach taken by the First-tier Tribunal to the level of harm required to meet the test was the correct one.

23. Next:

> The [Secretary of State] submits that Judge Herwald failed to give adequate consideration to the fact that the children can continue to maintain contact with their father and each other by modern means of communication, particularly as there was evidence before the FTT that the children were in contact by social media when not actually seeing each other.

24. Again, it is correct to say that the 'modern means of communication' argument is not something upon which the Judge makes definitive findings in respect of each child. He does, with justification in our view, rule it out for C6 who is autistic and non-verbal. He also emphasises the fact that for all of these children it is the *physical presence* of their father, for C2 and C3 in the home, and for the remainder through regular and frequent contact, that is so important. We would also observe that the concerns about C2, C4 and C8 are not something that could easily addressed by telephone or video calls, and that the Upper Tribunal has repeatedly cautioned against this argument being deployed in respect of parental relationships with very young children: see for instance Omotunde (best interests - Zambrano applied - Razgar) Nigeria [2011] UKUT 00247(IAC), LD (Article 8- best interest of child) Zimbabwe [2010] UKUT 278 (IAC).

25. The same point can be made about the fourth complaint in the written grounds:

> Arrangements could also be made for the children to visit the appellant in Jamaica.

26. That might be true (although the evidence before the Tribunal was to the effect that some of the mothers of these children were simply not in a financial position to pay for such trips) but it is not something capable of undermining the central findings about the importance to these children of their father's physical presence in the UK.

27. Finally in the written grounds:

> "The [Secretary of State] submits that Judge Herwald erred in finding that deportation would be unduly harsh as the children would lose contact with each other, which could only be maintained by being facilitated by the appellant. The [Secretary of State] submits that Judge Herwald failed to identify any reasons why the mothers of the children could not and would not continue to facilitate this contact in the absence of the appellant if they deemed it important to the children's emotional well-being. He also failed to consider that contact could be facilitated by the older children, [C1] being already an adult and [C2] and [C4] being 17 years old at the date of the FTT hearing"

28. There are six different mothers involved here, and as the Secretary of State correctly says an adult, that is to say 19 year old, sibling. We accept the submission that it would be *possible* for the inter-sibling contact to be maintained by these adults should the Appellant be deported. That is not however what the First-tier Tribunal was evaluating. It was tasked with considering what the likely outcome would be, and in doing so it was entitled to accept the evidence of witnesses it regarded as "impressive". These witnesses all pointed out that they do not know each other independently of the Appellant, and that they all have their own lives. We do not regard Judge Herwald's acceptance of that evidence as perverse or unreasonable. It was simply one factor to be taken into account. At the moment this "superman" father makes it his business to see all of his children regularly and to facilitate them seeing each other. Without his active presence in their lives the contact between all these children is going to be much more difficult. That is just a fact.

29. We now deal with some of the points raised by Mr Bates that did not feature in the grounds. He points to the finding at paragraph 29(m) that we highlight here:

> (m) I turn lastly [at C2]. He is 17. On the day the Appellant was detained in 2020, [C2] displayed serious behaviour issues at college. His mother was convinced this was related to his father's detention. She described [C2] as "vulnerable". He is at an impressionable age and has potential to engage with other gang related males in the area. But since having his father home there had been, she said, a significant improvement in his behaviour, along with boundaries and structure needed for [C2]. **You do not need to be a judge, to know that what kids need is boundary and structure, and very often, especially in Caribbean households, that is valuable, coming from a resident father**. It will be remembered that the Appellant himself had no resident father (he was brought up by grandparents) and I got the impression that he is attempting to be a father who is at least not absent, from the lives of his other children in Britain. That is particularly important here, because [C2] sees a man who, according to his mother "looks after the

> children, does most of the housework, cooks, cleans, takes the 4 year old to school, and occasionally takes [C2] to college. He sometimes even takes [C1] to work."

30. That highlighted remark was not, in Mr Bates' submission, something rationally open to the judge because it was not something that featured in the evidence. Whilst we accept that the vulnerabilities of male black teenagers are probably not something capable of coming within the purview of 'judicial notice' it is not true to say that there was no evidence before Judge Herwald. As the rest of the paragraph makes clear, it was the family itself that expressed this concern. The Appellant's own personal history of growing up in a family without a father, and the lived experience of C2's mother in looking after her son in the Appellant's absence, is what underpinned this finding. We would also reject Mr Bates' submission that the observation about boundary and structure is meaningless because it "could be said about any child". Setting aside any concerns that this is once again an impermissible introduction of the notional comparator approach, it is not even true. The concern expressed by C2's mother was that she has struggled on her own to give her son the boundary and structure that a male role model can.

31. Finally Mr Bates took issue with a remark made by Judge Herwald about the mother of C8. He wrote: "[she] is another professional. She is a probation officer. This was useful as I had no report from any probation officer in these proceedings". We agree with the Secretary of State that it is difficult to see how the evidence of this witness about her son could be a "useful" remedy for the absence of a report about the Appellant. We are not however satisfied that this amounts to a material error that would justify setting the decision below aside. Although it is unfortunate phrasing we think perhaps the point being made is that this witness, a professional who works in the criminal justice system who readily acknowledged the Appellant's criminality, was nevertheless prepared to come to court on his behalf and speak to his importance in the life of her son. It is in this way that her evidence carried weight.

32. Mr Jagadesham's response to this appeal is to say that it amounts to no more than disagreement with the findings made by Judge Herwald, and an attempt to re-argue the case. We are bound to agree. Conspicuous in its absence was any submission that the circumstances of this large and complex family are such that it could not be said that the deportation of the Appellant would have unduly harsh consequences for the children involved. The Appellant is a criminal, and has, in fathering so many children, obviously made it much more difficult for himself to be there for all of them. And yet this is what he has, according to the evidence accepted by Judge Herwald, managed to do. There were sound reasons for the Tribunal's conclusion that in this case the undue harshness test has been met, and the exception engaged. As the Tribunal put it [at its 29bb]:

"removing him would be unduly harsh, because of the impact on vulnerable children with special needs, and children who are not vulnerable, but who have such a close bond with him".

Decisions and Directions

33. The decision of the First-tier Tribunal is upheld, and the Secretary of State's appeal dismissed.

Upper Tribunal Judge Bruce
2nd October 2022