Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: UI-2021-000367
HU/09978/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 27 October 2022	**On 31 October 2022**

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

KSB
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 the appellant and her children are granted anonymity.

No-one shall publish or reveal any information likely to lead members of the public to identify the appellant and her children. Failure to comply with this order could amount to a contempt of court.

Representation:
For the Appellant: Mr. P Fadina, Representative, Fadina & Associates
For the Respondent: Mr. E Tufan, Senior Presenting Officer.

DECISION AND REASONS

Introduction

1. The appellant is aged 31 and is a national of Antigua and Barbuda. The respondent issued a deportation order, dated 16 May 2019, consequent to which the appellant's indefinite leave to remain was revoked. By a decision dated 17 May 2019 the appellant refused to grant the appellant leave to remain on human rights (article 8 ECHR) grounds. The appellant appeals against the latter decision.

2. The appeal was initially considered by Judge of the First-tier Tribunal Andrew who dismissed it by a decision dated 2 August 2021.

3. The appellant was granted permission to appeal to the Upper Tribunal and by a decision of a panel (Mrs. Justice Thornton and Upper Tribunal Judge O'Callaghan) dated 18 July 2022 the decision of the First-tier Tribunal was set aside in relation to the assessment of Exception 2 and very compelling circumstances. It stands in respect of the Exception 1 assessment.

Family Court Proceedings

4. By Order, the Family Court permitted the Tribunal access to relevant orders issued in respect of ongoing Family Court proceedings. The content of the orders is known to the parties and not addressed below other than in general terms.

Anonymity

5. By its decision of 18 July 2022, the panel issued an anonymity order noting that section 97(2) of the Children Act 1989 requires anonymity for a child or children subject to family law proceedings and includes a prohibition on the disclosure of any information that might identify the address or school of that child or children.

6. Whilst there is a clear public interest in the identification of the appellant, having been convicted of serious criminal offences in respect of her children, the panel concluded that the article 8 rights of the appellant's children outweighed the public interest established by article 10. The appellant has an unusual first name and there is a real risk in this matter that a 'jigsaw' identification could be undertaken by members of the public enabling the children to be identified.

7. There was no request by the parties before us to set aside the anonymity order and it is detailed above.

Background

8. The appellant is a national of Antigua and Barbuda. She entered the country in 1994 when she was aged 3. She was granted indefinite leave to remain in this country on 10 August 1998. Save for a period when she returned to Antigua as a child, she has resided in this country ever since.

9. She has British citizen children, presently aged 11 and 9, from a marriage that has come to an end, resulting in Family Court proceedings. On 16 March 2018 the Family Court ordered that the appellant should not take the children out of the jurisdiction without the permission of the Court. Despite the order, the appellant took the children to Antigua without informing the Family Court and the children's father as to her intentions. She returned to this country with the children approximately six months later in September 2018 and was subsequently arrested. Her children were placed in the care of their father, where they remain to date.

10. On 12 October 2018 the appellant was convicted at Shrewsbury Crown Court of two counts of taking a child out of the United Kingdom without appropriate consent, contrary to section 1 of the Child Abduction Act 1984.

11. On 30 November 2018 she was sentenced by HHJ Lowe to twelve months imprisonment on each count to be served concurrently. By means of his sentencing remarks HHJ Lowe observed, *inter alia*:

> 'I am satisfied on everything I have been told what happened here was within the family proceedings. The local authority prepared a report, what's called a section 37 report, and the recommendation was that the children should live with their father. It is recorded in the recital to the report that was made on 16 March that you did not accept the contents of that report and I imagine that report would have been in your hands some time before 16 March. I note from your basis of plea that you booked your tickets to take the children and yourself to Antigua on 10 March.
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> An aggravating feature is in the divorce they recorded in the recital to the order that you gave varying accounts of when you were due to depart from the United Kingdom when, as far as I can see, you must have known exactly when you were going to leave, having booked the flights only six days earlier. Whether that was an intention by you to make it difficult for any border checks to be made, I do not know. There is, at least, the possibility that was in your mind.
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> …

> Having taken the children to Antigua, I think you say somewhere that you were going for three weeks. In spite of the fact that the police and the social services contacted you, you do not, in fact, return for six months. In my judgment, that is what tips the balance in favour of a custodial sentence because there has to be a deterrent, not just to you but to other people who think that they can disregard orders of the court and that they can deal with children as they see fit, and then even if there is a rush of blood to the head once you have done it and you realise that you should return, you do not. Not just for a while but for a significant period of time. As a result of that, the children are prevented from having any contact with their father and they are prevented from continuing their schooling during the summer term.'

Law

12. The appellant is a foreign criminal for the purposes of section 32 of the UK Borders Act 2007 as she was sentenced to 12 months' imprisonment for a single offence.

13. Section 117C(1) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') establishes that the deportation of foreign criminals is in the public interest. Laws LJ observed in *SS (Nigeria) v. Secretary of State for the Home Department* [2013] EWCA Civ 550, [2014] 1 W.L.R. 998, at [54]:

> '54. … The pressing nature of the public interest here is vividly informed by the fact that by Parliament's express declaration the public interest is injured if the criminal's deportation is not effected. Such a result could in my judgment only be justified by a very strong claim indeed.'

14. Parliament has provided exceptions to the public interest in deportation by means of section 117C(3) to (5) of the 2002 Act:

> '(3) In the case of a foreign criminal ('C') who had not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
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> (4) Exception 1 applies where -
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> (a) C has been lawfully resident in the United Kingdom for most of C's life,
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> (b) C is socially and culturally integrated in the United Kingdom, and
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> (c) There would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has … a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the … child would be unduly harsh.'

15. Section 117C(6) of the 2002 Act:

'(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.'

Decision and Reasons

Exception 1

16. The First-tier Tribunal's conclusion as to Exception 1 was confirmed by the panel decision of 18 July 2022. Judge Andrew concluded:

'34. I turn then to Exception 1. As I have indicated the Respondent has accepted in the refusal letter the Appellant has spent most of her life lawfully in the United Kingdom. The Respondent does not accept that she is socially and culturally integrated because of the crime that she has committed. However, the Appellant has been here since an early age, she has been educated here and she has worked in this country as well. Although I have no evidence from friends, on the balance of probabilities, I accept she is likely to have friends in this country. In addition, her father lives here and he supports her at present. Based on this evidence I am satisfied that she is socially and culturally integrated.

35. Bearing in mind the relevant guidance from the Court of Appeal I direct myself as follows: The very significant obstacles test is a high threshold. The meaning of 'integration', or more accurately re-integration, involves a broad evaluative judgment of all relevant matters, both subjective and objective. Ultimately, it is a question of whether the individual concerned will be enough of an 'insider' such that in all the circumstances he or she will be able to develop and lead a reasonable life, bearing in mind the need to create social and economic ties in the country of origin.

36. However, on the evidence before me, I cannot find that there are very significant obstacles to her integration into Antigua. She has family there: a sister and aunts, uncles and cousins. In fact it is said at page 85 [of the Section 37 report] that the majority of her family are still in Antigua. It is there that she went with the children when she was stressed with all that was going on in the United Kingdom. She lived there for six months before returning to the United Kingdom. It is apparent that she lived for the first four years of her life there and then spent

further time there as a child. In addition to this the reports refer to her having visited Antigua with her children in the past.

37. Although the Appellant says she did not work there when she left the United Kingdom with the children and she was away for six months she has qualifications that would enable her to work if she so wished. The Appellant told me that she was supported to come extent by her father during this time and I have heard no evidence to suggest that her father would not continue to support her should she be deported to that country.

38. The Appellant speaks English which is, of course, the language used in Antigua. Given the time she has spent there, I am satisfied, on the balance of probabilities, she will be aware of the customs and traditions of that country. There is no credible reason why, on the balance of probabilities, the Appellant cannot re-integrate into Antigua and be enough of an insider there to form her own private and family life in Kamara terms.

39. This [sic] I find that the Appellant cannot meet Exception 1 ...

Exception 2

17. The focus of the hearing before us was upon Exception 2. On behalf of the respondent, Mr. Tufan observed the limited contact presently enjoyed by the appellant with her children, though he accepted that this was, in part, due to her former husband's non-engagement with Family Court proceedings over a period of time until the week prior to the hearing before the Upper Tribunal. He accepted that it would be in the best interests of the children to have contact with their mother, but they are not being mistreated by their father and the undue harshness test does envisage children being separated from parents: *Lee v Secretary of State for the Home Department* [2011] EWCA Civ 348, [2011] Imm. A.R. 542.

18. We were grateful for Mr. Tufan's helpful submissions, but we allowed the appellant's appeal at the conclusion of the hearing, and we now give our reasons.

19. From the outset we recognise the public interest in the appellant's deportation. Taking a child out of the United Kingdom without appropriate consent is a very serious matter, as is the flagrant disobeying of Court orders. Such concern was articulated by HHJ Lowe in his sentencing remarks.

20. However, upon considering the papers before us, we note HHJ Lowe's observation that events arose within family proceedings. Consequent to her conviction and release from prison, the appellant was granted contact by a final order of the Family Court, and we observe from papers before us that her relationship with her children developed from a

difficult start to reach a place where healthy and loving relationships were clearly developing. An application was made by the appellant to the Family Court for the children to be permitted overnight stays, resulting in the former husband breaking off contact with the Family Court, not being at home when court bailiffs attended and denying the appellant contact with the children. Having considered the documents before us we proceed on the basis that the former husband deliberately sought to prevent the appellant enjoying court approved contact. After various efforts made by the Family Court, the former husband re-engaged with proceedings shortly prior to the hearing before us and contact between mother and children has been reinstated. Proceedings as to overnight stays continues.

21. We consider our starting point to be as follows: that being fully aware as to the appellant's conviction and the circumstances underpinning her conviction the Family Court was content to order that the appellant enjoy contact with her children

22. The children are British citizens and so are 'qualified children' for the purpose of section 117D (1) of the 2002 Act.

23. We are satisfied that there is a genuine and subsisting parental relationship between the appellant and her children. There is no requirement that she have direct parental care or have an active role in her children's upbringing. It is a fact-sensitive assessment: *Secretary of State for the Home Department v. AB (Jamaica)* [2019] EWCA Civ 661, [2019] 1 WLR 4541. The appellant enjoyed regular face-to-face contact with her children through a final court order and the papers before us confirm the role that she enjoyed in her children's lives. The recent efforts of the former husband to frustrate contact does not diminish the genuine and subsisting nature of the parental relationship.

24. The primary question before us is whether the effect of the appellant's deportation would be unduly harsh upon the children. We are satisfied that it would be.

25. The question of unduly harsh is to be evaluated with reference to the children alone. To weigh the impact of deportation on a child against the criminality of a parent would be to offend against the seventh principle established by the Supreme Court in *Zoumbas v. Secretary of State for the Home Department* [2013] UKSC 74, [2013] 1 WLR 3690, namely that a child cannot be blamed for matters for which they are not responsible.

26. Whilst the children would not be expected to leave the United Kingdom as they reside with their father consequent to a Family Court order, we note that the question as to whether they leave the United Kingdom for the purpose of Part V of the 2002 Act is a hypothetical one. We are not

required to undertake a predictive factual analysis as to whether the children would in fact leave the country or stay.

27. We observe the recent Supreme Court judgment in *HA (Iraq) v. Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784. Unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this content denotes something severe, bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.

28. We are careful to consider the circumstances of the children from their point of view and our focus is upon the reality of their actual situation including the impact of emotional harm. We consider the breakdown of the parents' relationship to be a bitter one. Both have sought to frustrate Family Court orders. It was clear to us at the hearing that the appellant remains antagonistic towards her former husband. However, we observe that he has recently frustrated her ability to have contact with her children. The documents before us suggest that the children vacillate in their views of their mother. There is a strong indication of their father's animus towards their mother infecting their views. Over time, the appellant has sought to build up a relationship with her children through supervised contact. We are satisfied that if she were to cease having contact in any form other than through correspondence, the children's relationships with their mother would significantly deteriorate as there would be no counterbalance to their father's adverse views of her. We conclude that this would not be beneficial to the children. The subsequent loss of contact with their mother, and the strong likelihood of their hardening attitude to her consequent to the loss of such contact would be of such impact as to be unduly harsh for the purpose of Exception 2. It would significantly fracture their relationship with their mother, which has grown and developed since her release from prison, and will cause emotional harm over time to the children.

29. We allow the appellant's human rights (article 8) appeal on Exception 2 grounds.

Very Compelling Circumstances

30. Having allowed the appellant's appeal on Exception 2 grounds, there is no requirement that we proceed to consider her article 8 appeal under section 117C(6) of the 2002 Act.

31. The Court of Appeal clarified in *NA (Pakistan) v. Secretary of State for the Home Department* [2016] EWCA Civ 662, [2017] 1 WLR 207 that

section 117C(6) can also be relied upon by offenders who received a sentence of imprisonment of less than four years and who cannot meet Exceptions 1 and 2.

32. It is an extremely demanding test, and the public interest almost always outweighs countervailing considerations of family life. However, the public interest is not a monolith and must be approached flexibly, with recognition that there will be some cases, albeit unusual, where the person's circumstances outweigh the strong public interest in deportation.

33. In this matter the appellant is engaged in long-standing proceedings before the Family Court. In *MS (Ivory Coast) v. Secretary of State for the Home Department* [2007] Imm. A.R. 538 it was accepted by the Court of Appeal, following *Ciliz v Netherlands* (App. no. 29192/95) [2000] ECHR 365; [2000] FLR 469, that a decision to remove an appellant in the process of seeking a contact order may violate article 8, in particular on the basis that removal of an appellant during contact order proceedings would be unlawful because it prejudged the outcome of the contact proceedings and, more importantly, denied the appellant all possibility of any further meaningful involvement in the proceedings which may breach article 6 ECHR.

34. Upon a tribunal being satisfied that the outcome of family proceedings is likely to be material to an immigration decision and there being no compelling public interest reasons to exclude an appellant from the United Kingdom irrespective of the outcome of the family proceedings or the best interests of the children, and the initiation of contact proceedings was not based upon a desire to delay or frustrate removal, the general approach is to allow an appeal on human rights grounds and then for the respondent to grant leave to remain for a period of time considered appropriate in respect of Family Court proceedings: *MH (pending family proceedings – discretionary leave) Morocco* [2010] UKUT 439 (IAC).

35. If we had not found for the appellant in respect of Exception 2, we would have allowed the appeal on very compelling circumstances grounds.

36. The appellant is presently involved in Family Court proceedings which are, to us, subject to a toxicity arising from the breakdown of her marriage. We are satisfied that the proceedings were not instituted as a means of frustrating deportation, as evidenced by the final order granting the appellant supervised contact. The present proceedings seeking overnight stays are to us in this Chamber, and we acknowledge that we are not expert in family matters, an appropriate extension of previous proceedings. An order permitting overnight stays, and so an extension of personal contact with the children, could be material to an

immigration decision. Whilst observing the seriousness of the index offence, we note HHJ Lowe's observations that it arose in family proceedings and the Family Court has subsequently been content to order supervised contact in relation to the appellant and her children. In such unusual circumstances, we conclude that there would be no compelling public interest reasons to deport the appellant at such time whilst she is engaged in Family Court proceedings, particularly in light of the disruption to such proceedings recently caused by her former husband.

37. This is one of those unusual cases where the appellant's circumstances outweigh the strong public interest in deportation.

Hamid Direction

38. Concerns were raised by the panel at the error of law hearing as to Mr. Fadina's engagement with directions. There were also concerns as to professional competency in respect of drafting:

> '22. Noting the excessively long and repetitive nature of the grounds of appeal, Judge Bruce directed the appellant to file a 'succinct' skeleton clearly identifying the alleged errors of law with reference to the relevant evidence. Judge Bruce expressly confirmed that Mr. Fadina could 'proceed on the assumption that the Upper Tribunal is aware of the correct approach as set out by the Court of Appeal, and the skeleton need not repeat the detailed summary of the applicable caselaw made in the grounds'.
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> 23. 'Succinct' means something briefly and clearly expressed.
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> 24. Mr. Fadina prepared and filed a skeleton argument running to twenty-five paragraphs over fifteen pages. It appears at its core to replicate the grounds of appeal. Section 117C of the 2002 Act is unhelpfully set out in full, despite being well known to this Tribunal. Several paragraphs of the skeleton argument are of significant length. The first 'paragraph 1' runs to four pages. The second 'paragraph 1' runs to two pages. Paragraphs 5 and 11 each run to one page.
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> 25. The purpose of a skeleton argument is to assist the Tribunal by setting out as concisely as practicable the arguments upon which a party intends to rely. It should both define and confine the areas of controversy; be cross-referenced to any relevant document in the bundle; and should not include extensive quotations from documents or authorities. The document prepared and filed by Mr. Fadina entirely fails to satisfy these fundamental requirements. A skeleton which comprises lengthy recitation of the whole body of the case does not assist, nor does one which is unstructured, discursive and singularly failing to clearly identify the issues. The document's inadequacies are

such that it fails in its core objective: to persuade on behalf of the appellant.

26. By a direction issued by Upper Tribunal Judge O'Callaghan and sent to the parties on 30 May 2022, the appellant was required to file and serve a skeleton argument running to no more than five pages no later than 4pm on Tuesday 7 June 2022.

27. There was a failure by Mr. Fadina to file the directed skeleton argument on behalf of the appellant in accordance with directions. On 8 June 2022, after being contacted by Tribunal staff in relation to the failure to abide by directions, Mr. Fadina sought an extension of time in which to comply. Judge O'Callaghan agreed to vary the direction, with filing and service to take place no later than 12 noon on Monday 13 June 2022, two days before the hearing.

28. Mr. Fadina purported to comply with the amended direction by sending an email to the Tribunal (but not to the respondent) at 11.03am on 13 June 2022 with the skeleton argument placed within the body of the email, not as an attachment. The document was not sent in an appropriate form.

29. Mr. Fadina eventually filed and served the directed skeleton argument in document form.

30. We reminded Mr. Fadina at the hearing as to the requirement to comply with directions, and as to the obligation that falls upon him to assist Tribunal staff. Valuable resources, including judicial time, have been spent in this matter endeavoring to ensure his compliance with directions. Mr. Fadina is reminded as to his duty to the Tribunal.'

39. The reference at [30] of the error of law decision above is to Thornton J expressly detailing to Mr. Fadina the direction as to the filing of a skeleton argument fourteen days before the resumed hearing, attaining his acknowledgment that he understood the direction and securing his agreement that he would abide by the direction. He was expressly informed that he would be expected to address Exception 2 and very compelling circumstances only and further he was expressly referred to judgments including *MS (Ivory Coast)* with the expectation that they would be addressed in his skeleton argument.

40. Mr. Fadina filed and served a skeleton argument for the resumed hearing at 00.10 on the morning of the hearing, in breach of directions. Concerningly, the document filed and served was the 'succinct' skeleton argument dated 13 June 2022. The focus of this poorly drafted document is directed towards the decision of the First-tier Tribunal and is at its core a laborious examination of individual paragraphs of the decision. The document has no connection to the matters to be considered at the resumed hearing. Mr. Fadina provided no explanation

as to why he believed filing this document was consistent with his professional duties, nor as to why its filing at 00.10 was in accordance with the clear direction he had personally acknowledged at the error of law hearing in June 2022.

41. A further concern is the report by Mr. Tufan that when the representatives discussed this matter the day before the hearing, Mr. Fadina believed it to be an error of law hearing, despite his appearance before a panel – including a High Court judge – at the error of law hearing in June 2022 where the panel indicated its set-aside decision and gave oral directions, subsequently replicated in its written decision.

42. The Upper Tribunal observes its inherent jurisdiction to govern proceedings before it and to hold to account the behaviour of lawyers and representatives whose conduct of litigation falls below the minimum professional standards: *R. (on the application of Hamid) v Secretary of State for the Home Department* [2012] EWHC 3070 (Admin).

43. The panel therefore issued a *Hamid* direction at the hearing:

    (1) Mr. Dayo Fadina, Fadina & Associates, 5 Grove Road, Borehamwood, Hertfordshire, WD6 5DU is to file written submissions with the Upper Tribunal by 4pm on Friday 4 November 2022 explaining his conduct in this matter. Such written submissions are to address, but are not limited to, the issues addressed below:

        (i) The failure to comply with directions

        (ii) The filing of the skeleton argument, dated 13 June 2022, for the resumed hearing held on 27 October 2022

        (iii) Concerns as to the professional competency in relation to his drafting of documents

    (2) In his written submissions, Mr. Fadina is to:

        (i) Provide details of his professional regulator

        (ii) Explain whether he believes his conduct above was competent, with explanation, or if he accepts his conduct did not meet expected professional standard to provide detail as to what training, if any, he will undertake to ensure that appropriate professional standards are met in future engagement with the Upper Tribunal.

Notice of decision

44. By a decision dated 18 July 2022 the Upper Tribunal set aside a decision of the First-tier Tribunal promulgated on 2 August 2021 in respect of two issues arising in the appellant's human rights (article 8) appeal: Exception 2 and very compelling circumstances. The decision on these issues was set aside pursuant to section 12(2)(a) of the Tribunal, Courts and Enforcement Act 2007.

45. The decision on the appellant's appeal is remade and the human rights (article 8) appeal is allowed on Exception 2 grounds, and in the alternative is allowed on very compelling circumstances grounds.

46. The anonymity order is confirmed.

Signed: *D O'Callaghan*
Upper Tribunal Judge O'Callaghan

Dated: 31 October 2022