IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004788

First-tier Tribunal No: HU/59509/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 November 2024

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

Ryan Vaughn
(ANONYMITY ORDER REVOKED)

Appellant

and

The Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr J. Holt, Counsel, instructed by Paragon Law
For the Respondent: Mr P. Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 10 September 2024

DECISION AND REASONS

1. By a decision promulgated on 10 October 2023 following a hearing on 27 September 2023, First-tier Tribunal Judge Reed ("the judge") dismissed an appeal brought by the appellant, a citizen of Barbados born in 1974, against a decision of the Secretary of State dated 18 November 2022 to refuse his human rights claim made in the course of seeking to resist deportation. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant now appeals against the decision of the judge with the permission of First-tier Tribunal Judge Adio.

The issues in summary

3. The issues before the judge centred on whether it would be "unduly harsh" for the purposes of section 117C of the 2002 Act for the appellant's British partner, and his three minor British children, to remain in the United Kingdom without him.

The judge found that that would not be unduly harsh and that there were no "very compelling circumstances" over the statutory exceptions to deportation contained in section 117C of the 2002 Act, and dismissed the appeal.

4. The issues for resolution in these proceedings are:

   a. Whether the judge erred by failing expressly to direct himself as to the meaning of the term "unduly harsh" or otherwise failed to give sufficient reasons to justify his conclusion, in light of the evidence before him (grounds 1 and 2);

   b. Whether the judge erred by failing adequately to address the import of a report by an independent social worker, Raymond Tansey, dated 13 July 2023 ("the Tansey Report") (ground 3);

   c. Whether the judge erred by concluding that the appellant's elder daughter, who is profoundly deaf and lives with a number of associated challenges, would be able to communicate with the appellant "by modern means", in the event of his deportation (ground 4);

   d. Whether the judge's conclusions that it would not be unduly harsh for the appellant's British partner to remain in the United Kingdom in his absence were rationally open to him (ground 5).

5. By a letter dated 1 March 2024, the appellant's solicitors applied to adduce further evidence under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008. It is not necessary to determine the application, in light of my conclusions, below, since I have not set the decision of the judge aside.

Anonymity order revoked

6. The judge made an order for the appellant's anonymity, on the basis that he has three minor children. I revoke that order. It is not necessary for an anonymity order to be made simply because an appellant has minor children. There is no need in this decision to refer to the identity of the children, and I have not been taken to any evidence suggesting that there is a risk of jigsaw identification, or any other form of risk arising from the revocation of the anonymity order. Mr Holt agreed with this approach.

Factual background

7. The appellant arrived in the United Kingdom on a visitor's visa in September 2010. Following an allowed appeal, he was granted leave to remain, and later indefinite leave to remain. On 4 August 2020, the appellant was sentenced to 43 months' imprisonment for offences relating to the possession of drugs (including a drug of Class A) with intent to supply. Those convictions engaged the automatic deportation provisions of the UK Borders Act 2007, leading to the Secretary of State seeking the appellant's representations as to why he should not be deported.

8. The appellant relied on his long-term relationship with his British partner, DP, and the four children they have together, all of whom are British. The appellant's eldest daughter, D1, was born in 2004. She was an adult by the time the appeal was heard by the judge. The appellant's younger daughter, D2 was born in 2008. She was 15 when the judge heard the appeal. She lives with a number of health

conditions, including hearing difficulties and deafness, for which she receives extensive support. The appellant's eldest son, S1, was born in 2016. He was seven when the judge heard the appeal below. The appellant's younger son, S2, was born in 2021, while the appellant was in custody.

9. It was accepted by the Secretary of State that it would have been unduly harsh for DP and the children to go to Barbados. Thus, there were two issues before the judge. First, whether it would be unduly harsh for the appellant's children and DP to remain in the United Kingdom in his absence. Secondly, if not, whether there were "very compelling circumstances" over and above the statutory exceptions to deportation, which outweighed the public interest in the appellant's deportation.

Legal framework

10. Part 5A of the 2002 Act contains a number of mandatory public interest considerations to which a court or tribunal must have regard when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR. The considerations in section 117C apply in all cases concerning the deportation of foreign criminals: see section 117A(2)(b).

11. Section 117C provides:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has 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.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (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 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.
>
> (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.

> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

12. The term "unduly harsh" in section 117C(5) (and in the predecessor Immigration Rules) has been the subject of much litigation. In *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, the Supreme Court endorsed the decision of this tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC), which described the concept in the following terms, at para. 46:

> "By way of self-direction, we are mindful that '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."

13. That definition was re-endorsed by the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22: see para. 41. See also para. 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' - i.e. it involves a highly elevated threshold or standard."

14. The First-tier Tribunal is a specialist tribunal. In *HA (Iraq)* Lord Hamblen also said, at para. 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:
>
> > (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.
> >
> > (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.
> >
> > (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."

15. The Court of Appeal held in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at para. 76:

> "…on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

Grounds 1 and 2: no error in the judge's approach to the evidence, sufficient reasons given

16. Mr Holt submitted that the judge failed to direct himself concerning the correct approach to the concept of what amounts to "unduly harsh". While accepting that not expressly doing so would not necessarily amount to an error of law, Mr Holt submitted that the judge's findings on that issue were both internally inconsistent and inadequately reasoned, thereby throwing the lack of a self-direction into sharp relief. In Mr Holt's submission, the judge appeared to accept that S1 had experienced trauma, manifesting itself in enuresis while the appellant had been imprisoned. Those symptoms persisted despite regular telephone contact between S1 and the appellant when he was imprisoned. Yet the judge found that the impact of the appellant's absence would be mitigated by the appellant remaining in touch via modern means of communication: see para. 47. Mr Holt's primary submission was that that was an inconsistent approach. It either revealed that the judge did not have the correct "unduly harsh" test in mind, or, if he did, he applied it incorrectly. Put simply, if regular telephone contact did not cater for S1's needs when the appellant was imprisoned (as the judge accepted at para. 41), modern means of communication would not do so upon his deportation to Barbados (as the judge concluded at para. 47).

17. I reject this submission, for the following reasons.

18. First, the First-tier Tribunal is a specialist tribunal: "it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right" (*AH (Sudan)*, para. 30). While best practice would be to cite the relevant leading authorities, not doing so does not necessarily infect a tribunal's conclusions with an error of law. The judge cited the correct legal framework and, as a specialist tribunal, would have had the relevant authorities in mind. *HA (Iraq)* had been included in the bundle before the First-tier Tribunal. Mr Holt's skeleton argument also relied on it: see paras 26 and 27. The judge was plainly aware of *HA (Iraq)* and would have had considered it in the course of reaching his conclusion.

19. Secondly, the judge clearly had the relevant evidence in mind. At para. 37, he referred to the Tansey Report's conclusions that remote interaction would be no compensation for physical presence. At para. 38, the judge found that the children's best interests would be to remain with both parents in the UK. There is no requirement on a judge to repeat all items of evidence back to the parties,

nor expressly consider every evidential facet of the case. As it was put in *Volpi v Volpi* [2022] EWCA Civ 464 at para. 2(iii), "The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it."

20. Thirdly, it is difficult to see how the Tansey Report, and the evidence as to the impact on S1 of the appellant's imprisonment, had the incontrovertible impact on the judge's analysis for which Mr Holt contends. Para. 3.39 of the report said:

> "3.39 S1 was reported to have been enuretic and to have soiled himself at an age when this was not anticipated. It was contended by his parents that this was indicative of an emotional response connected to the absence of his father and his distress regarding his circumstances."

21. The evidence of soiling was consistent with that reported by DP, at para. 14 of her statement:

> "S1 though would cry himself to sleep every night, soiling himself on a daily basis, which he had not done for a while. He was clearly very upset by it all."

22. This evidence clearly demonstrated a degree of harshness flowing from the separation of S1 and the appellant. But the extent of the harshness was pre-eminently a matter for the judge. There were a number of features of the evidence, as pointed out by Mr Lawson, which inevitably tempered the weight this aspect of the evidence would attract. It was not a feature expressly mentioned by the appellant in his written evidence. More significantly, while the Tansey Report records the views of the appellant and DP that the enuresis was S1's emotional response to the appellant's absence, there was no medical or similar evidence to that effect, such as GP records. That is significant because DP's statement suggests that it was a symptom which S1 had displayed previously (c.f. "which he had not done for a while…"). Of course, it is difficult in the course of an appeal to recreate what took place before the judge below; that is a feature of all appeals challenging multi-factorial findings of fact and evaluation of the sort under considering here. As it was put in *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5 at para. 114:

> "(iv) In making his decisions the trial judge will have regard to the whole of the sea of evidence presented to him, whereas an appellate court will only be island hopping.
>
> (v) The atmosphere of the courtroom cannot, in any event, be recreated by reference to documents (including transcripts of evidence)."

23. The judge's analysis on this issue was consistent with the judge's final conclusion, at para. 47, that the impact on the children would be harsh, but not unduly so. I do not accept Mr Holt's submission that that conclusion was insufficiently reasoned, or internally inconsistent with the judge's other findings. The judge found that there would be a range of mitigations in play in the appellant's absence. See para. 38: D1 was now an adult, and so would be able to assist in a way she had not been able to previously. The family unit would thus be able to offer one another a degree of support going beyond their support mechanisms when the appellant was imprisoned. Communication could continue by modern means, which, by his reference to the strength of internet connections

in Barbados, the judge must have meant video calls. The appellant would not have had access to a video device in prison, meaning that the comparison between communication then, and prospective communication in Barbados, did not entail a like for like comparator. Moreover, the family would be able to visit the appellant in Barbados or a third country. While that would present practical and financial challenges, it nevertheless represents a difference from the position when the appellant was in prison, when both Covid-19 and the family's reluctance for the children to know about their father's imprisonment made visits very difficult.

24. I therefore do not accept that the judge's findings were either insufficiently reasoned or inconsistent with each other.

25. Grounds 1 and 2 are therefore dismissed.

Ground 3: no error in the judge's treatment of the Tansey Report

26. Pursuant to this ground, Mr Holt submits that the judge failed to give sufficient reasons for departing from the recommendations of the Tansey Report in relation to the inadequacy of modern means of communication as a means for the appellant to continue the parental relationship.

27. This criticism is without merit. The judge accepted that the best interests of all three minor children were for the appellant to remain in the United Kingdom. Central to that assessment would have been the acceptance of what is, in reality, an uncontroversial proposition in relation to any genuine and subsisting parental relationship, namely that remote forms of communication are no substitute for the real thing. Plainly, as Mr Holt accepts, it was for the judge to ascribe the appropriate weight to that facet of the appellant's case. As set out above, the judge's analysis did not rely solely on the possibility of communication continuing using online platforms or other digital means, but additionally on the prospect of the children being able to visit their father, whether in Barbados or elsewhere. The judge was entitled to find that that state of affairs would be harsh, but not unduly so.

28. In reaching that conclusion, it was not necessary for the judge expressly to focus on the fact that the Tansey Report had opined that modern means of communication would be no substitute for an in-person relationship. Moreover, not only were the conclusions of the Tansey Report not binding on the judge, they also did not address the central question with which the judge was concerned. That question was whether the appellant's deportation would be merely "harsh", or whether it would be "unduly harsh". The Tansey Report did not address that distinction. It understandably reflected the best interests of the appellant's children, as assessed by Mr Tansey (and as accepted by the judge). An assessment of a child's best interests informs the unduly harsh assessment, but does not dictate that assessment. It was not an error for the judge not to provide further reasons.

Ground 4: no error in relation to D2's ability to communicate by modern means

29. D2 lives with a number of health conditions relating to hearing difficulties. By this ground, Mr Holt submits that the judge erred when stating, at para. 40, that:

> "I have not been provided with any material evidence that D2 would not be able to communicate by modern methods with the Appellant in Barbados."

30. Mr Holt's submission under this ground is essentially a reformulation of ground 3, anchored to D2's circumstances. There was some evidence from D2's school that she sometimes removes her cochlear implants due to discomfort. At page 454 of the First-tier Tribunal bundle there is a report entitled *Teacher of the Deaf Report*, dated November 2021. It refers to difficulties and discomfort arising from the use of the implants.

31. That evidence, which pre-dated the hearing by some ten months, must be contrasted with the other evidence before the judge. At para. 3.37, the Tansey Report said the following in relation to this issue:

> "Her parents reported that D2 has now made significant progress since having received her cochlear implants and can now hear and communicate effectively."

32. It was not an error for the judge to approach this aspect of the evidence in the way that he did.

33. The reality was that the judge had *not* been provided with any evidence pertaining to D2's difficulties in relying on modern means of communication. Of course, as the judge accepted, the appellant's remote presence would fall a long way short of his actual, physical presence, and the judge's decision should not be read as though purporting to conclude that there was parity between the two. However, for the reasons set out above, the judge was entitled to conclude that the appellant's deportation would be harsh, but not unduly so, for the children in general and D2 in particular, on this account.

Ground 5: no error in relation to whether impact on DP would be unduly harsh

34. Mr Holt submitted that the judge's findings that the appellant's deportation would not have an unduly harsh effect on DP were wrong. The judge had reasoned that DP and the appellant had lived separately previously, yet, as Mr Holt submits, that was prior to the children being born, and it strained the relationship at the time. Moreover, it was nothing to the point that DP had coped while the appellant was in prison. She had relied on her mother then. Her mother now lives in Germany and cannot help as she did previously.

35. In my judgment, the judge was entitled to conclude that the impact on DP would not be unduly harsh. The judge accepted that DP's mother is now in Germany (see para. 44), and was thereby aware of the fact she would not be able to help now as she did previously. The judge also observed at para. 38 that D1 is now an adult. That observation was made in the context of the family being able to cope in the appellant's absence. This ground is without merit.

Conclusion

36. The grounds of appeal are without merit. They seek to challenge the judge's evaluative assessment and application of the unduly harsh threshold. As an appellate tribunal, I must not perform that assessment afresh, but ask whether there is some identifiable flaw in the judge's reasoning. For the reasons set out

above, there is not. There is, for example, no identifiable flaw, lack of consistency, failure to take account of some material factor, or other error of law infecting the judge's decision.

Notice of Decision

37. This appeal is dismissed.

Stephen H Smith

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 November 2024