IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case no: UI-2024-000138
First-tier Tribunal No: PA/53955/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued

On 28th of June 2028

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ABEL TENDAYI CHIKUVANYANGA
(NO ANONYMITY DIRECTION MADE)

Respondent

Representation:

For the Appellant: Mrs Arif, Senior Home Office Presenting Officer
For the Respondent: Mr Sobowale, counsel instructed by Goshen solicitors

Heard at Birmingham Civil Justice Centre on 10 June 2024

DECISION AND REASONS

1. To avoid confusion, we shall refer in this decision to the parties as they were before the First-tier Tribunal i.e. to Mr Chikuvanyanga as the appellant, and the Secretary of State as the respondent.

2. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Joshi promulgated on 14 November 2023 in which he allowed the appellant's appeal against a decision of the Secretary of State made on 22

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September 2022 on human rights grounds, dismissing the appeal on protection grounds. The Secretary of State's decision of 22 September 2022 refused the appellant's protection and human rights claims made in the form of a request to revoke a deportation order dated 21 June 2005. There is no cross-appeal by the appellant against the dismissal of his appeal on protection grounds. The focus of these proceedings is the judge's decision to allow the appeal on human rights grounds.

3. The appellant is a national of Zimbabwe. He claimed asylum on the basis of having a well-founded fear of persecution in Zimbabwe due to his political opinion, namely that he is not a supporter of Zanu-PF. He later added that he had become a supporter of the CCC. He also claimed that he would suffer treatment in breach of article 3 ECHR as he was diagnosed as HIV positive in 2005 and was receiving treatment in the UK, the discontinuation of which would have a detrimental effect upon his life; he also suffered with depression and anxiety. He said he had no family members or support network in Zimbabwe and would suffer extreme hardship if he were to return. He also relied on having strong ties in the UK; living with his wife and children (C aged 20 and J aged 11, both British citizens). He said his criminal conviction was over 18 years old with no further offences having been committed since such that there was no public interest in deporting him.

4. In a letter dated 22 September 2022 ("the Refusal Letter") the respondent rejected the appellant's claims. The letter said that the appellant's asylum claim had been fully considered in the decision of Immigration Judge Astle promulgated on 12 January 2011 and later maintained in the decision of First-tier Tribunal Judge Parkes promulgated on 28 May 2013, since which country conditions had not materially changed; the appellant would not be at risk on return as he had not been the subject of adverse attention from the authorities previously, had no political profile and had not conducted political activities in the UK. He was excluded from humanitarian protection pursuant to paragraph 339D(iv) of the immigration rules because he had committed a 'serious crime' of indecent assault for which he was sentenced on 19 April 2004 to 3 years' imprisonment. The appellant did not meet the high threshold for a medical claim made under article 3; this had also been fully considered in previous appeal determinations and medical treatment was available and accessible for all of his conditions. As regards his private life, the appellant's relationships with his wife and children were accepted and it was accepted that they were formed when the appellant's status was not precarious. However, C was now an adult and the wife was the primary carer for J; it would not be unduly harsh for them to accompany the appellant to Zimbabwe or to remain in the UK without him. The exceptions to deportation in immigration rules 399 and 399A were not met and the appellant had not demonstrated anything considered compelling over and above the exceptions. There were no exceptional circumstances which would give reasons for the appellant's deportation order to be revoked.

5. The respondent carried out a review of the appeal on 6 July 2023 and maintained the refusal decision.

6. The appellant appealed that decision. His appeal was heard by First-Tier Tribunal Judge Joshi ("the Judge") on 10 August 2023, after which the Judge's decision was promulgated on 14 November 2023.

The First-tier Tribunal's decision

7. The Judge heard evidence from the appellant, his wife and C in English without the assistance of an interpreter, and submissions from his representative, Mr Sobowale. The respondent was represented by Mr Swaby, Home Office Presenting Officer.

8. The Judge's key findings, with reference to the relevant paragraph numbers, are as follows:

   (a) [45]-[46] Pursuant to the case of Devaseelan [2002] UKIAT 000702, the starting point was the findings contained in the previous appeal determinations since which relevant changes have been the passage of time and the appellant's claim to now be a member and supporter of the CCC.

   (b) [48]-[49] The appellant does not have a profile that would place him at risk upon return to Zimbabwe. He had no political profile prior to leaving Zimbabwe and was able to leave via normal channels using his own passport; his political activity in the UK is minimal and could be an attempt to bolster his claim to remain. Even if the appellant's activity were genuine, it would not have come to the attention of the Zimbabwean authorities and even if it did, the appellant's profile as a low-level supporter would not put him at risk.

   (c) [51] The appellant has the serious illness of HIV and if he does not receive appropriate treatment he would be exposed to a serious, rapid, and irreversible decline in the state of his health resulting in intense suffering, and / or to a significant reduction in life expectancy for the purposes of article 3. [54] The appellant has failed to show there would be an absence of appropriate treatment (or the lack of access to such treatment) in Zimbabwe.

   (d) [55] Although he has been absent for 25 years, the appellant would still have some connections to his family in Zimbabwe. Due to concerns about credibility, it was not accepted that the appellant had no immediate family left there. The appellant's partner also has family in Zimbabwe and the appellant has connections with the Zimbabwean community in the UK. The appellant would therefore not be without support on return and his wife and C could support him from the UK.

   (e) [56] The support on return would have a bearing on the Appellant's mental health claim relating to his anxiety, depression, and suicide risk. [58] The appellant has been attending counselling and psychotherapy sessions in the UK. [61]-[62] There are psychiatric facilities available in Zimbabwe. The professional psychological input that he has received, along with careful planning and support from his family and friends, and his connections in Zimbabwe would assist in adequately managing the Appellant's mental health on return. There would be no breach of articles 2 or 3 ECHR on return.

   (f) [64] As regards exception 2 (family life) in section 117C(5) of the 2002 Act, it would be unduly harsh for J to remain in the UK without the appellant. [67] There is no suggestion that the Appellant's son would relocate to Zimbabwe with the appellant. [68] Weight is attached to J's letter. [72] The evidence

provided by the family is accepted and J would be most impacted by the appellant's removal. For J, the separation does meet the threshold of being unduly harsh.

(g) [73] Weight is attached to the report from the independent social worker Mr Horricks [75] who concludes that the major outcome of the appellant's removal would be a deterioration in the overall functioning of J and would have an adverse impact on his emotional/behavioural, educational, and social development. [76] Mr Horricks noted the appellant and his wife share a very high degree of mutual dependency and if they were to be separated, there would be major concerns for the wellbeing of wife's mental health and in turn an adverse impact on J. The wife is the main breadwinner and without the appellant she would struggle to cope alone, even with some assistance from C, which would create financial hardship for J.

(h) [77]-[78] Exception 2 applies in the appellant's case because of the unduly harsh consequences on J of the appellant's deportation. On the balance of probabilities the public interest is outweighed by that of the consequences to J of refusing the appeal. The appeal is allowed under article 8 ECHR.

Appeal History

9. On 17 November 2023 the respondent sought permission from the First -tier Tribunal to appeal to the Upper Tribunal on two grounds, as follows:

Ground 1: Making a material misdirection of law – application of the unduly harsh test

The judge fails to provide adequate reasons for finding that the appellant's deportation would be unduly harsh on his son, to an 'elevated standard' as cited at [65], with reference to HA (Iraq) [2022], that 'harsh' denotes 'something severe, or bleak'. The Judge relied primarily on the evidence of the appellant's wife and daughter and on an outdated social worker's report [73]. There was no new evidence to show that the threat of deportation has impacted J significantly in terms of his schooling or that he requires emotional support or counselling from medical professionals. Rather, J is said to be 'doing well at school' [69] and the appellant's wife continues to support the family financially as the 'main breadwinner' [76]. Undoubtedly, the whole family will be impacted by separation if the appellant is deported however the reasons given by the Judge do not establish that the unduly harsh threshold has been met to the 'elevated standard' required over and above those set out in PG (Jamaica) [2019] EWCA Civ 1213. The unduly harsh test has not been made out in the circumstances of this case.

Ground 2: Making a material misdirection of law – S117B – public interest consideration

The Judge errs by failing to give any consideration to the public interest requirement as per s117B (1)(4) and (5) of the 2002 Act, given that any family and private life formed in the UK has been established while the appellant has been residing here unlawfully, has committed crimes and failed to observe the laws of the UK. He is not financially independent and relies on his relationship with his son and family to remain in the UK. The Judge has not fully appreciated the public interest in deportation as identified in DW (Jamaica) v SSHD [2018] EWCA Civ 797, where it was found that the public interest had not been given the

correct recognition and weight in the requisite exercise (para 29 of that case cited).

10. On 12 January 2024, First-tier Tribunal Judge Chowdhury granted permission to appeal, saying:

> "1. The application is in time.
>
> 2. The grounds contend the judge failed to provide adequate reasons for finding the Appellant's deportation would unduly harsh on his son. It is arguable that the judge did not provide adequate reasons demonstrating that the unduly harsh threshold had been met, as set out in PG (Jamaica)."

11. The appellant did not file a response to the appeal.

The Hearing

12. The appeal came before us on 10 June 2024.

13. The submissions are set out in the record of proceedings. The main points were as follows.

14. Mrs Arif took us through the grounds of appeal, adding little more of substance. She confirmed that the challenge was in the nature of inadequacy of reasons, rather than irrationality; it cannot be ascertained what the Judge's reasons are for finding that the 'unduly harsh' test is met. She asked that the Judge's decision be set aside, to be remade in the Upper Tribunal.

15. Mr Sobowale responded to submit:

    (a) There is no error as the Judge has given adequate reasons; the grounds are mere disagreement and an attempt to reargue the case. At [23] the Judge notes the respondent's position and that the only matter in dispute is whether the impact on J is unduly harsh; if it is, the appeal falls to be allowed. At [66] the Judge notes the elevated standard. It is not correct that the Judge relies only on the evidence of the wife, C and the social worker; at [68] the Judge also gives weight to the letter from J. The evidence from the wife and C was not challenged and it was a matter for the Judge what weight to reply to it. There was also no challenge to the contents of the social worker's report beyond saying it was 2 years' old; there was nothing to show circumstances had materially changed since the report was written such that this criticism is without merit. Even if the Judge did only rely on the evidence of the wife, C and social worker, he was entitled to do so given this evidence was unchallenged and the report clearly discusses the likely impact of deportation on J in particular. The factual matrix in PG (Jamaica) is different to this appeal because here, the appellant still lives with his wife and child and has produced an independent expert report, the substance of which is not challenged.

    (b) Ground 2 is misconceived. The appeal was not allowed on basis of the appellant's private or family life with his wife, but on the basis of the unduly harsh test being met for J. Given the respondent's position was that the appeal turned on the single issue of whether the impact on J was unduly harsh, there was no need to go on to consider the issues under s117C of the

2002 Act. The Judge cannot be criticised for not making findings beyond the single issue in dispute.

16. In answer to our questions, Mr Sobowale confirmed that the evidence of the impact on J comprised of the family witness statements/letters and the social worker (Mr Horricks) report, nothing else. He said that the report of Dr Hanson appertained to the appellant's mental health rather than the impact of deportation on the family.

17. Mrs Arif had no further submissions. In answer to our questions, she confirmed it was correct that no challenge had been brought against the substance of the family's oral evidence or social worker report.

18. We questioned the need for continuing the anonymity order, given the appellant's protection appeal had been dismissed, and that dismissal had not been challenged. Mr Sobowale was given the opportunity to take instructions from the appellant, after which he confirmed that there was no need for the anonymity direction any longer. We therefore confirmed it would be lifted.

19. We rose for a short while before returning to confirm, in brief terms, that we would be upholding the Judge's decision and dismissing the appeal. We said we would provide a written decision containing our full reasoning; this we now do.

Discussion and Findings

20. At [22]-[23] of his decision, the Judge records the position of the respondent in the appeal as being:

    (a) that paragraphs 399 and 399A of the Immigration Rules are engaged.

    (b) that the reality is that the appellant's family will not accompany him to Zimbabwe.

    (c) therefore the only thing being considered is the impact on the family of them remaining in the UK without the appellant.

    (d) in this respect, the only issue is whether the impact on the appellant's son, J, will be unduly harsh in accordance with the test contained in HA (Iraq) (citation above) (which the Judge sites at [65]).

21. Ground 1 of the respondent's grounds of appeal alleges that the Judge did not give adequate reasons for finding in favour of the appellant on the identified issue.

22. In this respect, we consider it is worth citing para. 72 of Lord Hamblen's judgment in HA (Iraq) [2022] UKSC 22 in which he said (our emphasis in bold):

> "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."

23. Bearing this in mind, and for the reasons which we shall now discuss, we do not find ground 1 to be made out.

24. It is settled law that in Part 5A (sections 117A-D) of the Nationality, Immigration and Asylum Act 2002 Parliament has established a structured approach (or a "complete code") to deciding a human rights appeal brought on the basis of article 8 ECHR in a deportation context. Part 13 of the immigration rules, which uses much of the same language as the 2002 act, must be construed therefore to have the same effect as the act (see [22] of HA (Iraq) EWCA Civ 1176 as confirmed in the later Supreme Court consideration of the same appeal, cited above).

25. The Refusal Letter itself stated that:

> "The Immigration Rules at paragraph A362 and paragraphs A398 to 399D set out the practice to be followed by officials acting on behalf of the Secretary of State when considering an Article 8 claim made by a foreign criminal. These rules, which are approved by Parliament, set out a framework for the consideration of Article 8 claims and set out what the public interest requires. Parliament's view is set out at sections 117A to 117D in Part 5A of the Nationality, Immigration and Asylum Act 2002 (as inserted by the Immigration Act 2014)."

26. The respondent therefore recognised that, provided an assessment is carried out under Part 5A (which, as above, has been carried into Part 13 of the immigration rules), there is no need to conduct a separate assessment for the purposes of article 8.

27. Paragraphs 398-399 of the immigration rules (as they were) stated that (our emphasis in bold):

> "Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> …
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;
>
> …

> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies **and, if it does not**, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported;"

28. This reflects section 117C of the 2002 Act which states:

> "(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.**
>
> ...
>
> (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."

29. In essence, if the appellant is found to have a genuine subsisting parental relationship with a qualifying child, on whom the effect of the appellant's deportation would be unduly harsh, then the public interest in deportation is outweighed.

30. It is section 117C (rather than the immigration rules) to which the Judge refers in his decision, hence his reference in [77] to finding that "Exception 2 applies".

31. The Judge refers to the correct legal test concerning undue harshness in [65]-[66] of his decision, setting out in full the relevant passages from HA (Iraq). Having done so, he goes on to review the evidence to see whether this test is met. The test of undue harshness is later referred to by the Judge again at [72] and [77] when drawing together his conclusions on the evidence.

32. As set out above, the Judge attaches weight to J's letter [68], accepts the evidence provided by the family [72], and attaches weight to the report from Mr Horricks [73].

33. The Judge specifically refers to the aspects of that evidence which went to the impact on J, as follows:

(a) [69] the appellant's evidence was that it would be really difficult for his wife to care for the children and she would struggle financially and emotionally. The appellant said J was doing well at school but was very disturbed by the thought of the appellant being deported, having found it very difficult when the appellant was detained in August 2021.

(b) [70] the appellant's wife's evidence was that she and J needed the appellant in their life, even with the help of C; J needed the appellant for guidance, support, and care because the appellant looked after J when the wife was working and C was studying; the wife confirmed J was very withdrawn when the appellant was detained and very happy when they went to visit him; it would really affect J and his mental health if the appellant were deported.

(c) [71] C' evidence was that the family would 'crumble' if the appellant were to be deported as he was the pillar of the family and had kept them together; J would be impacted more because of his young age, having been 'hysterical' when the appellant was detained; J has a close bond with the appellant and would not cope well without him.

(d) [74]-[76] Mr Horrick's evidence was [in addition to those parts of his report already referred to above] that the children have been exposed to long-standing mental health difficulties of their parents, which has compounded the harm suffered to their emotional development; the permanent nature of any separation would mean such harm would be long-term/permanent and J was particularly vulnerable as a young black male growing up in an inner-city environment; it was the strong functioning relationship of the appellant and his wife that kept the family together in circumstances that had been dominated by poverty and the children had grown up being aware of their differences from other children.

34. In terms of the respondent's criticism that Mr Horrick's report was 'outdated', we note that the Judge specifically records at [73] that:

> "Whilst it was completed two years ago, the evidence relating to the Appellant's son has not significantly changed (as briefly set out above)".

35. The Judge has therefore provided a reason as to why weight can be attached to the report despite its age. The judge was entitled to approach the report in that way, for the reasons set out below.

36. Having ourselves read the written evidence of the family and Mr Horricks against what is recorded as being the oral evidence, in light of Mrs Arif's acceptance that the substance of this evidence was not challenged, and given above finding that the Judge adequately explains why weight can still be attributed to Mr Horrick's report, we consider the findings made by the Judge in respect of his acceptance of this evidence were open to him.

37. Whilst the conclusion that this evidence was sufficient to demonstrate that the test is met may not be one which all Judges would have reached, we refer again to the case law in saying "Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently".

38. Overall, we find the Judge carried out a properly reasoned analysis of the evidence as against the correct legal background in order to arrive at his conclusion that the appeal fell in the Appellant's favour. No error is disclosed.

39. In terms of grounds 2, the statutory provisions themselves in Part 5A of the 2002 Act confirm that the public interest will be outweighed if one of the exceptions to deportation is met, and we have set out above how these provisions provide a "complete code" in terms of assessing a claim under article 8 such that a separate assessment is not needed.

40. We therefore consider that, having had confirmation from the respondent's representative that the only issue was the question of undue harshness, and having found that the appellant succeeded in relation to this single issue, the Judge did not need to delve any further into the question of the public interest.

41. It follows that ground 2 is not made out; we find it to be in the nature of mere disagreement and no error is disclosed.

42. To conclude, we find the decision is not infected by any errors of law. The decision therefore stands.

Notice of Decision

1. The appeal to the Upper Tribunal is dismissed. The decision of First-tier Tribunal Judge Joshi promulgated on 14 November 2023 is maintained.

2. We lift the anonymity direction that was previously made, given that the Judge's dismissal of the appellant's protection claim stands and there is therefore no justification for departing from the principle of open justice.

Signed: L. Shepherd
Date: 21 June 2024

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber