IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000564
First-tier Tribunal No:
HU/57068/2022

THE IMMIGRATION ACTS

Decision and Reasons issued:
On the 25 June 2024

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAMBERLAIN

Between

FM
(ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms. G. Brown, Counsel instructed by Wilson Solicitors LLP
For the Respondent: Mr. C. Avery, Senior Home Office Presenting Officer

Heard at Field House on 6 June 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant is granted anonymity.

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

DECISION AND REASONS

1. This is an appeal by the appellant against a decision of First-tier Tribunal Judge O'Brien (the "Judge"), dated 3 January 2024, in which he dismissed the appellant's appeal against the respondent's decision to refuse his protection and human rights claim. The appellant is a national of Jamaica against whom the respondent made a deportation order.

Anonymity

2. I have continued the anonymity direction made in the First-tier Tribunal given the nature of the appellant's claim, and the involvement of a child.

3. Permission to appeal was granted by First-tier Tribunal Judge Grant-Hutchison in a decision dated 16 February 2024 as follows:

> "It is arguable that the Judge has erred in law (a) by way of a procedural irregularity in finding that the presumption in s72(2) of the NIAA 2002 had been rebutted when the previous Judge (Judge Howard) did not find that the presumption had been rebutted when he proceeded to determine the Appellant's protection claim. The s72 Certificate was last a live issue in February 2019 and had not been referred to subsequently in the two Respondent's decisions of 26 January 2022 and 27 September 2022 respectively and the Respondent's Review dated 17 July 2023; (b) by failing to adequately consider that the Appellant's offending in the UK could be linked with Jamaican gangs and when the Appellant gave evidence that when he returned to Jamaica on the second occasion he was in hiding; (c) by failing to assess (i) the children's individual circumstances considering that CGM is not a "qualifying child" (ii) CM is a "qualifying child" (iii) his partner KNG is a "qualifying partner; (d) by failing to consider given the Windrush historical injustice argument whether the Appellant might have become a British citizen and thereby not liable to deportation proceedings; (e) by failing to make any assessment of the expert report of the Independent Social Worker, Nikki Austin and (f) by failing to adequately consider and make findings on (i) KNG being diagnosed with PTSD, (ii) CGM will never be able to have a relationship with the Appellant by remote means, (iii) that KNG's father's health has deteriorated due to a stroke and other members of the family would not be in a position to be relied upon to offer any significant assistance given."

4. In a Rule 24 response dated 22 February 2024 the respondent opposed the appeal. The appellant provided a skeleton argument in response.

The hearing

5. The appellant attended the hearing which was held remotely. I heard submissions from both representatives. I reserved my decision.

Error of law

6. I state at the outset that I reject Mr. Avery's submissions that the length of sentence and seriousness of the crime mean that the appeal was bound to fail, and therefore that any error cannot be material. Clearly the appellant has the right to a fair hearing of his appeal.

Ground 1

7. Ground 1 asserts a procedural irregularity in the Judge's consideration of section 72(2) of the 2002 Act. It is submitted that the only logical conclusion that can be drawn from the previous decision of Judge Howard is that the presumption under section 72(2) had been rebutted given that he proceeded to consider the appellant's protection claim. It was submitted that this analysis must be correct

given that the existence (or otherwise) of a section 72 certificate was not referred to subsequently, and that these factors were drawn to the attention of the Judge.

8. It was submitted that the second error made by the Judge in relation to section 72 was in treating the certificate as extant. In the alternative it was asserted that the Judge erred by not permitting the parties to make post-hearing representations as to whether the section 72 certificate had already been discharged, whether it was a live issue and, in the event that it was, whether it was rebutted. It was asserted that the error was material as the assessments that the appellant was a high risk had been made more than two and a half years earlier when the appellant was still a serving prisoner.

9. Mr. Avery submitted, with reference to the Rule 24 response, that the reason that there was no reference to the section 72 certificate in the decision or review was due to the fact that a protection claim had not formed part of the original application. The appellant had made a human rights claim. He submitted that the Judge Howard had not resolved section 72 and that it had been incumbent on the Judge to deal with the issue. Given the evidence, it was inevitable that the Judge would find that the appellant had not rebutted the presumption. The appellant should have sought an adjournment or put in further submissions.

10. Ms. Jones relied on the grounds, and additionally submitted that the agreed list of issues had not been agreed as asserted by the Judge.

11. The Judge states at [10(a)] and [10(b)] that the agreed issues were whether the respondent was entitled to rely on the section 72 certificate, and whether the appellant had rebutted the presumption in section 72. In relation to the failure of the respondent to refer to this in his decision, I find that it is correct that it was not an issue at the start of these proceedings as the appellant's application was made on human rights grounds, i.e. that his deportation was a disproportionate interference under Article 8.

12. At [39] the Judge states:

> "The respondent has not issued a section 72 certificate subsequent to that issued on 11 February 2018. However, Judge Howard did not find that the presumptions therein were rebutted; indeed, Judge Howard did not deal substantively with the certificate at all. In my judgment, that certificate remains extant. In any event, I would be obliged to consider the application of section 72 even if there had been no certificate at all (see paragraph 29 of SSHD v TB (Jamaica) [2008] EWCA Civ 977). It is not suggested on behalf of the appellant that considering section 72 would give rise to a procedural unfairness and I find that it would not."

13. The Judge states that Judge Howard did not find that the presumption had been rebutted. However, he does not then explain how, if the presumptions had not been rebutted, Judge Howard was able to go on to consider the appellant's asylum claim. He considers whether the presumption has been rebutted at [40]. The most recent evidence to which he refers is dated 2021. He states:

> "As for whether the appellant poses a danger to the community of the United Kingdom, whilst he has been assessed as posing a low risk of reoffending in 2021, I note that he was considered a very low risk of reoffending in 2015 and yet went on to commit a further firearms offence in 2017. In any event, the appellant is assessed as posing a high risk to the public and a high risk to children."

14. He finds that the appellant is assessed as posing a high risk. At [28] he sets out in his findings of fact as follows:

> "When the appellant was released from prison, it was one of the conditions of his licence that he do not live at the family home. An OASys report dated 30 April 2021, whilst assessing him as posing a low risk of reoffending, nevertheless assessed the appellant as posing a high risk of serious harm to children and the general public. In particular, he was considered to be a current risk to his children on the basis that his offending activities had entered into the family environment through the storage of weapons at his home address. Subsequently, the couple agreed with social services a non-binding safety plan by which any contact between the appellant and his children was to be supervised by his wife and was not to take place in the family home. The appellant remains living with his sister nearby to the family."

15. This finding indicates that things had moved on since the appellant was considered to be a high risk, given that he now has access to his children even if supervised, and even if away from the family home. However, the Judge does not make any reference to this change in circumstances since the appellant left prison which is when the assessment was made. He states at [28] that he was a "current" risk when the assessment was made, but this is three years earlier, in different circumstances.

16. I find that the Judge erred in his consideration of the section 72 certificate. I find that the fact that Judge Howard had proceeded to consider his asylum claim indicated that the presumption had been rebutted. I accept that the protection claim was not part of the original application, but that asylum arose later on account of the Positive Conclusive Grounds decision. However, had the respondent considered the section 72 certificate to be a live issue, I find that he should have addressed this prior to the hearing, especially given that there was a previous decision of the Tribunal which had considered the appellant's asylum claim, thus indicating that the presumption under section 72 had been rebutted.

Ground 2

17. This asserts irrationality or unreasonableness in relation to the Judge's consideration of the protection claim, given that the Judge accepted that the appellant was a victim of trafficking on account of being groomed into gang involvement as a child, that he accepted that the appellant's brother had been abducted in 2001, and that he also accepted the appellant's wife's evidence that she received phone calls from a person enquiring about the appellant's whereabouts. Ground 5 is relevant in relation to the appellant's wife's evidence as it asserts that the Judge failed to make any adequate assessment of her evidence, and failed to provide reasons for rejecting it. Her evidence of the phone calls was that they were from a Jamaican individual who was asking where the appellant was. There were also messages left around the time that he was to be deported. Her evidence was that the calls had stopped as they knew that the appellant was not going to be deported.

18. Mr. Avery submitted that the Judge's findings at [42] were "reasonably clear". The Judge had not accepted the link between the two sets of issues in Jamaica and the United Kingdom. He submitted that the findings were open to the Judge.

19. In response, Ms. Brown submitted that the evidence before the Judge was that the appellant had continued to have problems with Jamaican gangs. There were inadequate reasons given at [42]. The appellant's wife's evidence, that the person calling had wanted information about the appellant's deportation, had

been ignored. She submitted that, while the Judge had not been bound to accept all of the evidence, he was bound to provide adequate reasons. There had been no adverse credibility finding made in respect of the appellant's wife.

20. The Judge states at [42]:

> "Nevertheless, I must consider the appellant's article 3 claim, which is advanced on an identical basis. It is now uncontested that the appellant was a victim of trafficking by reason of being recruited by a criminal gang in Jamaica into illegal activities such as hiding and transporting guns and drugs. However, I do not accept that he has been involved with Jamaican gangs nor the target of Jamaican gangs since coming to the United Kingdom. To the extent that individuals had been trying to locate the appellant whilst he was most recently in prison, I find that that is overwhelmingly likely to be connected to his criminality in the United Kingdom rather than indicative of any malicious desire on the part of Jamaican gangs to locate the appellant. In short, I find that it is not even reasonably likely that the appellant is at risk on return to Jamaica of either persecution or serious harm because of his previous involvement in a gang there, because of any perception that he is an informer, or indeed on any other grounds."

21. I find that the Judge has not addressed the evidence of the appellant's wife. He has found that the attempts to locate the appellant whilst he was in prison were "overwhelmingly likely" to be connected to his criminality in the United Kingdom. However, this was not the evidence of the appellant or his wife, and he has not given reasons for rejecting the evidence of the appellant's wife. I find that it therefore follows that Ground 5 is made out, as there is no full consideration of the appellant's wife's evidence and no rejection of it.

Ground 3

22. It is asserted that the Judge erred in his assessment under section 117C(6) insofar as he failed to make any assessment of the appellant's children's individual circumstances. One of the appellant's children was not a "qualifying child" and therefore should not have been included as part of the "unduly harsh" consideration. His circumstances could only have been relevant to the consideration of "very compelling circumstances", but no separate findings were made in relation to him. The Judge had failed to engage with the evidence when considering whether there were any "very compelling circumstances".

23. Mr. Avery relied on the Rule 24 response and submitted that the Judge had taken into account all relevant factors, and the likely impact on the family. Ms. Brown submitted that there was no separate consideration of the children from [45] to [52]. The balancing exercise had not been carried out with reference to the older child's needs. Neither had there been any consideration of the wife's miscarriage in the balancing exercise.

24. The Judge states at [49]:

> "Judge Howard also concluded that the appellant's deportation would be unduly harsh on the appellant's wife and children, albeit that his reasoning appears to suggest to the contrary, raising the possibility that the conclusion was a typographical error. In any event, I am satisfied that both of the affected children have significant disabilities in respect of which they receive welcome and effective help from the appellant. It is likely that their welfare (and best interests) would be significantly adversely affected by the appellant's deportation to the extent that I am satisfied that his deportation would have unduly harsh consequences for them, and consequentially for the appellant's wife."

25. I find that the Judge has erred in failing to make adequate and separate findings in relation to the appellant's children. The appellant's eldest child was not a qualifying child, so did not fall for consideration under the "unduly harsh" test. I find, as asserted in the grounds, that therefore any assessment of "exceptional and compelling circumstances" cannot be fully and completely made, given that these circumstances must be over and above anything unduly harsh, and there are no specific findings made as to what it is that is unduly harsh for the qualifying child, and no adequate consideration of the older child's situation when considering exceptional and compelling circumstances.

26. This ground also asserts a failure to factor to the assessment of exceptional and compelling circumstances the fact that the appellant was a victim of trafficking, and the Windrush historical injustice argument. It was submitted that the Windrush historical injustice argument was a live issue, and it was not open to the Judge to decline to address it. It was submitted that the "assertion that any injustice was "effectively remedied" by the grant of leave to remain as a spouse is incapable of disposing of the issue since the essence of the argument is that but for the historical injustice, the Appellant might have become a British citizen and thereby not liable to deportation proceedings at all".

27. Mr. Avery submitted that the Judge had not disregarded the Windrush argument. He had proceeded on the basis that there may well have been some historic injustice, but that it was outweighed by the appellant's criminal activity. Ms. Brown submitted in response that the fact that he was a victim of trafficking should have been factored in, and the Judge should have made a decision as to whether or not the Windrush historical injustice argument should have been taken into account.

28. At [53] the Judge states:

> "Dealing briefly with two of those matters regarding the appellant himself, first it might well be that his mother should have been permitted to re-enter the United Kingdom as a returning resident in 1988, that he should therefore have been allowed to join her in 1994, and that he might therefore have been able to naturalise as British citizen by the time of his first offence. However, he was not. Even accepting (and on the imperfect evidence before me I decline to make a final finding on the matter) that the appellant thereby suffered historic injustice, that was effectively remediated when the appellant was granted leave to remain as a spouse. Any residual injustice is dwarfed by the public interest in deportation to the extent that it barely registers in the balance."

29. I find that the Judge has declined to deal with the Windrush historical injustice argument in any significant way. Further, I accept that it is not an answer that he was granted leave as a spouse, given that he may have been a British citizen were it not for the historical injustice. I find that there is no consideration either of the fact that he is a victim of trafficking, which is especially relevant given the circumstances under which he was found to be a victim, as a child, with criminal gangs in Jamaica.

30. I find that the assessment of very compelling circumstances involves the making of material errors of law.

Ground 4

31. This ground asserts that the Judge did not make any assessment of the independent social worker's report, or indeed, refer to it all. It was submitted that it was an error of law for an expert report not to be addressed.

32. Mr. Avery submitted that there was no error and it was unnecessary for the Judge to consider this given the other evidence before him. He had accepted the appellant's children's medical issues. Ms. Brown repeated that the Judge needed to engage with the expert report from the independent social worker.

33. I find that to fail to consider, or even refer to, the expert report is a material error of law, given the issues before the Judge and the issues considered by the expert. That the appellant's children's medical needs were accepted does not detract from the failure to take into account the expert report which considered the effect on the family, and in particular his children, of the appellant's deportation.

Ground 5

34. I have addressed above the Judge's failure to make any or any adequate assessment of the appellant's wife's evidence, and/or his failure to provide reasons for rejecting it. Her evidence was also relevant to the assessment under section 117C(6). I find that this is a material error of law.

35. I find that the decision involves the making of material errors of law. I find that the grounds are made out, and that the findings cannot stand. In considering whether this appeal should be retained in the Upper Tribunal or remitted to the First-tier Tribunal to be remade I have taken into account the case of Begum [2023] UKUT 46 (IAC). At headnote (1) and (2) it states:

> *"(1) The effect of Part 3 of the Practice Direction and paragraph 7 of the Practice Statement is that where, following the grant of permission to appeal, the Upper Tribunal concludes that there has been an error of law then the general principle is that the case will be retained within the Upper Tribunal for the remaking of the decision.*
>
> *(2) The exceptions to this general principle set out in paragraph 7(2)(a) and (b) requires the careful consideration of the nature of the error of law and in particular whether the party has been deprived of a fair hearing or other opportunity for their case to be put, or whether the nature and extent of any necessary fact finding, requires the matter to be remitted to the First-tier Tribunal."*

36. I have carefully considered the exceptions in 7(2)(a) and 7(2)(b). I find that there are no findings which can be preserved, and that the appellant has been deprived of a fair hearing in respect of the procedural error in consideration of the section 72 certificate, and the failure to consider the evidence provided. It is therefore appropriate to remit this appeal to be reheard in the First-tier Tribunal.

Notice of Decision

37. The decision of the First-tier Tribunal involves the making of material errors of law and I set the decision aside. No findings are preserved.

38. The appeal is remitted to the First-tier Tribunal for a de novo hearing.

39. The appeal is not to be listed before Judge O'Brien or Judge Howard.

40. I direct as follows:

Direction

1. The appeal is to be listed for a CMR in the First-tier Tribunal within 42 days of the date of promulgation of this decision in order to establish the outstanding issues, in particular whether the section 72 certificate is still a live issue. It is my preliminary view that the presumption under section 72 has been rebutted, given that Judge Howard considered the appellant's asylum claim. However, further submissions may be needed on this point which should take place at a CMR. It is imperative that the issues be established prior to the substantive hearing of the appellant's appeal, especially given that he is self-funding.

Kate Chamberlain

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber
18 June 2024