Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/06558/2020
UI-2021-000563

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 4 March 2022	**On 30 May 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE WELSH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AOH
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr Moriarty of Counsel, instructed by Sutovic & Hartigan Solicitors
For the Respondent: Ms Gilmore, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against a decision of First-tier Tribunal Judge C H O'Rourke ("the Judge"), promulgated on 1 July 2021. By that decision, the Judge allowed AOH's appeal against the decision of the Secretary of State for the

Home Department to refuse his claim under Article 8 of the European Convention on Human Rights ("ECHR"). His claim arose out of the making of a deportation order following his conviction, on 4 May 2012, at the Birmingham Crown Court on two counts of robbery, for which he was sentenced to concurrent terms of 12 months' detention in a Young Offender Institution.

2. To avoid confusion, we refer to the parties as they were in the First-tier Tribunal, with AOH as the Appellant and the Secretary of State for the Home Department as the Respondent.

3. At the conclusion of the hearing before us, we determined that the decision of the First-tier Tribunal did not involve an error on a point of law. We now provide our reasons.

Factual background

4. The Appellant is a national of Somalia, born on 2 February 1993. He left Somalia at the age of eight, residing in Ethiopia for two years before joining his father, a refugee, in the United Kingdom ("UK") on 18 June 2003. He was granted Indefinite Leave to Remain on 11 October 2005, in line with his parents and five siblings.

5. A Deportation Order was served on 14 August 2013. In response, the Appellant made a protection and human rights claim. This claim was refused on 26 March 2014. His appeal against that refusal was dismissed and he became appeal rights exhausted on 11 May 2015.

6. He made further submissions, relating to his family and private life, in 2020. The relevant circumstances of those submissions, insofar as this appeal is concerned, relate to his family life. He had been a relationship with his partner, a British citizen, since approximately 2015. She has two sons (born in 2001 and 2003) and a daughter (born in 2013) from previous relationships. The Appellant and his partner also have a child together, a son born in 2019, who suffers from serious medical conditions.

7. In a decision dated 14 July 2020, the Respondent refused the Appellant's human rights claim. The Respondent accepted that the Appellant has a genuine and subsisting parental relationship with his son but concluded that, though it would be unduly harsh for the Appellant's son to relocate to Somalia with the Appellant, it would not be unduly harsh for the child to remain in the UK without his father.

8. The Appellant appealed the Respondent's decision pursuant to section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

The decision of the First-tier Tribunal

9. In relation to the Appellant's son's medical conditions, it was not in dispute, and the Judge found, that:

> [The child] has been diagnosed with retrognathia (a condition in which the lower jaw is set back further than the aperture), which has required the child to be fitted with a tracheostomy, to allow him to breathe … Both parents have been trained to remove/replace the tracheostomy, in resuscitation and emergency tracheostomy care … [The child] has also been diagnosed with hypertelorism (an abnormal distance between the eyes) and fixed flexion contractions of several fingers on both hands (an inability to fully flex the fingers). [15]

10. The Judge considered the effect of the Appellant's deportation on his son under paragraph 399(a) of the Immigration Rules. The correct approach (see for example CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027) would have been to consider the case within the statutory framework of section 117C of the 2002 Act but nothing turns on this. The Judge concluded at [27] that it would be unduly harsh for the Respondent's son to remain in the UK without his father. Given the focus of this appeal is on that conclusion, we set it out in full:

> The Respondent does not dispute the nature of the Appellant's son's medical condition, the effect it has upon him, or the level of care he needs. He is severely disabled and highly vulnerable and there is no evidence that that situation is likely to change in the foreseeable future. A failure to properly care for him could be life-threatening. I found the Appellant's and his partner's evidence on this point (and generally – any discrepancies being minor) entirely credible, in particular that it is only them (together), who can properly care for their son, both practically and emotionally. The notion that such close level of care for a two-year-old child could, in the alternative to a father's care, particularly also as he grows to be a boy and a teenager, be partially delegated to carers is frankly cruel and inhuman and therefore, by its very nature, 'unduly harsh'.
>
> This situation is exacerbated by [the Appellant's partner's] own vulnerabilities, if left to fend on her own. It is not in dispute that she has had long-term mental health issues, stemming from the suicide of the father of her two elder children. She was abandoned by the biological father of [her daughter] and she has obviously had a very difficult pregnancy and birth with [her son] (there is reference in the medical notes to him having to spend the first six months of his life in hospital). If she is obliged to take sole care for [her son], with also sole responsibility for [her daughter] (with that child also suffering the absence of the man she regards as her father), without the practical and emotional support of the Appellant, there is a real risk that she will be overwhelmed, with potentially severe adverse consequences for her two youngest children. I find, therefore, applying s.55 Borders, Citizenship and Immigration Act 2009 that it cannot be in either child's best interests to be separated from the Appellant, which, while not a paramount factor, is a primary one. I am reliant for this finding on both [the Appellant's partner's] medical records, her entirely credible and straightforward evidence and Dr Farooqi's [the Independent Social Worker] report. In respect of the latter, I do not accept, as asserted by [the Home Office Presenting Officer] that Dr Farooqi has been one-sided, or acted as an advocate for the family. The report is detailed and measured; she relied on both documentary evidence

> and her own observations of the family; she has considerable expertise in this area and was clearly conscious of her professional duties to the Tribunal. Again, as found above, I don't consider it humane, or indeed rational, considering the costs of doing so that the absence of the Appellant's care can be met by professional carers.

11. The Judge went on to make an assessment of the public interest taking into account, as a factor reducing the weight to be attached to the public interest, that the Respondent had not attempted to deport the Appellant following him becoming appeal rights exhausted in 2015.

The grounds of appeal and grant of permission

12. The Respondent relies upon two grounds, which we summarise below:

    (1) Ground 1 - "making a material misdirection/failing to give adequate reasons for findings on a material matter". The Judge's reasoning that the deportation would result in undue harshness for the Appellant's son "simply does not establish that the high threshold, as set out in the established case law … is made out" (paragraph 10 of the grounds).
    (2) Ground 2 - the Judge took into account an irrelevant consideration when assessing the public interest, namely that the Appellant had not been deported once he became appeal rights exhausted in 2015.

13. On 3 August 2021, permission to appeal was granted by First-tier Tribunal Judge Grant. The grounds upon which permission was granted were not restricted.

The Upper Tribunal hearing

14. Ms Gilmore relied upon the grounds of appeal and Mr Moriarty his skeleton argument.

15. Ms Gilmore accepted that the Judge had correctly self-directed when considering the meaning of 'unduly harsh' and confirmed she was not submitting that the Judge ought to have departed from the judgment of the Court of Appeal in HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176; [2021] 1 WLR 1327.

16. She clarified the grounds of appeal as follows. She submitted that the Judge's reasoning, in relation to the question of the provision of care for the child in the absence of the Appellant, was flawed in three ways:

    (1) The Judge did not address the possibility that the elder sons of the Appellant's partner could provide the care currently administered by the Appellant.
    (2) The Judge's approach to the question of social services providing care in the absence of the Appellant was contrary to the decision of the

Court of Appeal in BL (Jamaica) v the Secretary of State for the Home Department [2016] EWCA Civ 357;

(3) In his evidence, the Appellant had stated that he intended to find employment if his appeal was successful. The Judge did not take into account that, in these circumstances, alternative care would need to be found and therefore the child would be in no different a position whether or not the Appellant remained in the UK.

17. Mr Moriarty submitted that the Appellant did not have to demonstrate that the care he provided was irreplaceable. In any event, the Judge made an unchallenged finding that the previous attempt to secure alternative care had been unsuccessful.

Discussion and conclusions

Ground 1 – alternative care for the child

18. Before addressing the particular matters identified by Ms Gilmore, we make a general point in relation to the question of alternative care for the child. In focusing solely on the practicality and availability of such care, it is the Respondent who falls into error not the Judge.

19. The relevant parts of section 117C of the 2002 Act provide that the public interest requires the deportation of the Appellant unless the effect of his deportation on his child would be unduly harsh. The assessment of 'unduly harsh' requires consideration of a multiplicity of factors relevant not only to the practical effects on the child but also the emotional impact. As stated by Peter Jackson LJ at paragraph 159 in HA (Iraq):

> "… there is no hierarchy as between physical and non-physical harm".

This holistic exercise is precisely what the Judge carried out. His conclusion that the Appellant's parents are the only ones capable of providing proper care, both practically and emotionally, was supported by wholly cogent reasons.

20. Turning to the particulars identified by Mr Gilmore, the Respondent's reliance on BL (Jamaica) is misconceived. The ratio of that case is not that the provision of adequate care by social services should be afforded a particular weight in the assessment of the effect on a child of the deportation of parent. It was simply a decision, on the particular facts of the case, that the question of whether social services would perform their duties under the law was not "irrelevant" (paragraph 53) to the question of whether there were very compelling circumstances such that the public interest in deportation was outweighed. The decision in this appeal is not tainted by any such error. The Judge took into account the availability of care by social services and gave cogent, evidence-based reasons for his

conclusion that such care would not, on its own or in combination with any other factor, sufficiently ameliorate the unduly harsh consequences of the Appellant's deportation on his son.

21. In considering the other two matters raised by Ms Gilmore, we remind ourselves of the need for appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Lowe [2021] EWCA Civ 62, at paragraphs 29-31 and AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41. We also remind ourselves that the Judge's decision must be read sensibly and holistically and that we are neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons.

22. The Judge carried out a comprehensive, sensitive and careful assessment of the evidence. He considered the practical and emotional effects, both direct and indirect, on the child in the short term and the long term. In the context of such a detailed assessment, the two matters identified by the Respondent are so minor as to be incapable of being material to the overall assessment.

23. Further, the matters relied upon by the Respondent conflict with the findings of fact of the Judge, which are not the subject of challenge, such that they are irrelevant considerations.

24. Ms Gilmore was unable to confirm that it ever been suggested to the Judge that the two elder sons of the Appellant's partner could provide care in the absence of the Appellant. Certainly, no such suggestion was made in the refusal decision of the Respondent. For that reason alone, the Judge cannot be criticised for not addressing the point.

25. The Judge accepted the evidence of the Appellant and his partner, together with the undisputed medical evidence, and there is no challenge to his reasons or conclusions in this regard. That evidence disclosed that the child's stepbrothers were, at the date of hearing, approximately 20 years old and 18 years old respectively. The medical care required by the child must be administered quickly and precisely because if not done in this manner, the child is unable to breathe. The child has difficulty eating and cannot speak. Taking these findings into account, the suggestion that these two young men could step into the shoes of the Appellant is far-fetched.

26. The suggestion that the child would be in no different a position, in terms of practical care, if the Appellant were deported than if he remained in the UK because the Appellant wanted to find employment, is wholly speculative. It takes no account of the multiple ways in which the Appellant and his partner could, as many families do, organise their

domestic lives and work commitments around the needs of their children nor of the fact the Appellant's desire to contribute financially to the family income is unlikely to prove possible given the needs of his son.

Ground 2

27. Any error in the assessment the public interest is not capable of being material, given that the finding that the effect of deportation would be unduly harsh on the Appellant's son was determinative of the proportionality assessment.

Decision on error of law

28. The decision of the First-tier Tribunal did not involve an error on a point of law and that decision shall stand.

Anonymity Order

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, and whilst recognising the importance of open justice, we make an anonymity order, given the sensitive medical information relating to the Appellant's partner and son. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

C Welsh

Signed Date 25 March 2022
Deputy Upper Tribunal Judge Welsh