IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-005919

First-tier Tribunal No: HU/52168/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 6 August 2023

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O H
(AMONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mrs A Nolan, Senior Home Office Presenting Officer
For the Respondent: Ms S Khan, Counsel

Heard at Field House on 21 July 2023

Although is an appeal by the Secretary of State, I shall refer to the parties as they were in the First-tier Tribunal.

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 and/or any member of his family, likely to lead members of the public to identify the appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a citizen of Jamaica born in 1973. His appeal against deportation was allowed on human rights grounds by First-tier Tribunal Judge Galloway ('the judge') on 6 October 2022. The Secretary of State appealed on the grounds that the judge erred in law in taking into account the appellant's offending behaviour when assessing whether the appellant's deportation would be unduly harsh. Further, the judge conflated the best interests of the children with the unduly harsh test. On the facts, the unduly harsh threshold was not met and the judge failed to give adequate reasons. Permission was granted by Upper Tribunal Judge Pickup on 19 January 2023 on the basis it was arguable the grounds went beyond mere disagreement with the judge's findings.

2. In November 1977, the appellant, aged 4, entered the UK for settlement with his mother. He has been convicted of a number of criminal offences and in November 2015 he was sentenced to two years' imprisonment for assault occasioning actual bodily harm ('ABH') on his then partner Ms U, with whom he has two children D and E. The appellant was given a 5 year restraining order and on 26 August 2016 a deportation order was signed.

3. The appellant appealed the refusal of his human rights claim and his appeal was dismissed by First-tier Tribunal Judge Davies on 24 October 2017. Judge Davies found the offence of ABH was serious and had taken place in front of the children D and E. He concluded that it was reasonably likely the appellant would commit further offences against women. Judge Davies found that the appellant did not have a genuine and subsisting relationship with D and E at that time and the appellant's removal to Jamaica would not be unduly harsh. Judge Davies also found that there were no significant obstacles to integration in Jamaica and no compelling circumstances.

4. In June 2019 and February 2020, the appellant made a protection claim and submitted further submissions on human rights grounds. These applications were refused and the appellant's appeal came before Judge Galloway on 5 October 2022. It is the appellant's case that the situation had dramatically changed since the decision of Judge Davies. The appellant is in a relationship with Ms D and their daughter Z was born in December 2020. He now has a genuine and subsisting parental relationship with D and E who have formed a sibling relationship with Z. D and E stayed with the appellant every other weekend and in the school holidays. Their mother, Ms U, is suffering from a serious and potentially fatal medical condition and D and E care for her. Due to the deterioration of Ms U's health, the appellant needed to provide greater support for D and E. The appellant relied on the unchallenged evidence from Ms J a social worker.

5. Judge Galloway found that the situation had significantly changed since the decision of Judge Davies. She concluded the risk of re-offending was now low and the appellant had a genuine and subsisting parental relationship with his children, Z, D and E. The judge considered the report of Dr L, a chartered psychologist, and attached significant weight to the evidence of Ms J, the appellant and his witnesses. The judge found that the appellant's deportation would be unduly harsh on his children.

6. The grounds do not challenge the judge's factual findings or the judge's assessment of the credibility of the appellant and his witnesses. The grounds submit the judge failed to apply the elevated threshold test and, taking the

appellant's claim at its highest, his deportation would not meet the test of unduly harsh.

Submissions

7. Mrs Nolan relied on the grounds of appeal and submitted the judge conflated the best interests of the children with the unduly harsh test and failed to apply the elevated threshold in HA (Iraq) v SSHD [2022] UKSC 22 at [41] and [44]:

> "41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "… '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."
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> "44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.

8. Mrs Nolan submitted there was no reference to this elevated test or why it was met. In respect of Z the judge found that it was not in her best interests to grow up without her father. This did not meet the elevated test. In respect of D and E, there was no medical evidence to support the judge's speculative finding that their mother may be hospitalised in the future and their grandparents would be unable to care for them. The judge found that the appellant's deportation was not in the best interest of the children. She failed to apply the elevated test of unduly harsh and exception 2 was not met.

9. Ms Khan submitted the decision was very detailed and well-reasoned. The grounds amounted to disagreements with the judge's findings. The judge set out the relevant test and applied it to her findings at [27] onwards. The risk of re-offending was re-visited at [41] in light of the change in circumstances since the previous decision. The judge considered the unduly harsh test at [42] to [46]. Reading the decision as a whole the judge did not conflate the relevant tests and gave adequate reasons for her conclusions.

10. The grandmother of D and E, Mrs B, gave evidence and the mother of D and E, Ms U, had written a supportive letter. There was medical evidence dated 5 February 2021 setting out Ms U's heart and lung problems. There was also the appellant's and Mrs B's evidence that Ms U had recently been admitted to hospital. Given Ms U's history and continued health problems and the advanced age of Mrs B and her husband, D and E were likely to need the appellant's continued support. There was evidence from the headteacher of D and E which showed that they required counselling when the appellant was in prison. There was evidence in the social worker's report that D and E provided a caring role for their mother when she passes out and they have had to call an ambulance. The emotional impact on D and E in coping with their mother's condition was the focal point of the social worker's report.

11. Ms Khan submitted the judge had taken into account all the evidence and given adequate reasons for why the unduly harsh test was met. She relied on Sicwebu v SSHD [2023] EWCA Civ 550 at [49]:

> "Appeals to this court from the Upper Tribunal are limited to appeals on a point of law: see section 14(1) of the Tribunals, Courts and Enforcement Act 2007. Absent an error of law, the appeal must be dismissed. Furthermore, as a specialist fact-finding tribunal, this court should not rush to find an error of law in the decision of the tribunal simply where it might have reached a different conclusion on the facts: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at paragraph 30. I have borne these principles in mind when considering the impugned decision in this case."

12. Ms Khan submitted the judge had placed the unduly harsh test at the centre of her decision and considered the specific circumstances of the case. The judge had taken into account all the evidence and her conclusions were open to her on the evidence before her.

13. In response, Mrs Nolan submitted there was nothing in [44] and [45] of the judge's decision which demonstrated that the judge applied the elevated threshold test and, taking the evidence at its highest, the appellant's deportation would not be unduly harsh.

Conclusions and reasons

14. I accept that the judge did not refer to HA (Iraq) in her decision, but I find that his was not material because on the undisputed facts found by the judge, the appellant's deportation would be unduly harsh on his children D and E. It is apparent from the analysis of the judge's decision set out below that the judge applied the relevant test to her findings of fact and there was ample evidence before her to meet the elevated threshold test of unduly harsh.

15. In her decision, the judge clearly set out the relevant test in section 117C(5) of the Nationality, Immigration and Asylum Act 2002, exception 2 at [15]. She heard evidence from the appellant, his partner Ms D, Mrs B (the maternal grandmother of D and E) and Ms J (the social worker) which she summarised at [17] to [22]. The judge found the appellant and his witnesses to be credible. The respondent did not cross-examine Mrs J the social worker. Mrs J was of the opinion that it would be difficult for anyone else to fulfil the appellant's parental role in light of the children's emotional needs. In particular, the anxiety of D and E in relation to their mothers' health and their role as carers, taking blood pressure, checking on her and sleeping with her.

16. The judge found the appellant's circumstances had significantly changed since the decision of Judge Davies. The appellant had unsupervised and overnight contact with D and E and facilitated their relationship with Z. This position had been expressly approved by social services. The report of Ms J was not before Judge Davies. The judge found Ms J to be an experienced, balanced and fair witness. The judge accepted her evidence that the appellant had a good relationship with his children and he had been a significant source of emotional support for D and E. The judge attached significant weight to Ms J's evidence and the letter from the headteacher of D and E. The judge found the separation of D and E and the appellant (when he was in custody) had a clear detrimental impact on the children's well-being.

17. The judge considered Ms U's medical condition and took into account the letter from her GP and GP notes disclosed with her consent. Ms U was diagnosed at an exceptionally young age with cardiomyopathy and coronary artery disease which requires life-long medication and monitoring. She accepted Ms J's evidence that D and E were young carers who were understandably anxious about their mother. The judge accepted the appellant supported his children and would be there for his children if Ms U was unwell. The judge found Ms U's health difficulties have significantly increased and she required regular periods of hospitalisation. Mrs U wished for D and E to have contact with the appellant should anything happen to her. The judge found the appellant was in a genuine and subsisting relationship with Z, D and E and focussed on this relationship in the remainder of the decision, having noted that she could afford little weight to the appellant's relationship with Ms D: [37] and [38].

18. The judge then went on to consider whether the risk of re-offending should be reconsidered and concluded at [41] that the risk was low. She was of the view this was a relevant consideration when considering the best interests of the children because the assault on Ms U took place in front of the children. The judge took into account the expert report of Professor S, a forensic psychiatrist.

19. At [42] to [46] the judge considered the best interests of the children as a primary consideration and considered all the evidence in the round. She concluded that the appellant played a pivotal role in supporting D and E in caring for their mother. D and E relied on the appellant for respite from their role as young carers and for emotional support. The judge accepted Ms J's evidence that the role played by the appellant could not readily be replaced.

20. The judge found on the totality of the evidence that the appellant's deportation would be unduly harsh and she gave adequate reasons for her conclusions at [45]. On the facts found by the judge, the appellant meets the requirements of exception 2 in section 117C(5) of the 2002 Act.

21. I am not persuaded the judge erred in law in allowing the appellant's appeal on human rights grounds for the following reasons. I find the risk of re-offending was relevant to the best interests of the children given the offence of ABH took place in front of the children, D and E. The judge's finding at [41] was not contrary to KO (Nigeria) v SSHD [2018] UKSC 53 as alleged in the grounds of appeal.

22. On reading the decision as a whole, it is apparent the judge considered the best interests of the children as a primary consideration alongside the other evidence in concluding that the appellant's deportation would be unduly harsh. There was medical evidence of Ms U's condition supported by evidence from the appellant and Mrs B. The judge was entitled to place significant weight on the opinion of Mrs J and gave cogent reasons for doing so. There was no challenge to the credibility of the witness and the judge accepted the evidence of Mrs B that she and her husband would struggle to care for D and E should anything happen to Ms U.

23. I am satisfied that the judge took into account all relevant evidence and applied the elevated threshold test to her findings of fact. I find there was no material error of law in the decision of 6 October 2022 and I dismiss the appeal.

Notice of Decision

The Secretary of State's appeal is dismissed

J Frances
Judge of the Upper Tribunal
Immigration and Asylum Chamber

25 July 2023