Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19757/2018**

THE IMMIGRATION ACTS

Heard remotely at Field House
On the 24th May 2021 *via Teams*

Decision & Reasons Promulgated
On the 16th June 2021

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

The Secretary of State for the Home Department

Appellant

and

DN (VIETNAM)
(ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:
For the Appellant: Mr S. Whitwell, Senior Home Office Presenting Officer
For the Respondent: Ms L. King, Counsel, instructed by Qualified Legal Solicitors

DECISION AND REASONS (V)

This has been a remote hearing which has been consented to / not objected to by the parties. The form of remote hearing was V (video). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing.

The documents that I was referred to were primarily those that were before the First-tier Tribunal, plus the grounds of appeal, written submissions, and the judgment of the First-tier Tribunal, the contents of which I have recorded.

The order made is described at the end of these reasons.

The parties said this about the process: they were content that the proceedings had been conducted fairly in their remote form.

1. This is an appeal by the Secretary of State. For convenience, I will refer to the parties using the terminology from before the First-tier Tribunal, unless otherwise stated.

2. The Secretary of State appeals against a decision of First-tier Tribunal Judge Swaney promulgated on 23 October 2019. The judge allowed an appeal by the appellant, a citizen of Vietnam born in June 1980, against a decision of the Secretary of State dated 18 September 2018 to refuse his human rights claim and to deport him from the United Kingdom.

Factual background

3. The appellant entered the United Kingdom unlawfully in November 2003. He claimed asylum but absconded and his claim was refused. On 20 October 2007, he was convicted of being concerned in the production of what was then a Class C controlled drug, namely cannabis, and sentenced to 14 months' imprisonment. He made a further claim for asylum on 19 December 2007. That claim was refused and subsequent appeals against it were dismissed. The appellant was deported from the United Kingdom on 5 August 2008 pursuant to his conviction. He claims to have re-entered in 2009. His re-entry was in breach of the deportation order.

4. The appellant's human rights claim under consideration in these proceedings was made in the form of a request to revoke the deportation order made against him in 2008. The appellant is married to a British citizen and they have two sons together, TN, born in 2011, and HN, born in 2015. The appellant's wife has a daughter from a previous relationship, who was aged 14 at the time of the hearing before the First-tier Tribunal. It was common ground below that the appellant enjoys a genuine and subsisting parental relationship with all three children. The judge below referred to all three children as being the appellant's, and I see no reason to adopt a different approach.

5. In 2018, HN received speech and language therapy for delayed speech development. By the time of the hearing below, he continued to receive support from his school, including weekly visits from a speech and language therapist, and was being monitored by the paediatric service on a six-monthly basis. The judge outlined the treatment HN had received at [72].

6. In unchallenged findings of fact, the judge found that it would be unduly harsh for the appellant's wife and three children to relocate with him to Vietnam. The judge allowed the appeal on the basis that the appellant met the requirements of "Exception 2" contained in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), on account of her findings that it would be unduly harsh for the appellant's wife and children, in particular HN, to remain here without the appellant.

7. Before reaching that conclusion, the judge made findings concerning the best interests of the three children. She did so on the basis of a report from an independent social worker and a country expert. Although the judge had some concerns about aspects of the independent social worker's report, she accepted that the report's analysis concerning the children's circumstances in this country attracted weight. At [46], she accepted the report's conclusion that it was in the best interests of the children to remain in this country, and to be raised by both parents. There has been no challenge by the Secretary of State to that assessment. At [47], the judge directed herself that simply because the best interests of the children concerned were to be raised by both parents in this country, that was not determinative of the outcome of the appeal.

8. The judge reached a number of findings of fact which have not been challenged by the Secretary of State. At [76], she found that the appellant was the primary carer for all three children. Having found that all three children would suffer considerable distress in the event of the appellant's deportation, she identified that the question for her consideration was whether the children would suffer harshness going beyond that which would be "due" or otherwise expected in the event of the deportation of a parent.

9. The judge found at [79] that HN's speech and language therapy, and the pivotal role played by the appellant in meeting his speech and language needs through providing support recommended by the therapists, meant that the impact of the appellant's deportation would go beyond that which would normally be expected in the event of the parent being deported. In that paragraph she held:

> "[HN] has specific needs as a result of his diagnosis of speech and language delay, social anxiety and other delay. His particular circumstances place him outside the normal range of normal expectations about children facing the deportation of a parent."

10. At [80], the judge identified that HN's needs were to receive ongoing support, from the appellant. His needs included the opportunity to associate with other children and to be provided with language support at home. The judge found that it was the appellant who was responsible for engaging with professionals and HN's school. It was the appellant who identified concerns with HN's speech initially, and it had been the appellant who attended all sessions with professionals in order to acquire techniques and methods to practice with his son at home. The judge found that it was the appellant who provided his son with the social opportunities outside school hours recommended by the speech therapists. The appellant's wife works full time in two roles. The judge went on to say:

> "…it is true that the appellant's wife could reduce her hours in order to better meet the needs of her son. The evidence before me to which I have referred suggests that she has not to date been involved in his speech and language development. While it may well be the case that she could fill the appellant's shoes, the evidence demonstrates that the appellant has been showing various techniques over numerous sessions and over a

> period of time. It appears reasonably likely that she will not immediately be able to provide the same level of support as the appellant. I am satisfied that the appellant's absence will have a detrimental impact on the appellant's son's development and that in his particular circumstances the effect of the appellant's deportation on him would be unduly harsh."

11. The judge allowed the appeal on the basis that Exception 2 was met on account of the unduly harsh impact on HN remaining in this country.

Permission to appeal

12. Permission to appeal was granted by First-tier Tribunal Judge Shimmin on three grounds. First, that the judge erred in her assessment of the "unduly harsh" test concerning HN's speech and language development. The reasons given by the judge failed to identify how the harsh, severe or bleak threshold identified in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC) at [46] was met. Secondly, that the judge was wrong to conclude that HN's speech and language needs placed him outside the normal range of normal expectations concerning children facing the deportation of a parent, in light of the approach of the Court of Appeal in *Secretary of State for the Home Department v PG (Jamaica)* [2019] EWCA Civ 1213. Thirdly, the judge failed to identify the support that could be available to the appellant's son from the social services, contrary to the approach of the Court of Appeal in *BL (Jamaica) v Secretary of State for the Home Department* [2016] EWCA Civ 357 at [53], where it was said:

> "The UT were entitled to work on the basis that the social services would perform their duties under the law and, contrary to the submission of Mr Rudd, the UT was not bound in these circumstances to regard the role of the social services as irrelevant."

Submissions

13. The Secretary of State provided a skeleton argument dated 30 March 2020 drafted by a Mr A. McVeety of the Secretary of State's Specialist Appeals Team. The appellant provided a rule 24 response on 24 February 2020 and made written further submissions on 11 June 2020. In addition, Mr McVeety wrote to the Tribunal on 15 June 2020 to respond to paragraph 33 of the appellant's further written submissions, concerning the issue of whether HN would be face "neglect" in the event of the appellant's deportation, to clarify the Secretary of State's position. Nothing turns on this point of clarification and I need not address it any further.

14. At the hearing before me, Mr Tufan summarised the Secretary of State's position as being primarily a sufficiency of reasons challenge to the judge's finding that it would be unduly harsh for HN to remain here without the appellant. In addition, the availability of social services was a material consideration that the judge failed to take into account.

15. Very fairly, Mr Tufan said that he no longer relied on the ground of appeal that the facts as found by the judge were incapable of taking the impact on the appellant's

deportation on HN outside the range of the "normal" consequences to deportation, in light of *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176.

16. Ms King submitted that the judge identified the correct test for the relevant exception to deportation, applied it correctly, and gave sufficient reasons for her conclusion. The Secretary of State's grounds of appeal were, Ms King submitted, no more than a disagreement with the rational findings of the judge that were properly open to her to reach.

Legal framework

17. The Secretary of State has not challenged the judge's self-direction as to the law at [36] to [40] of her decision. The essential statutory provision is section 117C of the 2002 Act, which sets out statutory exceptions to the principle that the deportation of foreign criminals – such as this appellant – is in the public interest. Exception 2 is relevant in these proceedings:

> "(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."

18. Parliament has legislated to the effect that, if the above exception is met, the public interest does not require the deportation of a foreign criminal.

Discussion

19. Properly understood, and as focussed on by Mr Tufan in his oral submissions, the Secretary of State's primary ground of appeal is a sufficiency of reasons challenge. In light of *HA (Iraq)*, the Secretary of State no longer contends that the facts of this case were incapable of taking the impact of the appellant's deportation outside the territory of the "normal" impact of deportation on children. The question for my consideration under the first ground of appeal is whether the judge gave sufficient reasons for her finding that the impact of the appellant's deportation on HN would be "unduly harsh".

20. In *English v Emery Reimbold & Strick Ltd. (Practice Note)* [2002] EWCA Civ 605, the Court of Appeal gave guidance as to the concept of sufficiency of reasoning. At [19] it said:

> "… if the appellate process is to work satisfactorily, the judgment must enable the appellate court to understand why the Judge reached his decision. This does not mean that every factor which weighed with the Judge in his appraisal of the evidence has to be identified and explained. But the issues the resolution of which were vital to the Judge's conclusion should be identified and the manner in which he resolved them explained. It is not possible to provide a template for this process. It need not involve a lengthy judgment. It does require the Judge to identify and

> record those matters which were critical to his decision. If the critical issue was one of fact, in may be enough to say that one witness was preferred to another because the one manifestly had a clearer recollection of the material facts or the other gave answers which demonstrated that his recollection could not be relied upon."

21. And at [118]:

> "…an unsuccessful party should not seek to upset a judgment on the ground of inadequacy of reasons unless, despite the advantage of considering the judgment with knowledge of the evidence given and submissions made at the trial, that party is unable to understand why it is that the Judge has reached an adverse decision."

22. In *Jones v First Tier Tribunal & Anor (Rev 1)* [2013] UKSC 19 (17 April 2013), [2013] 2 AC 48, the House of Lords held, at [25]:

> "It is well established, as an aspect of tribunal law and practice, that judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined. The appellate court should not assume too readily that the tribunal misdirected itself just because not every step in its reasoning is fully set out in it."

23. The strongest feature of Mr Tufan's submission concerning the sufficiency of the judge's reasons may be found in [73] of the judge's decision, where she made the following finding, in the context of reaching her (unchallenged) findings that it would be unduly harsh for the children and HN to accompany the appellant to Vietnam:

> "There was no evidence to support [counsel for the appellant's] submission that any of the difficulties [with HN's speech] were particularly serious."

24. On a superficial reading, the above finding of the judge can be difficult to reconcile with her later findings that the very same speech and language conditions experienced by HN lie at the heart of her operative finding that the appellant's deportation would be unduly harsh for HN. However, I recall that an appellate tribunal should be slow to assume that the tribunal below misdirected itself simply because every step in its reasoning was not set out: see *Jones*, at [25]. In any event, the judge's analysis at [73] was directed at the ability of HN to adapt to life in Vietnam, and the linguistic challenges that that would present under that scenario. That, of course, would be a scenario in which HN would be accompanied by the appellant, with the benefit of the speech therapy coaching and assistance he provides in this country; there would be no interruption. It was in that context that the judge found that HN's speech and language conditions were not such as to be regarded as particularly serious, but those were findings reached as part of the judge's broader unchallenged analysis that it would be unduly harsh for the children to accompany the appellant to Vietnam. The judge simply found that, in the context of the "go" scenario (that is, if HN and the family were to accompany the appellant to Vietnam),

HN's speech conditions were not so serious that they would render the appellant's deportation unduly harsh in isolation. That is an entirely different matter to the position, as found by the judge, in relation to HN staying here without the appellant, as set out below.

25. In my judgment, bearing in mind the restraint with which an appellate court or tribunal should approach the scrutiny of reasons given by a tribunal below, the judge's reasons for finding that the appellant's deportation would be unduly harsh on HN for him to remain here without the appellant were tolerably clear. The judge reached unchallenged findings relating to the best interests of all three children were for the appellant to remain in this country. She correctly identified that that was not dispositive of the appeal. She went on to identify how the appellant attended HN's language assessments and had been identified in the care plan as being responsible for implementing the strategies identified at home. She recognised that there was no indication of the severity of the conditions, but did note that they were sufficiently concerning to warrant intervention and ongoing monitoring [73]. She reached a further unchallenged finding of fact that the appellant was HN's primary carer [76], and that the fact of HN's conditions place him outside the territory of "any other child facing the prospect of a parent being deported" [79].

26. I pause here to observe that, as the decision of the First-tier Tribunal pre-dates the clarification of the law provided by *HA (Iraq)*, the judge is not to be criticised for interpreting the Supreme Court's judgment in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, in particular at [23], as meaning that there was a benchmark of what amounts to a "normal" impact of deportation. That is not the case: see Underhill LJ at [56] of *HA (Iraq)*:

> "How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'."

27. At [80], the judge found that it was the appellant who was responsible for providing HN with the care and assistance that he needs. Significantly, the support required by HN was much broader than that provided in the context of formal speech therapy sessions provided to HN by the health service or at school. The speech therapy treatment received by HN, under the appellant's parental supervision, was in order to identify treatment needs, and the steps that would be necessary for such treatment to be provided, by the appellant, in the home following the guidance given by the relevant professionals. For that to take place, the appellant needed to improve the interaction between HN and other English-speaking children, which the judge found was the appellant's responsibility. Although it would be possible for HN's mother, the appellant's wife, to reduce the hours she worked, that would provide a lesser level of provision. The judge found that would have a detrimental impact on the appellant's son's development and that, in the particular circumstances of the case, that impact would be unduly harsh.

28. It is nothing to the point, as submitted by Mr Tufan, that the judge did not dwell in further depth on the ability of the appellant's wife to assume his role in his absence.

The decision must be read as a whole; the wife/mother works in two jobs full time, with two young children and a daughter who was 14 at the time of the hearing. The appellant was found to be the primary carer for the children. HN clearly had a degree of acquired speech therapy expertise, and the judge found that the wife would not immediately be able to assume the appellant's role. Plainly that conclusion was open to the judge, as her unchallenged finding at [80] was that the appellant's wife had not to date been involved in HN's speech therapy. She also found that the children all enjoy a strong attachment with the appellant, and would suffer considerable distress if he were to be removed, which is a factor unaffected by his wife's ability to reduce her hours.

29. It is clear to the reader of the decision the basis upon which the judge reached her findings. Her analysis was set out sequentially and in building blocks. It is tolerably clear. The reader of the decision is able to understand why the judge reached the operative conclusion that she did. The considerable distress the children would inevitably experience in the event of the appellant's deportation would be augmented by HN's conditions and the particular impact he would suffer in the event of the appellant's deportation. The submission that the judge failed to give sufficient reasons is without merit.

Social services

30. The remaining ground of appeal is that the judge failed to address the potential role of the relevant social services in meeting HN's needs in the event of the appellant's deportation. This submission is without merit. It is new point, being raised for the first time on appeal. It was not canvassed below. This submission also fails to engage with the nature of the care provided by the appellant; it is round-the-clock, day-to-day speech therapy assistance, provided to HN by his father. It includes a focus on engaging with other children of a similar age. There was no evidence before the judge which could rationally have permitted her to conclude that the speech therapy needs of HN currently provided by the appellant could adequately be replaced by the relevant social services.

31. The grounds of appeal's reliance on *BL (Jamaica)* is misplaced; there the Court of Appeal was concerned with the ability of a family to cope in the absence of BL as a consequence of his deportation, in part due to the claimed likelihood that BL's partner, KS, would not be able to manage her money or control her alcohol consumption. Having been sentenced to four years' imprisonment, BL was in the most serious category of foreign criminals, and would only be able to demonstrate that the public interest would not require his deportation if he were able to demonstrate "very compelling circumstances" over and above the two exceptions in section 117C of the 2002 Act. There was evidence that the family had coped while BL had been imprisoned when serving a sentence of four years, and while he had been in immigration detention. There was no evidence that the family would fall into poverty, and, if they did, it was in that context that the relevant social services could be expected to have assisted. That is an entirely distinct scenario to that in the present matter where the issue for the judge was whether the elevated threshold of

"unduly harsh" was met by reference to HN's particular needs, when taken with the judge's remaining (and unchallenged) findings that all three children had formed a strong attachment to the appellant and would suffer considerable distress following his deportation. The criticism of the Upper Tribunal in *BL (Jamaica)* turned on the facts of the case and did not seek to establish the proposition for which the Secretary of State relies upon it.

Conclusion

32. In conclusion, while not all judges would have found that this appellant's deportation would be unduly harsh on HN, Judge Swaney gave tolerably clear reasons for her conclusion that it would be unduly harsh for HN to remain here in the absence of the appellant. It was not an error of law not to consider the "safety net" of the potential availability of social services, in light of the particular nature of HN's requirements, especially given it was not raised below.

33. The decision of the First-tier Tribunal did not involve the making of an error of law.

34. I maintain the anonymity direction already in force.

Notice of Decision

This appeal is dismissed.

The decision of the First-tier Tribunal did not involve the making of an error of law such that it must be set aside.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Stephen H Smith*
Upper Tribunal Judge Stephen Smith

Date 2 June 2021