



**Upper Tribunal  
(Immigration and Asylum Chamber)      Appeal Number: HU/00097/2021  
UI-2021-000701**

**THE IMMIGRATION ACTS**

**At: Field House  
On: 17<sup>th</sup> May 2022**

**Decision & Reasons Promulgated  
On: 19<sup>th</sup> October 2022**

**Before**

**MRS JUSTICE HILL  
UPPER TRIBUNAL JUDGE BRUCE**

**Between**

**Secretary of State for the Home Department**

Appellant

**And**

**Marlon Nicholas Lewin  
(no anonymity direction made)**

Respondent

**For the Appellant: Ms Willocks-Briscoe, Senior Home Office Presenting Officer**

**For the Respondent: Ms Bennett, by Kesar & Co**

**DECISION AND REASONS**

1. The Respondent is a national of Jamaica born in 1978. On the 3<sup>rd</sup> August 2021 the First-tier Tribunal (Judge Bird) allowed his deportation appeal on human rights grounds. The Secretary of State now has permission to appeal against that decision.

## Background and Matters in Issue

2. The Respondent arrived in the United Kingdom on the 15<sup>th</sup> September 2000 with leave to enter as a visitor. His leave was thereafter varied and on the 1<sup>st</sup> June 2006 the Appellant was granted indefinite leave to remain.
3. The reason that the Secretary of State now intends to deport the Appellant is that on the 3<sup>rd</sup> February 2020 he was convicted of assault, and possession of Class A drugs with intent to supply. He was sentenced to four years imprisonment. The deportation order was signed on the 23<sup>rd</sup> December 2020.
4. In his appeal to the First-tier Tribunal the Respondent submitted that in the 20+ years he has spent in the UK he had an established family and private and that it would be disproportionate to interfere with them now. In particular he relied upon his relationship with his current partner and their daughter.
5. The Tribunal duly recorded that the Respondent has twice been convicted of a criminal offence. In 2006 he received a sentence of 4 months' imprisonment, suspended for 12 months, and then in 2020 he committed the index offences and was sent to prison for 4 years. He has also received a police caution for possession of drugs. He is, accordingly, a "serious offender" and under the scheme set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 he must show that there are "very compelling circumstances over and above" one of the exceptions in s33 of the Borders Act 2007 being engaged. The Tribunal directed itself to the dicta of Lord Wilson in Kiarie and Byndloss [2017] UKSC 42 regarding the very strong public interest in the deportation of such offenders, and that only very compelling reasons could outweigh that: the test imposes a "formidable hurdle".
6. Having heard the evidence Judge Bird made the following findings of fact:
  - The Respondent has lived lawfully in the UK for over 20 years and has had ILR since 2006
  - He has worked and paid taxes throughout that time. He has never been reliant on public funds
  - A psychiatric assessment of the Respondent conducted whilst he was in prison found him to have a mental and behavioural disorder, but his risk to others to be low
  - The Respondent is in a genuine and subsisting relationship with his partner, W
  - W was born in Jamaica but has lived in the UK since she was 12 and is now a British citizen

- Together they have a daughter, D, who was born in May 2017. The Respondent has a genuine parental relationship with his daughter
  - D was born prematurely with a birth weight of 2lb. She has significant developmental needs and autism. She has limited verbal communication, difficulty in regulating her emotions, tantrums and problems in socialising with other children
  - D has been found by Paediatrician Dr Ian Johnston to have a Moderate Learning Disability (MLD) but that diagnosis is complicated by her autism. She has no sense of danger and will for instance, “run off”. She is excessively distressed by loud noises and experiences significant sleep onset disruption, with it taking 3-4 hours per night for her to settle down and get to sleep
  - The demands of caring for D are high. W suffered from post-natal depression after she was born, and when the Respondent was in prison W found caring for D alone extremely challenging: it took a toll on her own emotional and mental health. Independent professional assessments by both a clinician and a social worker have concluded that W is only able to provide a basic level of care for D on her own
  - If W is required to care for D alone there will be a further deterioration in her own mental and physical health
  - Although another adult could theoretically help, the challenging nature of caring for D means that the commitment of such a third party would need to be considerable
  - Because of D’s communication difficulties there is no prospect that she would be able to maintain a relationship with her father over the telephone. His deportation would effectively bring an end to their relationship
  - It is in D’s best interests that she is cared for by both of her parents
  - Were W to be left to care for her alone there is a risk that W will have to give up her job, and that the family home could be at risk as she would be unable to keep up with the mortgage repayments. The family would become reliant on state benefits
  - There would also be a risk that W’s mental health could deteriorate to the extent that D would have to be placed in care, which would be contrary to her best interests
  - There is a strong probability that W will not be able to cope on her own
7. Applying those findings to the legal framework in Part 5A of the 2002 Act Judge Bird began by recognising the public interest in the

deportation of serious offenders. She notes the significant harm caused to society by drug offences. Against that she weighs the findings of fact relating to the negative impact that deportation would have on this family, as summarised above. Her ultimate conclusion, expressed at her paragraph 113, is that the deportation of the Respondent would have “devastating” consequences for this family. On that basis she found the test at section 117C(6) of the 2002 Act to be made out and allowed the appeal.

8. The Secretary of State submits that in reaching her conclusions on the consequences of deportation the Judge failed to give adequate reasons, and/or failed to take material matters into account.

### **Discussion and Findings**

9. We are grateful to the parties for their careful preparation and submissions. We are not however satisfied that the decision of Judge Bird is flawed for any error of law such that it should be set aside.
10. There can be no dispute that the Tribunal properly directed itself to the correct legal test, and applied that test throughout its reasoning: although the Secretary of State disputes the outcome, she does not contend otherwise. Rather her challenge relates to the Tribunal’s findings on the facts. Before we turn to address the specific arguments raised before us we make two observations. First, we note that the skeleton argument prepared by Ms Willocks-Briscoe, and her oral submissions, ranged considerably wider than the original grounds. We have nevertheless considered all the arguments that she carefully put. Second, both grounds and skeleton take implied issue with the Tribunal’s “wholesale” acceptance of expert evidence tendered by two witnesses, paediatrician Dr Johnson, and Independent Social Worker (ISW) Mr Beckwith. This is unfortunate since it is apparent from the First-tier Tribunal’s recitation of the submissions made before it that no challenge was made to those reports at the hearing. Nor did the Presenting Officer on the day, Mr Ojo, seek to adduce any evidence that might counter the conclusions reached by those experts. Similarly it was not evident from the submissions of the Secretary of State before the First-tier Tribunal – or indeed before us – that any challenge was made to the evidence of W, who was found to be wholly credible. It is against that background that we have considered the arguments put, as follows.

### *Communication*

11. The first issue is whether the Tribunal erred in finding that the relationship between father and daughter could not realistically be maintained should the Respondent be deported. At its paragraph 103 the Tribunal said this:

“I find that because of the autism and developmental needs of [D] any meaningful communication and maintenance of family life with her father from abroad would cease. There is evidence to show that she is unable to communicate on the telephone. For all intents and purposes any family life that should exist between a child and its father will be brought to an end”.

12. That finding, of a complete nullification of family life with a vulnerable child, lies at the heart of Judge Bird’s decision. Ms Willocks-Briscoe accepts that the point about telephone contact may have been correct on the evidence, but contends that this was only half the story: she submits that there was nothing in the evidence to indicate that the child could not communicate with her father via video call. She submits that there was evidence that the child responds positively to seeing photographs of her father, and that it can from this be inferred that she would like to see him on a video call.
13. Ms Willocks-Briscoe is right to say that the concern expressed by the ISW Mr Beckwith about communication was limited to audio calls. This may well be, as Ms Bennett points out, because that is what was happening in the time he prepared his report: the Respondent was then in prison and video calls were not available to him. Although Mr Beckwith does not therefore offer any direct opinion on the child’s ability to engage with a video call, he does note that her sensory processing problems mean that she will only watch television programmes with music. If there are any spoken words she will turn the sound down. She is unable to verbally communicate if she is feeling distress or discomfort and can only be comforted physically, by cuddling. Dr Johnston records that the child is unable to make eye contact, and is unable to recognise the meaning of facial expressions in others. If the evidence that D is happy to see a photograph of her father should have led the Judge to consider whether she could use a video call, this was all evidence strongly pointing the other way. There are repeated references in the evidence to the child’s difficulties in communication and how distressing this can be for her as well as those who care for her. The Secretary of State did not seek to adduce her own evidence about the ability of this child, nor indeed similarly situated autistic children, to maintain relationships via video call. She cannot therefore now complain that the Judge followed the only evidence that was before her, all of which reasonably led her to the conclusion that she reached.

W

14. The medical evidence about W was that she had suffered from endometriosis and migraines all of her adult life and that investigations had revealed her to have lesions in her brain. She had suffered from post-natal depression and it was her own credible evidence that she was finding it extremely difficult to cope whilst the

Respondent was in prison. At the date of the appeal W had recently been investigated for multiple sclerosis because she was experiencing numbness on her left side and tremors in her hands: she had been advised that she was clear of that disease but rather the symptoms she was experiencing resulted from “extreme stress”. Consultant Psychiatrist Dr Ranbir Singh found her to meet the full diagnostic criteria for Adjustment Disorder “with prominent disturbance of other emotions such as anxiety, depression, worry and tension. She is struggling to adjust to her current life circumstances”. Although he did not consider that there would be an acute risk of suicide or self-harm should the Respondent be deported, it is likely that W’s resulting low mood would “affect her physical health recovery and quite possibly worsen it”. In his report Dr Johnston sets out the extremely challenging nature of D’s condition. When asked whether he thought that W would be able to cope as a single mother in the long term his answer was “no, certainly not at a consistent and optimum level”. ISW Mr Beckwith noted that W’s severe migraines in turn contributed to lethargy and low mood which further inhibited her ability to properly care for D. She was experiencing anxiety and stress around work, and found that this impacted on her sleep, meaning that she was yet further exhausted.

15. Conversely, Mr Beckwith’s report details how the Respondent was able to support W after the birth of D when she was suffering from post-natal depression: W reported to Mr Beckwith that he was “extremely supportive on both a practical and emotional level. He would take responsibility for cooking, cleaning, washing and looking after [D] allowing her to rest”. Dr Singh records how the Respondent’s absence has impacted on W’s previously “exceptional” performance at work, not just because W is exhausted, but for instance because she is late in when D refuses to go to nursery. Dr Johnston finds that D’s demands on her carers are “significantly more than typical” and that “a second adult would ease the caring burden considerably”.
16. It was against this background that the Tribunal found that the Respondent’s removal would likely have a negative impact on W’s mental and physical health and ability to look after their daughter. The grounds of appeal are that the First-tier Tribunal has given “no explanation” for that conclusion. This is a submission wholly without merit. The decision sets out the reports of the experts in some detail, and goes on to state in clear terms why that evidence leads the Tribunal to the conclusions that it does. It simply cannot be said that the reader is left in the dark as to why this finding was made. As the preceding paragraphs illustrate, the evidence was such that the First-tier Tribunal was plainly entitled to reach the conclusion that it did; given that the evidence itself was unchallenged it might even be said that it was in fact the only rational conclusion that the Tribunal could have come to.

*Third Party Assistance*

17. The Secretary of State's case before the First-tier Tribunal was that W could, in the absence of the Respondent, be assisted by family, friends, or the state. Judge Bird rejected that contention. Her findings in this respect are now challenged on the ground that they are not "adequately reasoned".
18. Again, we find this reasons challenge to be wholly without merit. Judge Bird expressly did consider alternative sources of support for W. She directs herself to the relevant paragraphs in the refusal letter that make this point [at her 16]; she records where the matter was investigated during the live evidence [29, 33, 38, 39]; she notes the submissions made by the HOPO [47-49] and then at [99-100] reaches her conclusions:

"At the hearing it was suggested by Mr Ojo on behalf of the Respondent that another adult could help her. Whilst this is a feasible alternative in normal circumstances, one has to keep in mind that in the case of [D] who is on the autistic spectrum and has other developmental challenges, the commitment required of a third party would be considerable.

It would require managing the child when taken out in the way described by her mother and having to be extra vigilant as the child has no idea of her safety and tended to run off (reports of Dr Johnston and Mr Beckwith). The third party would be required to deal with the child's emotional tantrums in the home and outside. They would also be required to deal with the 3 hours required in the morning to put the child to bed as well as the 90 minutes required to get the child ready in the mornings".

19. We are satisfied that her reasoning here is perfectly clear. The demands of caring for D are such that only the most committed of third parties could be counted on: as it is put in the decision, "she could not be left with just anyone". The evidence before the Tribunal did not indicate that any such candidate existed. It was the accepted evidence of the witnesses that W's mother was herself unwell and that her sisters worked and had their own families to care for. Crucially the times that W needed the most help - in the morning and evening getting D ready for the day and bed respectively, were not times that these busy working mothers would be likely to be available. We further note from the evidence of Dr Singh that two of W's sisters are themselves autistic. One of them is also registered blind, and their mother is her registered carer: it is difficult to see what meaningful long term assistance this lady could therefore offer in also caring for her granddaughter.
20. It was perhaps in recognition of this evidence that Ms Willocks-Briscoe concentrated her submissions on the possibility that social services would be able to assist. We were asked to have regard to the

fact that W had not yet even approached them to see what help they could offer. This was of course something of a Catch-22 as far as the family were concerned, since at the date of the hearing they were living together (the Respondent having been released on licence back to the family home). It seems to us unlikely that social services would spend precious resources on conducting a speculative assessment of the notional needs of the single-parent unit of W and D in circumstances where the child's father was currently living in the family home and assisting to meet his daughter's needs. The Tribunal did however have the benefit of the report by the ISW Mr Beckwith, who has been a social worker for 37 years; Mr Beckwith spent 6 of those years as team manager for a local authority team of professionals dealing with all aspects of child care and children in need, and has chaired child in need reviews. He was accordingly well placed to comment upon the possible outcome here, which was the possibility that in view of the "already overstretched" children's services D would simply end up in care.

21. That conclusion was, it appears to us, an uncontroversially realistic one. We would however note that this issue was not of great material relevance on the facts of this case. This is not simply a case of a child with physical needs that could be met by a nurse, or carer, or support worker. This is a child with particular emotional and developmental challenges which leave her feeling extremely distressed and frightened if she is not given reassurance in the form of hugs and love from those who know her best. The evidence all indicated that that support was best given by her parents, and as we have said, it is her need for both her *parents* that is at the heart of the First-tier Tribunal's decision.
22. For those reasons we find that Judge Bird's decision was open to her on the evidence. On the exceptional facts of this case she was entitled to find the very high threshold met, and her findings are clear and well-reasoned. We would also note that there were yet other matters capable of weighing in the Respondent's favour that play no part in Judge Bird's s117C balancing exercise: his own difficult personal history, the other family members he has here, and his very long lawful residence in the UK.

### **Decision**

23. The decision of the First-tier Tribunal is upheld and the Secretary of State's appeal dismissed.





**Appeal Number: HU/00097/2021  
UI-2021-000701**

Upper Tribunal Judge Bruce  
18th

May 2022