Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17002/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 January 2022	**On 27 January 2022**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE MONSON

Between

LOUIS DIELLIVER VALLIANO SIMON
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr C Rahman, Counsel, instructed by Okafor and Co Solicitors
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is the re-making of the decision in the Appellant's appeal following the previous decision of a panel of the Upper Tribunal (comprising Mr Justice Saini and Upper Tribunal Judge Norton-Taylor), promulgated on 4 November 2021, by which it concluded that the First-tier Tribunal had materially erred in law when allowing the Appellant's appeal against the Respondent's refusal of his human rights claim made in the context of

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deportation proceedings. The error of law decision is appended to this re-making decision and both decisions should be read together.

2. In summary, the First-tier Tribunal had allowed the Appellant's appeal on Article 8 grounds because it concluded that it would be unduly harsh for his partner and child to go and live in Mauritius with him, that it would also be unduly harsh for them to be separated, and that the circumstances as a whole were very compelling. The panel decided that the First-tier Tribunal had failed to provide adequate reasons in respect of both limbs of the unduly harsh assessment, particularly in respect of the partner's medical condition, and these errors fatally undermined the very compelling circumstances conclusion with respect to section 117C(6) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"). The First-tier Tribunal's decision was set aside, although findings made in respect of the Appellant's private life and the exception contained within section 117C(4) of the 2002 Act were expressly preserved.

3. The core issues in respect of the resumed hearing were identified as being: (a) firstly, whether both limbs of the unduly harsh assessment could be satisfied at all; and (b) whether there were very compelling circumstances in the Appellant's case over and above those described in the exceptions set out in sections 117C(4) and, in particular 117C(5) of the 2002 Act.

Background

4. The Appellant is a citizen of Mauritius, born in 1997. He arrived in the United Kingdom in 2008 as a visitor aged 10 years and 11 months. He subsequently became an overstayer and a number of attempts to regularise his status were unsuccessful. On the day of his 18th birthday the Appellant committed a number of serious offences, all linked to a particular incident in his local area. Having contested a trial he was convicted in April 2016 of robbery, wounding with intent to commit grievous bodily harm, and possession of an offensive weapon in public. He received concurrent sentences of 3 years for the first offence, 5 years for the second, and 12 months for the third. The convictions and sentences obliged the Respondent to initiate deportation proceedings pursuant to the UK Borders Act 2007 and a deportation order was signed on 14 October 2017. In response, the Appellant made a human rights claim in February 2018. In this he relied on his ties in the United Kingdom and claimed lack of connections to Mauritius.

5. By the time his case went before the judge following the Respondent's refusal of the human rights claim, the Appellant was relying in large part on family life under Article 8 ECHR. He claimed to be in a genuine and subsisting relationship with a British citizen, JL, and their British daughter, who had been born in September 2019. JL suffered from idiopathic generalised epilepsy and was receiving relevant medication for this condition.

6. By the time of the resumed hearing, JL had given birth to the couple's second child, a son. He was born on 1 December 2021 and is, like a sister, a British citizen. This fact did not give rise to any question of whether a "new matter" now existed.

The evidence

7. Notwithstanding the clear directions included in the error of law decision, the Appellant's representatives only filed additional evidence on 6 January 2022, the day before the hearing. This new evidence was not accompanied by any explanation as to why nothing had been done sooner. It transpired that the new evidence had not even been served on the Respondent. In the circumstances, we made an oral direction at the hearing for a written explanation from the solicitors no later than 5pm on Wednesday 12 January 2022. It was made clear to Mr Rahman that the explanation was expected to be comprehensive.

8. The new evidence mentioned above consists of the following:

(a) the birth certificate of the Appellant's son, born on 1 December 2021;

(b) a letter from Kings College Hospital confirming admission to hospital of the Appellant's son on 4 January 2022;

(c) a letter from Dr Dassan, Consultant Neurologist at Ealing Hospital, dated 7 July 2021, relating to JL's condition.

9. In addition, the Appellant continues to rely on the bundle provided to the First-tier Tribunal, indexed and paginated 1-38.

10. The Appellant attended the resumed hearing and gave oral evidence in English. This evidence is a matter of record and we do not propose to summarise it here. Relevant aspects thereof will be referred to when we set out our findings of fact and conclusions, below.

11. JL, did not attend the hearing. We were told that this was because she and the couple's baby had only been discharged from hospital the day before and that there was to be a check-up at home on the day of the hearing. We asked for any documentary evidence confirming this to be sent in immediately. During the course of the hearing, JL did indeed email through a discharge notification, confirming the series of events which had been outlined to us.

12. No other witnesses appeared on behalf of the Appellant.

Relevant legal framework

13. There is no need to set out the applicable legislative framework and relevant case-law in any detail here. Both parties are fully aware of the

legal context within which our assessment of the evidence falls to be conducted.

14. The following summary will suffice. In light of the Appellant's sentence for the relevant offences, in order to succeed in his appeal he must show that there are very compelling circumstances over and above those described in the two exceptions contained in sections 117C(4) and (5) of the 2002 Act. The unduly harsh assessment may be relevant to that task, but the bare satisfaction of either exception will not be sufficient.

15. In assessing whether it would be unduly harsh for JL and the two children to go to Mauritius and whether it would be unduly harsh for a family split to occur, we have no regard to the misconduct of the Appellant. As the case-law currently stands, our primary sources as regards self-direction are KO (Nigeria) [2018] UKSC 53; [2019] Imm AR 400 and HA (Iraq) [2020] EWCA Civ 1176; [2021] Imm AR 59.

16. In respect of the very compelling circumstances threshold, we have taken into account what is said at paragraphs 29 to 32 of NA (Pakistan) [2016] EWCA Civ 662; [2017] Imm AR 1, as endorsed by HA (Iraq).

17. The public interest in deportation is made up of three elements: deterrence, protecting the public from a risk of re-offending; and reflecting the public's concern as to the ability of the authorities to take action against foreign criminals (what had once been described as the "revulsion" element). However, the public interest is not a fixity and it may be reduced in light of strong factors weighing in an individual's favour.

18. The best interests of children is of course a primary consideration in all cases.

Submissions

19. As with the evidence, the parties' respective submissions are a matter of record. By way of summary, we set out the following. Mr Lindsay had initially raised a concern as to whether there was still a genuine and subsisting relationship between the Appellant and JL, given her non-attendance at the hearing. He later accepted that this may not be a particularly potent line of argument. Indeed, he took no substantive issue with the Appellant's credibility in the general. It was accepted that the best interests of both children lay in remaining with both their parents. This could be achieved by the entire family unit moving to Mauritius. As to a relocation, Mr Lindsay submitted that in light of the evidence, such an occurrence would not be unduly harsh. The Appellant had close family living in that country, there was no evidence to indicate that relevant medication for JL's condition would be unavailable, and there was no evidence to indicate a lack of educational or employment opportunities. As British citizens, JL and the children could return to the United Kingdom at any time.

20. Mr Lindsay submitted that the “stay” scenario was also not unduly harsh. There were family members in the United Kingdom to assist JL. The medical evidence did not indicate that JL required the Appellant’s presence here.

21. In respect of section 117C(6) of the 2002 Act, Mr Lindsay submitted that the Appellant’s offending was very serious indeed. Although the risk of re-offending may be low, this was only one facet of the public interest. The other two remained as powerful factors in the Respondent’s favour. The Appellant’s length of residence in the United Kingdom was, submitted Mr Lindsay, a “neutral factor”, as described by the First-tier Tribunal.

22. Mr Rahman relied on his skeleton argument (aside from the passages which dealt with matters relating to the error of law issue). He relied on the remorse shown by the Appellant for his offending and the assessment of the risk of re-offending. The Appellant had no assets in Mauritius, had not lived there since the age of 10, and would “struggle to survive” there. He did not have contact with remaining relatives in that country. In respect of medical treatment for JL, the standards would not be the same as in the United Kingdom. Mr Rahman accepted that English was spoken in Mauritius.

23. As regards the “stay” scenario, Mr Rahman submitted that it was “not clear” whether JL would receive support from family members in this country. It would be “very harsh” on JL to have to run the family by herself. In terms of the Appellant’s offending, he had been “influenced by friends”, but had now cut off ties from these people and was focused on his own family. Looking at the whole case, Mr Rahman requested that we allow the appeal and let the Appellant remain with his family in the United Kingdom.

24. At the end of the hearing we reserved our decision.

Findings of fact

25. In reality, there is relatively little by way of factual dispute between the parties.

26. The Appellant is a Mauritian citizen who arrived in United Kingdom at the age of 10 years and 11 months. He came in on a visit visa. There was no successful extension of this leave and he has remained in United Kingdom unlawfully since late 2008 or, at the latest, early 2009.

27. The circumstances surrounding the relevant offending had been set out previously: on 16 July 2015, he robbed another person, and stab them repeatedly with a kitchen knife.

28. Notwithstanding Mr Lindsay’s somewhat tentative suggestion that there was no longer a genuine and subsisting relationship between the Appellant and JL, we find that such a relationship does in fact exist. Not only the First-tier Tribunal find itself entirely satisfied on this, but the evidence before us really only points in one direction. We have witness statements

from the Appellant and JL, oral evidence which we consider to be reliable, and supporting documentary evidence. In respect of the latter, the birth certificate of both children names the Appellant as the father and the hospital admission and discharge letters in respect of the new baby state the same residential address. In addition to this, the fact of the birth of the new baby in itself is indicative of an ongoing genuine and subsisting relationship.

29. It is common ground that JL suffers from idiopathic generalised epilepsy, as confirmed by Dr Dassan's letter of 13 November 2019. The only other item of medical evidence relating to her condition is Dr Dassan's subsequent letter of 7 July 2021. This records that JL informed his secretary that she had suffered two seizures towards the end of June of that year, these had occurred indoors, and within six hours of each other. It is said that JL did not bite her tongue or have a headache afterwards. They took place when JL was approximately 15-16 weeks pregnant. The letter goes on to state that JL had been advised to increase relevant medication. We were informed by the Appellant at the hearing, in our view reliably, that this increase had taken place and that JL managed her own medication, taking it in the morning and at night.

30. The Appellant told us that JL had had two seizures in 2019 after the couple's daughter was born, the first after a couple of weeks in the second some four months later. We accept that these took place. He also told us that JL had had two seizures during her last pregnancy. Again, we accept this to be the case.

31. In light of the evidence as a whole, including the two letters from Dr Dassan, what the Appellant said, and JL's witness statement, we find that the epilepsy is controlled, that seizures have been infrequent (seeming to correspond with pregnancy in particular), and have not led to either significant injury or a danger to JL or others. We, like the First-tier Tribunal, find that she has secured what had been described by the judge below as "good coping strategies". There is no suggestion now that JL is no longer in a position to apply the strategies.

32. There is no evidence before us as to the provision of relevant epilepsy medication in Mauritius. The evidence from Dr Dassan does not indicate that JL's medication regime is such that it could not potentially be replicated in another country using the same medication, or indeed an equivalent. The evidence simply does not address the issue of any potential impact on JL's condition and any connected consequences were she to relocate to Mauritius. In all the circumstances, we find that it is more likely than not that appropriate medication is available in Mauritius, albeit that it may come at a cost (although there is in fact no evidence to indicate that it would have to be privately funded).

33. We accept that the Appellant's baby was admitted to hospital to for three days with a lung infection. We also find that the fact he was discharged 6 January 2022 indicates that the medical professionals were satisfied as to

his recovery. We find that there is no ongoing issue in respect of the infection.

34. We find that the Appellant does not have any assets in Mauritius, but that he does have close family members residing there, namely his mother and half-siblings. We are prepared to accept that he is not in fact had contact with these relatives for a fairly significant period of time. However, there is merit in Mr Lindsay’s submission that the re-establishment of contact with some or all of these individuals would be both reasonable and more likely than not to result in at least some form of potential support were he to return to that country, whether or not accompanied by JL and the children. In saying this, we are not suggesting that such support would be wholesale in terms of, for example, financial provision and accommodation. It is, however, more likely than not to at least result in some form of practical assistance in terms of re-adjusting to Mauritian society and its norms.

35. We reiterate the findings of the First-tier Tribunal in so far as the private life exception under section 117C(4) of the 2002 Act is concerned. Thus, we find that the Appellant would be able to find employment and re-integrate into Mauritian society notwithstanding his lengthy absence from the country.

36. We find that English is one of the official languages spoken in Mauritius. We are prepared to accept that the Appellant speaks little, if any, Creole.

37. It is clear from the evidence before us that the Appellant and JL have supportive family members residing in the United Kingdom. On the Appellant’s side, we find that his father, siblings, uncles, aunts, and cousins are all settled here. He stated that he has a good relationship with them. This state of affairs is corroborated by the Social Services assessment of 2019, which notes that the Appellant and JL get on very well with not only their own family, but also each other’s. We find that JL has her parents and siblings here. We accept that her mother has two children still living at home, but that would not in our judgment preclude some practical assistance, at the very least. The evidence as a whole leads us to find that material support would be highly likely to be forthcoming from both sides of the family.

38. There is no evidence before us to suggest that all familial support would immediately cease were the Appellant, JL, and the children to go to Mauritius together. It is in our view highly likely that support of one sort or another, including financial provision, would be forthcoming from both sides of the family were a relocation to occur. This inference is based on what both the Appellant and JL have themselves said, together with the clear references in the Social Services assessment to close bonds and well-engaged relatives.

39. As regards the Appellant’s offending, we find that the risk of re-offending is currently low and that he has not engaged in any misconduct since his

release from prison in 2018. We accept that he has undertaken some courses and has expressed genuine remorse for what he did in 2015.

Conclusions on the unduly harsh assessment: the "go" scenario

40. For the reasons set out below, and focusing on the particular circumstances of JL and the two children with which we are concerned, we conclude that it would not be unduly harsh for them to relocate to Mauritius.

41. First, it is clear that the best interests of the two children would be best served by remaining with both of their parents. A relocation to Mauritius would avoid any split of the family unit.

42. Second, both the children are very young and are at a stage in their lives where significant relationships beyond those with their parents will not have been properly established. In saying this, we do not seek to diminish relationships between grandchildren and grandparents, but the reality is that such bonds are highly likely to be only at the very start of their development. The children's ages also mean that there are no educational or other social ties which might otherwise result in the best interests also resting in remaining in the United Kingdom. Their British citizenship is of course a significant factor, bringing with it rights and privileges. This consideration is not, however, decisive: see Patel (British citizen child-deportation) [2020] UKUT 45 (IAC), as cited at paragraph 21 of the error of law decision. We have found that there will be appropriate educational opportunities for the children in Mauritius. When these matters are viewed together with what we say about the likely situation of the family unit in Mauritius, we conclude that the best interests of the children do not require them to remain in the United Kingdom. Even if they did, it would only be by a narrow margin.

43. Third, on our findings of fact, it is more likely than not that JL would be able to receive appropriate epilepsy medication were she to go to Mauritius. In turn, it is very unlikely that her condition would result in consequences which would have a significantly adverse impact on either her or the children.

44. Fourth, on our findings of fact, it is more likely than not that the Appellant would be able to obtain reasonable employment and, in turn, appropriate accommodation for the family unit. It may be that the living standards would not be equivalent to those enjoyed in the United Kingdom, but on the evidence before us, we are not satisfied that they would be so significantly lessened as to constitute a factor which alone, or taken cumulatively, would meet the undue harshness threshold.

45. Fifth, we accept that JL would experience genuine distress being removed from her family relationships in the United Kingdom. Having said that, she would be with the Appellant, who is undoubtedly a source of support in this genuine and subsisting relationship. There would of course have to be

significant re-adjustments by JL: she would be moving to a new country, with all that brings with it. On the facts of this case, we are satisfied that JL would be able to cope with this without it being unduly harsh.

46. Sixth, have found that there will be support from the United Kingdom were a relocation to take place. Some form of financial assistance would be of a material benefit to the family unit in terms of establishing themselves and dealing with, for example, costs of medication, accommodation, and/or utilities, and/or other practical matters.

47. Seventh, the undue harshness threshold is high. It has not been lessened by the guidance provided in HA (Iraq). Rather, the focus of that threshold has been confirmed as resting on the particular children in any given case (as opposed to a general cohort of comparator children) and, by extension, the particular partner in question. We have directed our focus on the facts as they relate to the two children and JL. Whilst acknowledging that relocation would be difficult, indeed perhaps harsh, it would not in our judgment reach the necessary threshold.

Conclusions on the unduly harsh assessment: the "stay" scenario

48. We have also reached the conclusion that a split of the family unit would not be unduly harsh. This is so for the following reasons.

49. First, unlike with the "go" scenario, the best interests of the two children would clearly not be served by the Appellant being removed from their day-to-day lives. It is important for young children to create and maintain a bond with their father. In this way, the best interests consideration manifestly counts in the Appellant's favour. The best interests of children is not, however, a trump card.

50. Second, there is nothing in the evidence before us to suggest that either of the two children have any additional medical and/or developmental needs/conditions which might otherwise require the Appellant's presence in the United Kingdom.

51. Third, the children's very young ages would, perhaps to a limited extent, militate against a level of distress which they might experience from their father's departure were they some years older.

52. Fourth, on our findings of fact, it is highly likely that both the children and JL would receive significant familial support from both sides of the family resident in United Kingdom. Such emotional and practical support would, in our view, be likely to ameliorate some of the difficulties arising from separation.

53. Fifth, and related to the previous point, JL's epilepsy would not in our view lead to a significant impairment in her ability to care for the children by virtue of the Appellant's absence. JL is able to manage her medication by

herself, the medication regime is appropriate, and the seizures are very sporadic. It is true that family members might not be with her on a 24-hour basis, but nor would the Appellant if he remained in this country with leave and was going out to work, as he has told us he intended to.

54. Sixth, Social Services have been involved with the family unit in the past and there is no reason to suppose that further assistance would not be forthcoming if required.

55. Seventh, as with the first limb of the unduly harsh assessment, we accept that a separation would be distressing to JL and the children, and that life would be more difficult than if the Appellant remained in the United Kingdom. Once again, the threshold is high and, focusing on the particular circumstances of JL and the two children, it simply has not been met in this case.

Conclusions on very compelling circumstances

56. That the Appellant has been unable to show that it would be unduly harsh on JL and/or two children is not dispositive of his appeal. However, it represents a very significant obstacle to success.

57. We assess public interest in this case the following way. There is clear significant public interest in deterring non-British residents of the United Kingdom such as the Appellant from committing very serious offences in this country. Nothing in the evidence before us goes to diminish that particular facet of the overall public interest. There is an equally strong public interest in maintaining society's confidence in the ability of the respondent to take effective action against foreign criminals. In terms of the risk of re-offending, we accept that it is low in this case. That does count in the Appellant's favour as, to a limited extent, reducing the great weight attributable to the public interest. The "limited extent" caveat is important. As made clear at paragraph 141 of HA (Iraq), whilst normally a relevant consideration, positive evidence of rehabilitation and a consequent reduced risk of re-offending "will rarely be of great weight bearing in mind that… the public interest in the deportation of criminals is not based only on the need to protect the public from further offending by the foreign criminals in question but also on wider policy considerations of deterrence and public concern."

58. We have accepted the Appellant's expressions of remorse and the fact that he has undertaken some courses relating to life skills and the consequences of his offending. He is committed to his family and it is unlikely that he would re-offend in the future, especially as regards anything as serious as what took place in 2015.

59. Taking all relevant circumstances into account, including the Appellant's age when he committed the offences and the period of time since his release from prison in 2018, we attach weight to the low risk of re-

offending, but conclude that it is only of moderate significance in the overall balancing exercise.

60. With regard to section 117C(2) of the 2002 Act, we consider that the Appellant's offences were very serious indeed. The attack was premeditated and targeted. Kitchen knives were used by the Appellant and his co-defendant, with the Appellant stabbing the victim in the back and other areas. He had contested all counts on the indictment, but was convicted by a jury. The particular facts of this case only enhance the strength of the overall public interest in deportation.

61. The considerations under section 117B of the 2002 Act must also be considered, in so far as relevant. The Appellant speaks fluent English and is financially independent (he is reliant on funds from relatives, but has had no recourse to public funds). These are neutral factors.

62. Somewhat unusually for a case in which the individual has resided in this country for a significant period of time and since a fairly young age, the Appellant has had no leave since late 2008 or early 2009. It remains a fact, however, that he has resided in this country unlawfully for the vast majority of his time here. Thus, the maintenance of effective immigration control represents an additional element of the overall public interest. In addition, the "little weight" consideration applies to both his private life and his relationship with JL. Notwithstanding his length of residence and the genuineness of his relationship with JL, there are no particularly compelling features of the Appellant's case which go to cancel out, as it were, the overall reduction in weight attributable to his Article 8 rights.

63. There are of course factors in the Appellant's favour, as alluded to previously. He arrived in United Kingdom at the age of nearly 11 years old and has now resided here for 13 ½ years. He has clearly spent important years of his life growing up in this country and we acknowledge that he genuinely regards the United Kingdom as his home. Almost all of his family are here. He has no "lived experience" as a teenager or an adult in Mauritius. We have viewed these matters cumulatively and weighed them in the balance.

64. The Appellant's family life with JL and his two children is also an obviously relevant factor, but is to be placed in the context of our unduly harsh assessment and what we say about section 117B of the 2002 Act. We have concluded that, on one scenario, the family unit could remain intact without it being unduly harsh. Alternatively, we have concluded that a split would not be unduly harsh.

65. A further factor which, to an extent, counts in the Appellant's favour is the young age at which he committed the offences in 2015. A day earlier and he would still have been a minor. In any event, he was the youngest of adults. Strictly speaking, the criteria enunciated in the well-known Strasbourg case of Maslov v Austria [2009] INLR 47 does not apply to the Appellant's case: he was neither a minor at the relevant time, nor had he

resided lawfully in the United Kingdom. Notwithstanding this, it can be seen from our assessment thus far that we have, as part and parcel of our overall proportionality assessment, specifically taken into account the four matters set out at paragraph 71 of the judgment, namely:

(a) the nature and seriousness of the offence committed;

(b) the length of the Appellant's stay in the United Kingdom;

(c) the time elapsed since the offence was committed and the Appellant's conduct during that period; and

(d) the solidity of social, cultural and family ties with both the United Kingdom and Mauritius.

66. In his submissions, Mr Lindsay addressed the question of whether there were "very serious reasons" to justify the Appellant's deportation, with reference to paragraph 75 of Maslov. Aside from the inapplicability of the terms of that judgment to the Appellant's case (for the reasons set out above), the Supreme Court in Sanambar [2021] UKSC 30; [2021] WLR 3847 confirmed that the "very serious reasons" point did not represent a free-standing test or "condition subsequent". Rather, it simply provides a summary of the implications of the proportionality assessment which will already have been carried out, having regard to relevant criteria set out at, for example, paragraph 71 of Maslov (see paragraph 46 of Sanambar). It follows that we are not required to address any "very serious reasons" question in this case.

67. Bringing all of the above together, we conclude that there are no very compelling circumstances over and above those described in the two exceptions under section 117C of the 2002 Act. In other words, the Appellant's Article 8 claim is not sufficiently strong to outweigh the very significant public interest. The factors in his favour fall relatively far short of demonstrating that the Respondent's decision to refuse his human rights claim was, and is, disproportionate. It follows that the Appellant's appeal must be dismissed.

68. For the avoidance of any doubt, if it were to be said that it would be unduly harsh on JL and/or the two children to relocate to Mauritius or to be separated, it could, on the facts of this case, only be by a very narrow margin. Given this, we make it clear that this alternative basis would not have materially affected our overall conclusion on the very compelling circumstances assessment. The scenario would have amounted to that described in paragraph 30 of NA (Pakistan), namely a "bare case" of the kind set out in the two exceptions under section 117C(4) and (5). As a serious offender, the Appellant would not be able to demonstrate very compelling circumstances. Thus, on this alternative basis, the Appellant's appeal would nonetheless fall to be dismissed.

Anonymity

69. There has been no anonymity direction throughout these proceedings. There was no application for one to be made at the re-making stage and we do not see any proper basis for so doing in any event.

Notice of Decision

70. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law and that decision has been set aside.

71. We re-make the decision by dismissing the appeal on human rights grounds.

Signed: H Norton-Taylor Date: 10 January 2022

Upper Tribunal Judge Norton-Taylor

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed: H Norton-Taylor Date: 10 January 2022

Upper Tribunal Judge Norton-Taylor

APPENDIX: ERROR OF LAW DECISION

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17002/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 19 October 2021	…………………………………

Before

THE HONOURABLE MR JUSTICE SAINI
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT
Appellant

and

Mr LOUIS DIELLIVER VALLIANO SIMON
(ANONYMITY DIRECTION NOT MADE)
Respondent

Representation:
For the Appellant: Mr T Lindsay, Senior Home Office Presenting Officer
For the Respondent: Mr C Rahman, Counsel, instructed by Okafor and Co Solicitors

DECISION AND REASONS

Introduction

1. For ease of reading we shall refer to the parties as they were in the First-tier Tribunal, although it is the Secretary of State who brings this appeal to the Upper Tribunal; thus Mr Simon is once more the Appellant and the Secretary of State is the Respondent.

2. The Respondent appeals with permission against the decision of First-tier Tribunal Judge Dyer ("the judge"), promulgated on 28 April 2021. By this decision the judge allowed the Appellant's appeal against the Respondent's refusal of his human rights claim made in the context of deportation proceedings.

3. The Appellant is a citizen of Mauritius, born in 1997. He arrived in the United Kingdom in 2008 as a visitor aged 10 years and 11 months. He subsequently became an overstayer and a number of attempts to regularise his status were unsuccessful. On the day of his 18th birthday the Appellant committed a number of serious offences, all linked to a particular incident in his local area. Having contested a trial he was convicted in April 2016 of robbery, wounding with intent to commit grievous bodily harm, and possession of an offensive weapon in public. He received concurrent sentences of 3 years for the first offence, 5 years for the second, and 12 months for the third. The convictions and sentences obliged the Respondent to initiate deportation proceedings pursuant to the UK Borders Act 2007 and a deportation order was signed on 14 October 2017. In response, the Appellant made a human rights claim in February 2018. In this he relied on his ties in the United Kingdom and claimed lack of connections to Mauritius.

4. By the time his case went before the judge following the Respondent's refusal of the human rights claim, the Appellant was relying in large part on family life under Article 8 ECHR. He claimed to be in a genuine and subsisting relationship with a British citizen, JL, and their daughter, who had been born in September 2019. JL suffered from idiopathic generalised epilepsy and was receiving relevant medication for this condition.

Relevant legislative framework

5. For the purposes of this appeal, the only provision which need be set out is section 117C of Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"):

> **Section 117C Article 8: additional considerations in cases involving foreign criminals**
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

The decision of the First-tier Tribunal

6. Having set out the essential factual background to the Appellant's case and directing herself correctly to the relevant legal framework, the judge began with a consideration of the two exceptions contained within sections 117C(4) and 117C(5) of the 2002 Act, recognising that in light of his 5-year sentence, the Appellant could only succeed if he was able to demonstrate the existence of "very compelling circumstances over and above" those set out in the exceptions. The judge found that the Appellant had spent over half of his life in the United Kingdom and she was prepared to regard this residence as being a "neutral factor", notwithstanding his lack of lawful status for the vast majority of that period. The judge also concluded that, despite the offending, the Appellant was socially and culturally integrated into life in the United Kingdom.

7. However, in respect of the third limb of the private life exception under section 117C(4) she concluded that having regard to all the circumstances the Appellant would not face very significant obstacles to a reintegration into Mauritian society.

8. The judge then moved on to consider the family life exception under section 117C(5) of the 2002 Act. She accepted that there were genuine and subsisting relationships between the Appellant and JL and his daughter. The issue, insofar as it was relevant to the overall nature of the appeal, was whether it would be unduly harsh on the couple's child and/or JL for them all to go to Mauritius and whether it would also be unduly harsh on the child and JL for them to be separated from the Appellant if he were to go to Mauritius alone. In respect of the former scenario (often described as the "go scenario"), the judge concluded at paragraph 42:

   > "I find that it would be unduly harsh for the Appellant's partner and child to move to Mauritius to maintain a family life with the Appellant given that the nature of [JL's] conditions and the lower standard of living in terms of health, employment opportunities and education that they would face which would be to the detriment of both the child and mother, both British citizens."

9. Turning to the second scenario (the so-called "stay scenario"), the judge concluded that the best interests of the child lay in remaining with both parents: she reasoned that children should have the love and support of

both parents in order to assist with their physical and emotional care and that the development of appropriate and healthy attachments to adults was "vital to the future successful and healthy adult functioning of any child...".

10. An important aspect of the judge's reasoning on the "stay scenario" was JL's epilepsy and the effect that this was said to have on both her wellbeing and the best interests of the child if the Appellant was to be deported to Mauritius. Paragraph 46 of the decision reads as follows:

> "I also consider the impact to the child from [JL's] epilepsy, and whilst it is clearly the case that there are many single parents with epilepsy who parent effectively, and there are ways by which the risks posed can be managed… the fact remains that there is an increased risk to the child and mother's wellbeing that would arise if the Appellant was not around. That risk would be managed by [JL] moving to be nearer her family and by her adapting her parenting to accommodate various methods of reducing the physical risk to the child and herself from a potential spontaneous fall during a seizure. Whilst these are all good coping strategies for someone who has no choice or chooses to parent alone, I must consider the impact on the child and [JL] if the Appellant was to be removed. In light of the obvious difficulties there would be for [JL] being a single parent with epilepsy and the impact that would have on their child and considering my finding that it would be in the best interests of the child for the Appellant to remain, I do find that the effect of the appellant's removal would be unduly harsh on his child."

11. Next, the judge considered whether there were any very compelling circumstances in the Appellant's case pursuant to section 117C(6) of the 2002 Act. At paragraph 48 and 49 she found that the Appellant's offending was "extremely serious" and that "the public interest in removing people who commit this type of crime is high and does not need further elaboration".

12. Evidence of the Appellant's rehabilitation and the reduction of the risk of reoffending was dealt with in considerable detail. Ultimately, the judge concluded that the Appellant presented a "low risk of future harm through further offending".

13. Having then taken account of additional factors including the length of time the Appellant had spent in United Kingdom and the absence of very significant obstacles to reintegration, the judge stated her overall conclusion on very compelling circumstances at paragraph 53:

> "The threshold to be satisfied by the Appellant to tip the balance in his favour is a high one. The fact that the Appellant is a loving father, a supportive partner and a reformed offender who would struggle to make a new life for himself in Mauritius does not, even collectively, amount to very compelling circumstances. I have taken his unlawful immigration status as a neutral factor given what I have found regarding the process of his entry to the UK and subsequent applications for leave. The factor that takes his case into the realm of very compelling circumstances is the nature of the (*sic*) [JL's] health condition and the impact that his deportation would have on

> [JL's] ability to parent with epilepsy and the subsequent impact on the child. This factor, taken together with the Appellant's social and cultural integration here since arriving at the age of 10, the best interests of his daughter in having a positive father role model in her life, the support that he does provide his partner and the fact he is a low risk of future offending combine to elevate this case to the high threshold of very compelling circumstances."

14. The appeal was duly allowed on human rights grounds.

The Respondent's grounds of appeal

15. The Respondent drafted relatively lengthy grounds of appeal which can be condensed to the following assertions: firstly, the judge failed to give adequate reasons for concluding that JL's epilepsy meant that it was unduly harsh for her and the couple's child to go to Mauritius; secondly, the judge failed to provide adequate reasons as to why it would be unduly harsh on JL if the Appellant went to Mauritius alone; thirdly, the judge failed to explain why the assessment of best interests then led to the conclusion that it would be unduly harsh on JL and the child in respect of the family life exception; fourthly, the absence of reasoning relating to JL's epilepsy infected the judge's conclusions as to whether very compelling circumstances existed; fifthly, the judge failed to have any or any adequate regard to the wider public interest, which extended beyond a risk of reoffending.

16. In preparation for the hearing before us the Respondent provided a detailed skeleton argument which in essence followed the grounds of appeal. A brief skeleton argument was provided on behalf of the Appellant.

The hearing

17. We received concise oral submissions from both representatives which were consistent with the grounds of appeal and the Appellant's skeleton argument. We have of course carefully considered all the arguments put forward by the parties.

18. At the conclusion of the hearing we announced our decision, with reasons to follow, that the judge had erred in law and that the errors were such that her decision should be set aside pursuant to the exercise of our power under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007.

Discussion and conclusions

19. We exercise restraint before interfering with the judge's decision, with reference to recent observations made by the Court of Appeal in KM [2021] EWCA Civ 693, at paragraph 77. In particular, we acknowledge that she was not required to set out each and every step in her reasoning process, nor was she required to provide reasons for reasons, as it were.

Having said that, adequate reasons were required in respect of her conclusions on the core issues.

20. The first of these issues was whether it would be unduly harsh for JL and the child to move to Mauritius with the Appellant. It is clear from what is said in paragraph 42 of the decision, quoted above, that JL's epilepsy formed an important aspect of that conclusion. Yet no explanation is given as to what, if any, medical difficulties would have attached to a relocation. There is no reference to country information concerning the availability of relevant medication. Upon inspection of the materials before us, we are satisfied that there was no such evidence before the judge. The judge does not make reference to any other source of evidence emanating from this country in terms of possible consequences of a relocation, nor, as far as we can tell, did such evidence exist. The only medical evidence before her, as confirmed by Mr Rahman at the hearing, was a letter from Dr P Dassan, Consultant Neurologist, dated 30 November 2019, which confirmed JL's diagnosis, her medication, and a management plan consisting of an increase in that medication. There was no updated medical report on JL's circumstances leading up to the hearing before the judge.

21. In light of the foregoing, we are satisfied that the judge failed to explain, by way of adequate reasons, how a relocation to Mauritius was likely to have a sufficiently significant impact as to make it unduly harsh on JL and/or the couple's child, with particular reference to the former's health condition. That is an error of law. It is a material error not simply because it goes to the heart of the "go scenario" (and it is uncontroversial that an individual must demonstrate that it would be unduly harsh on a partner and/or a child to relocate and be separated before section 117C(5) of the 2002 Act can be satisfied: Patel (British citizen child - deportation) [2020] UKUT 45 (IAC)), but because JL's health condition constituted "the factor" upon which the judge later relied when concluding that very compelling circumstances existed. Further, it cannot be said, on the facts of this case, that JL's and the child's British citizenship was a determinative factor in the "go scenario", notwithstanding the error we have identified: Patel, *ibid*.

22. Turning to the judge's consideration of the "stay scenario", we see nothing wrong with her assessment of the child's best interests, but of course this could only have taken the Appellant's case so far: the undue harshness test sets a higher bar. Once again, it is clear from what is said in paragraph 46 that the judge regarded JL's epilepsy as of central importance to her overall conclusion on undue harshness. The difficulty we have with the judge's reasoning is that it fails to explain in an adequate fashion why the "good coping strategies" established by the evidence (as recorded in paragraph 23 and the Social Services assessment contained in the Appellant's bundle) could not reasonably have been employed by JL if the Appellant was deported. To put it another way, the judge has failed to provide adequate reasons why, notwithstanding the strategies described, a separation would be unduly harsh on JL and, in turn, the child. We are bound to say that we do not fully understand the judge's attempt in

paragraph 46 to distinguish the situation of someone who has “no choice” as to her circumstances or “chooses to parent alone” from that in which the other parent (i.e. the Appellant) would be deported. As we see it, the latter represents a situation where there is no “choice” as such: the question to be addressed by the judge was whether, if the Appellant was in fact deported, it would have an unduly harsh impact on JL and/or the child. The lack of adequate reasons when answering that question is an error of law and, in light of the same considerations we have set out in respect of the “go scenario”, it is material.

23. Our conclusions thus far feed into the issue of very compelling circumstances. It is plain from what is said in paragraph 53 of the judge’s decision, quoted above, that JL’s health condition and its relevance to the family’s circumstances played a decisive part in the conclusion that such circumstances did exist. Given the errors committed in respect of the undue harshness assessment, it is inevitable that the conclusion on very compelling circumstances is also flawed. Adopting the terminology of the Respondent’s grounds of appeal, the errors on the family life exception under section 117C(5) of the 2002 Act have “infected” the conclusion under section 117C(6).

24. Finally, we deal briefly with the Respondent’s argument that the judge failed to adequately address the public interest. It is well-settled that the public interest is made up of at least three facets, one of which is to protect the public from the risk of reoffending. The judge dealt with this issue in some detail, as we have already mentioned. Whilst not a live issue before us, we note in passing that the Court of Appeal has expressed reservations as to the likely significance of rehabilitation in deportation cases: HA (Iraq) [2020] EWCA Civ 1176; [2021] WLR 1327, at paragraph 139.

25. As to the remaining facets of deterrence and public confidence in taking action against foreign national criminals, we see some merit in the Respondent’s challenge. The judge could certainly have said more about these two matters. Having said that, what is said in paragraphs 48 and 49 makes it clear that the seriousness of the offending was accounted for and it may be said that that the additional aspects of the public interest are implicitly recognised therein. For the purposes of this appeal we need not state a firm conclusion on whether the judge has erred in this respect.

26. For the foregoing reasons the judge’s decision is set aside.

27. Having regard to paragraph 7.2 of the Senior President of Tribunals Practice Statements, we see no basis for remitting this appeal to the First-tier Tribunal. Instead, it will be retained in the Upper Tribunal and set down for a resumed hearing at which the decision in the Appellant’s appeal will be re-made.

28. The judge’s findings in respect of the private life exception under section 117C(4) of the 2002 Act have not been the subject of a cross-appeal by

the Appellant. There is no need to disturb those findings. The central question to be addressed at the resumed hearing is whether the Appellant can demonstrate that very compelling circumstances exist in order to outweigh the public interest in his deportation.

Anonymity

29. The judge made no direction and we have not been asked to do so. Although a young child is involved in this case, we have concluded that, in all the circumstances, there is no good reason to impose an anonymity direction, having regard in particular to the importance of open justice and the Presidential Guidance Note No.1 2013.

Notice of Decision

The decision of the First-tier Tribunal involved the making of errors of law. That decision is set aside.

The decision in this appeal will be re-made by the Upper Tribunal following a resumed hearing, to be listed in due course.

Directions to the parties

1) **No later than 4pm on 30 November 2021**, the Appellant shall file and serve in electronic and physical form a consolidated bundle of all evidence relied on in his appeal. Any evidence not before the First-tier Tribunal shall be the subject of an application under rule 15(2A) of the Tribunal Procedure (Upper Tribunal) Rules 2008;

2) **No later than 4pm on 7 December 2021**, the Appellant shall file and serve in electronic and physical form a skeleton argument;

3) **No later than 4pm on 21 December 2021**, the Respondent shall file and serve in electronic and physical form a skeleton argument;

4) **No later than 5 days** before the resumed hearing, the Appellant may file and serve a reply to the Respondent's skeleton argument;

5) With liberty to apply.

Signed H Norton-Taylor Date: 26 October 2021

Upper Tribunal Judge Norton-Taylor