Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/04297/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 20 January 2022	**On 7 February 2022**

Before

UPPER TRIBUNAL JUDGE KAMARA
DEPUTY UPPER TRIBUNAL JUDGE JARVIS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AAM
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Home Office Senior Presenting Officer
For the Respondent: Mr M. Moriarty, (Counsel instructed by Thompson & Co Solicitors)

DECISION AND REASONS

DIRECTION REGARDING ANONYMITY

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, we make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the Appellant or members of his family. This

direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings.

1. In this appeal the Secretary of State is the Appellant however, for ease of reading with the First-tier decision, we shall refer to the parties as they were in the First-tier hearing before Judge Beach (hereafter "the Judge".)

2. The Secretary of State has challenged the decision of the Judge (dated 5 March 2021) by way of Grounds of Appeal which were originally refused permission to appeal to the Upper Tribunal by the First-tier Tribunal (Judge Andrew) on 9 March 2021 but given permission in full by Upper Tribunal Judge Macleman on 16 July 2021.

THE APPELLANT'S IMMIGRATION AND CRIMINAL HISTORY IN THE UK

3. In brief, the Appellant entered the UK on 21 February 2002 and was included as a dependent on his father's application for asylum. On 28 January 2003, the Appellant was granted Indefinite Leave to Remain as a refugee.

4. On 24 September 2008, the Appellant was convicted of 5 counts of supplying a Class A drug (heroin), 3 counts of supplying a Class A drug (crack cocaine), two counts of supplying a Class A drug (cocaine), being concerned in the supply of a controlled Class A drug (crack cocaine), being concerned in supplying a controlled Class A drug (heroin) and being concerned in supplying a controlled Class A drug (cocaine). He was sentenced to 4 years imprisonment and on the same day was convicted of breaching a suspended sentence and was sentenced to 52 weeks imprisonment to run consecutively.

5. On 22 July 2018, the Appellant was convicted of conspiring/supplying a controlled Class A drug (cocaine), possession of a controlled Class B drug (cannabis), conspiring/controlling Class A drug (heroin). He was sentenced to 80 months imprisonment for each conviction to run concurrently.

6. On 3 September 2018, the Appellant was served with the decision to deport; he responded to that decision by raising a claim for asylum. On 16 June 2020 the Secretary of State decided that the Appellant's refugee status had ceased and on 27 August 2020, a Deportation Order was signed; he was also served with a decision to refuse his protection and human rights claim on the same date.

THE FIRST-TIER JUDGE'S DECISION

7. In her decision, the Judge made a number of core findings which have not been challenged by the Appellant. They are, in summary:

   a. The Appellant's most recent offence constituted a *particularly serious crime* as per s. 72 of the NIAA 2002, [63].

   b. The Appellant had failed to rebut the statutory presumption that he remained a danger to society under the same section, [68].

   c. That the same reasoning meant that the Appellant's appeal by reference to Humanitarian Protection provisions in the Rules (339D) should also be dismissed, [69].

   d. That there had been a significant and durable change in the DRC since the time at which the Appellant was given Indefinite Leave to Remain as a refugee in 2003, [83].

   e. The medical evidence did not show that the Appellant could not withstand questioning by the DRC authorities on return and therefore there was no associated risk of the Appellant's prospective initial detention lasting longer than 24 hours which would lead, according to the Secretary of State's country policy, to a breach of Article 3 ECHR, [85].

   f. Although the report of Dr Rawala diagnosed the Appellant as suffering with severe PTSD, severe mixed anxiety and depression and the overall evidence showed that the Appellant was being treated for, at least, Hepatitis B, there was no evidence of the Appellant's long-term prognosis and the effect on the Appellant if his medication was not available in DRC, [89].

   g. The Appellant had therefore failed to show, the burden being upon him, that he would be deprived of treatment in DRC and therefore the medical threshold test as clarified in AM (Zimbabwe) v Secretary of State for the Home Department [2020] UKSC 17 was not met, [89] and Article 3 ECHR not breached on that basis either.

8. The Judge also made further findings which have largely been challenged:

   a. The report of Dr Rawala indicated that the Appellant required further treatment such as CBT and EMDR and that he was highly unlikely to engage with treatment in the DRC because of his mental health problems and associated lack of resilience, [90].

   b. The Judge noted that the Secretary of State now accepted that the Appellant has a genuine and subsisting parental relationship with his child and stepchildren as well as his partner, [92].

   c. The Judge concluded that it was in the best interests of the children for the Appellant to remain in the UK and that because of a combination of factors including the likelihood of the Appellant failing to engage with psychological therapy in the DRC and the susceptibility of his son to being targeted by gangs

in the UK the nature of the void left behind would be serious enough to amount to *undue harshness*, [101].

d. The impact upon the children would also make deportation unduly harsh for the Appellant's partner, [103 & 104].

e. The Appellant had, despite his heavy prison sentence, established that he is culturally and socially integrated in the UK, [105].

f. It had also been established that the Appellant would face *very significant obstacles* to his integration into the DRC on the basis of his length of residence in the UK, the lack of family connections in the DRC and the impact of his mental health problems on his ability to cope, find work and engage, [111].

g. The Appellant also has a subjective fear of return because of his experience of sexual abuse in the DRC (see [84]) and his fear of the impact of his father's previous role in politics in the country, [115].

h. The Judge did not accept as credible the Appellant's claim to be the full-time carer for his parents and otherwise concluded that alternative care arrangements could be made, [116].

i. The public interest in deportation is strong and the Appellant's rehabilitation at an early stage but overall there were *very compelling circumstances* as per s. 117C(6) and therefore the Appellant's deportation a breach of Article 8(2) ECHR and section 6 of the HRA 1998.

THE SECRETARY OF STATE'S GROUNDS OF APPEAL

9. In the Grounds of Appeal renewed to the Upper Tribunal on 6 April 2021, the Secretary of State raises the following challenges to the Judge's decision:

Ground 1 – the Judge had given insufficient weight to the Appellant's two lengthy sentences of imprisonment and failed to lawfully apply the Upper Tribunal's decision in Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC) when concluding that the Appellant is culturally and socially integrated in the UK for the purposes of s. 117C(4).

Ground 2 – that the evidence of the independent social worker only showed that the children would be upset by the Appellant's deportation and there was no evidence to support the Judge's conclusion that the Appellant's son would be at a higher risk of gang targeting in his absence. This therefore undermined the Judge's conclusions on undue harshness in s. 117C(5).

Ground 3 – that the Judge's conclusions in respect of the Appellant's mental health and the likelihood of him not engaging with

psychological services in the DRC was not material as the Appellant is not receiving those services in the UK and the Appellant would not be financially responsible for his family in the UK as he is not currently so responsible and so the conclusions on very significant obstacles (s. 117C(4)) were not lawful.

Ground 4 – the Judge had unlawfully failed to factor into the very compelling circumstances assessment the fact that the Appellant's offending involved county lines drug supply when making findings under s. 117C(6).

THE ERROR OF LAW HEARING

10. The error of law hearing was conducted in person at Field House. We have had sight of the Appellant's Rule 24 response dated 5 November 2021; we also received a digital version of the Appellant's bundle which extends to section C34.

11. We heard oral submissions from both representatives with the last word going to the Secretary of State and formally reserved our judgment at the end of the hearing.

12. In his submissions, Mr Melvin relied upon the Grounds of Appeal (dated 9 March 2021) and his skeleton argument which we received on the day of the hearing.

13. He argued that the Secretary of State's challenge is not a perversity argument but that the Judge had not given sufficient reasons for her conclusions and failed to lawfully apply the very compelling circumstances test. Mr Melvin emphasised that the Judge had earlier in the decision concluded that the Appellant was still a threat to the community in the UK.

14. Mr Melvin also asserted that the Judge had unlawfully speculated that the Appellant would not engage with medical services on return to the DRC and also speculated in respect of the Appellant's subjective fear rising from his previous experience of sexual abuse when he was a child in that country.

15. Mr Melvin also referred us to [56] of the Court of Appeal's decision in HA (Iraq) v Secretary of State for the Home Department (Rev 1) [2020] EWCA Civ 1176 ("HA (Iraq)") and asked us to take into account that the Appellant does not live with his children and that the findings at [31] of the judgment indicated that he currently did not provide any financial support to his partner or his children and that therefore the separation in this case would not have a financial impact, which is one of the factors listed by the court in HA (Iraq).

16. In response Mr Moriarty relied upon his rule 24 response dated 5 November 2021 and asked the panel to conclude that the Secretary of State's grounds of challenge did in fact constitute perversity

arguments. He emphasised that the Judge had referred to the relevant tests and that she had otherwise taken a balanced approach to the evidence before her. He gave the example of the Judge's approach to the independent social worker's report (dated 21 December 2020) which she considered was relevant in some respects but not in others (see [97] in which the Judge concludes that the social worker should not have commented upon his view of the risk to the Appellant on return to the DRC as this was not within his expertise). Mr Moriarty also submitted that the Judge had lawfully considered all of the broad, relevant factors including the corollary effects upon the children of the impact of deportation upon the Appellant. He referred to the Judge's finding that the combination of the Appellant's subjective fear of his previous sexual abuse in the DRC and his psychiatric issues likely meant that contact would be severed between the Appellant and his children in the UK and so there would be, in reality, no relationship at all.

17. In respect of the Judge's assessment of undue harshness, he argued that the Court of Appeal's decision in AA (Nigeria) v Secretary of State [2020] EWCA Civ 1296 ("AA (Nigeria)") at [12] reiterated the Court's earlier decision in HA (Iraq) and observed that a finding of undue harshness might occur frequently and there was no particular limit to the number of factors which might be relevant to such a finding. Mr Moriarty also reminded us that the Judge had concluded that the Appellant had regular contact with his children including having them at his home at weekends and that he was due to have them over for Christmas according to the independent social worker's report.

18. In reference to the Judge's conclusions on the private life exception under section 117C(4), Mr Moriarty argued that the Judge had plainly carried out a careful balance of the competing issues relevant to whether or not the Appellant had socially and culturally integrated into the United Kingdom and had expressly factored in that the Appellant had received "heavy" sentences and that she was lawfully entitled to conclude that the balance was tipped in the Appellant's favour.

19. Mr Moriarty also referred us to [112-119] of the judgment in respect of the Judge's approach to the test of very compelling circumstances in section 117C(6) and argued that the Judge had lawfully considered the exceptions in the context of a cumulative approach to the question of whether or not there were such very compelling circumstances in this case. He added that the Judge's findings in respect of the Appellant's ability to engage and adapt in the DRC were not speculative but underpinned by the findings of a psychiatrist (Dr Rawala) in a report which is not challenged by the Secretary of State at the First-tier.

20. He also added that the Judge had shown sufficient awareness of the strength of the public interest in deportation cases as well as in this case by reference to the particular sentences received by the Appellant and by reference to a number of binding authorities which reiterate this including Secretary of State for the Home Department v MA (Somalia) [2015] EWCA Civ 48 at [113] of this judgment.

FINDINGS AND REASONS

21. In coming to our conclusions on the specific challenges to the findings of fact made by the Judge raised by the Secretary of State in this appeal we have reminded ourselves of the binding guidance from the superior courts as to the caution to be applied, for instance in PE (Peru) v Secretary of State for the Home Department [2011] EWCA Civ 274:

> "6. Provided, so Mr Swift submits, that what is now the First Tier Tribunal reaches a conclusion that was properly open to it then (absent other errors of law) neither the Upper Tribunal nor an appellate court can interfere. He cited to us Piggott Brothers v Jackson [1992] ICR 85 in which Lord Donaldson said, at page 92, reversing a decision of the Employment Appeal Tribunal:
>
> > "It does not matter whether, with whatever degree of certainty, the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal was a permissible option.""

22. And recently in KM v Secretary of State for the Home Department [2021] EWCA Civ 693 which, although directed to the Court of Appeal itself, is nonetheless also applicable to the Upper Tribunal:

> "77. I bear in mind the following well-established principles as to the approach of the Court of Appeal when considering a decision of a specialist tribunal such as the UT:
>
> > (1) First, the UT is an expert tribunal and an appellate court should not rush to find a misdirection an error of law merely because it might have reached a different conclusion on the facts or expressed themselves differently (per Lady Hale in *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49 at [30]).
> >
> > (2) Second, the court should not be astute to characterise as an error of law what, in truth, is no more than a disagreement with the UT's assessment of the facts (per Lord Dyson in *MA (Somalia) v SSHD* [2010] UKSC 49 at [45]).
> >
> > (3) Third, where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has

> not been taken into account (per Lord Dyson in *MA (Somalia)* at [45]).
>
> (4) Fourth, experienced Judges in this specialised tribunal are to be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically, unless it is clear from their language that they have failed to do so (per Popplewell J in *AA (Nigeria) v SSHD* [2020] EWCA Civ 1296 at [34]).
>
> (5) Fifth, judicial restraint should be exercised when the reasons that a tribunal gives for its decision are being examined and 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 (per Lord Hope in *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19 [2013] 2 All ER 625."

23. As well as in Lowe v The Secretary of State for the Home Department [2021] EWCA Civ 62, see [29 & 31].

24. And RG (Ethiopia) v Secretary of State for the Home Department [2006] EWCA Civ 339:

> "36. … The principle to be applied is well-established: the reasons must be intelligible and deal with the substantial points raised: In re *Poyser and Mills Arbitration* [1964] 2 QB 467, 478. Reasons can be briefly stated: per Lord Scarman in *Westminster City Council v. Great Portland Estates plc* [1985] I AC 661. That proposition was endorsed by the House of Lords again in *South Bucks District Council v. Porter* [2004] UKHL 33, [2004] 1 WLR 1953, at paragraph 36, where Lord Brown of Eaton - under-Heywood emphasised that
>
> > "The reasons need refer only to the main issues in the dispute, not to every material consideration."
>
> He also made the well-recognised point that such decisions are addressed to parties well aware of the issues involved and the arguments advanced. That was a town planning case, but the point is one which applies to decisions made by an immigration and asylum adjudicator, since both the Appellant and the Secretary of State are to be taken to be aware of the issues."

25. In our view, after careful consideration of the competing written and oral arguments, we have concluded that the Secretary of State has failed to identify any material errors of law in her criticisms of the decision of this Judge.

26. Firstly, in respect of Ground 1 (paragraphs 4-5), it is plain to us that the Judge did direct herself to the appropriate legal test when considering the Appellant's level of social and cultural integration in the UK. She in fact referred to a relatively recent authority of the Court of Appeal in this context, Binbuga (Turkey) v Secretary of State for the Home Department [2019] EWCA Civ 551 ("Binbuga (Turkey)"), at [105]. Although the Secretary of State asserts at paragraph 5 of the Grounds of Appeal that the Judge failed to lawfully apply the Tribunal's decision in Bossade, we note that this was in fact the very case endorsed by the Court of Appeal in Binbuga (Turkey), (see [58] of the Court's judgment), and was therefore plainly in the Judge's mind when reaching her conclusions.

27. Equally, whilst the conclusion at [105] might be described as generous, we conclude that the Judge did not fail to take into account a material matter in her assessment of the Appellant's level of integration and did specifically note the Secretary of State's argument that the Appellant was not integrated because of his criminal convictions and sentencing. The Judge also plainly factored in that the Appellant has received "heavy prison sentences" for multiple convictions for drug offences.

28. We have therefore concluded that the Secretary of State has failed to identify any material error of law and that the conclusion of the Judge in [105] was not perverse and was open to her on her findings in this appeal.

29. In respect of Ground 2, we have taken the view that the Judge has shown reference to all of the factors materially relevant to an assessment of the undue harshness of the impact of deportation upon the Appellant's children. At [100], the Judge expressly refers to the binding authority of HA (Iraq) and, at [101] gives full, lawful reason for concluding that the impact upon the three children of the Appellant being deported to a country where, on the unchallenged evidence from Dr Rawala, the Appellant's mental health problems and lack of resilience would lead to him being unable to cope with return and very likely also leading to a severance of contact with his partner and children and having a long lasting emotional impact on the children, is sufficient explanation to justify why the Judge found that the elevated threshold of undue harshness has been met in this case. As the Court of Appeal said in AA (Nigeria), when summarising the effect of HA (Iraq), (our emphasis):

> "12. As explained in *HA (Iraq)* at [44] and [50] to [53], this does not posit some objectively measurable standard of harshness which is acceptable, but sets a bar which is more elevated than mere undesirability but not as high as the "very compelling circumstances" test in s.117C(6). Beyond that, further exposition of the phrase "unduly harsh" is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and

> dangerous to seek to identify some "ordinary" level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may not occur quite commonly; and how a child will be affected by a parent's deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of "ordinariness"."

30. We also add that we do not accept the Secretary of State's description of the Judge's conclusions on the likelihood of the Appellant being unable to engage with psychological services and return to the DRC as "speculative". We accept Mr Moriarty's submission that such a finding was underpinned by specific, expert evidence from Dr Rawala (a consultant psychiatrist) which was not challenged by the Secretary of State in the First-tier and was therefore a conclusion open to the Judge.

31. What we have just said about the Judge's conclusions in the Appellant's mental health and the impact of return to the DRC upon him also applies directly to the Secretary of State's Ground 3 and the criticism of the Judge's assessment of the very significant obstacles threshold in s. 117C(4)(iii).

32. It is clear to us that the Judge carried out an extensive, detailed analysis of the evidence relevant to how the Appellant would cope and how he would integrate on return to the DRC having been in the United Kingdom for almost 20 years, from [106 – 111]. In our view these findings are well balanced, the Judge finds against the Appellant in some respects (see for instance [109], the Appellant's failure to show that he would not be able to access relevant or similar medication for his hepatitis B or depression in the DRC) but also finds for the Appellant by reference to the expert findings of Dr Rawala and country evidence (again not disputed by the Secretary of State) which showed that there is a lack of psychological treatment available in the DRC partly as a result of the broken healthcare system (which is described as being in a shambles) and partly as a result of the number of people requiring psychological intervention there as a result of the decades of conflict and violence. In our view it is irrelevant that the Appellant is not receiving such treatment in the UK (as is mentioned by the Secretary of State at paragraph 11), the Judge had to consider what would likely happen to the Appellant (on the balance of probabilities) when faced with return to a country which he had not resided in for two decades, with severe mental health problems which would be exacerbated by his experiences of sexual abuse as a child.

33. It should be noted that part of the findings made by the Judge were predicated upon the fact that the Secretary of State did not challenge the Appellant's original claim that his extended family had been killed in the DRC [106] and also factored in, at [111], the impact of return

even if the Appellant's family in the UK were able to provide him with some initial financial support.

34. We therefore conclude that the Secretary of State's criticisms do constitute disagreement with the factual findings of the Judge and no material errors have been identified.

35. With reference to Ground 4 (paragraph 12), the drafter of the Grounds, him or herself, frames the challenge expressly against the weight given by the Judge to the public interest in the balancing exercise inherent in s. 117C(6).

36. In our view, in a judgment such as this, where the Judge has clearly directed herself to the relevant binding authorities and properly reminded herself of the significance of the weight to be given to the public interest in general (see [113]) and with specific reference to the sentences and the Appellant's appalling previous past offending (see [3, 4, 63-68 & 118]) including the finding that the Appellant is at a very early stage of rehabilitation, it is not open to this Tribunal to interfere with her conclusions that the cumulative impact of the exceptions in s. 117C being met in this case did constitute very compelling circumstances over and above those exceptions as required in s. 117C(6). Her approach in law is compatible with the binding guidance in NA (Pakistan) v Secretary of State for the Home Department & Ors [2016] EWCA Civ 662:

> "37. In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

CONCLUSION

37. We therefore conclude that the Appellant has failed to establish that the making of the decision by the FtT involved any error on a point of law by reference to s. 12(1) of the Tribunal, Courts and Enforcement Act 2007 and the appeal is therefore dismissed.

NOTICE OF DECISION

The Appellant's appeal against the FtT decision is dismissed.

Signed  Date 25 January 2022

Deputy Upper Tribunal Judge Jarvis

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically)**.

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically)**.

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is "sent' is that appearing on the covering letter or covering email.