IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-001595
First-tier Tribunal Nos.:
PA/52296/2022 and IA/05733/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 05 July 2023

Before

UPPER TRIBUNAL JUDGE O'CALLAGHAN
DEPUTY UPPER TRIBUNAL JUDGE SKINNER

Between

ZIBUSISO NDLOVU
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr J. Mutyambizi-Dewa, of Dewa Legal Services Ltd
For the Respondent: Mr A. Basra, Senior Home Office Presenting Officer

Heard at Field House on 28 June 2023

DECISION AND REASONS

Introduction

1. The Appellant is a foreign criminal whom the Respondent has decided should be deported to Zimbabwe, his country of nationality. He appeals, with permission of First-tier Tribunal Judge Gibbs, against the decision of First-tier Tribunal Judge Row ("the Judge") dated 5 March 2023 ("the Decision"). The Judge dismissed the Appellant's appeal against the Respondent's decision of 20 April 2022 rejecting further submissions that the Appellant had submitted on 26 July 2021.

Anonymity

2. The Judge granted the Appellant anonymity in the FTT. No reasons for doing so were given and we were told by Mr Mutyambizi-Dewa that there had been no application for anonymity. It has not been suggested that any statutory requirement for anonymity applies. Given that, until the hearing before the Judge,

this was pursued as, inter alia, a protection appeal, it would appear that this case was administratively anonymised at case creation on an interim basis in accordance with the FTT's usual practice, but then no-one positively turned their mind to the question of whether continued anonymisation was appropriate in light of the legal test that applies. In this regard, we note that:

a. It is well established that the starting point is open justice. Any derogation from open justice, such as anonymisation, must be necessary.

b. As set out in para. 25 of the Upper Tribunal Presidential Guidance Note 2002 No. 2 on anonymity orders and hearings in private, "the fact that someone has committed a criminal offence will not justify the making of an anonymity order, even if it is known that such a person has children who may be more readily identified if the details of the person are known." Indeed, as Baroness Hale put it in R (C) v Secretary of State for Justice [2016] UKSC 2, [2016] 1 WLR 444 at [36], "The public has a right to know, not only what is going on in our courts, but also who the principal actors are. This is particularly so where notorious criminals are involved. They need to be reassured that sensible decisions are being made about them." The Appellant may not be notorious, but he has committed a serious criminal offence and is the subject of deportation proceedings in the public interest (see s.117C(1) of the Nationality, Immigration and Asylum Act 2002). The public need to be similarly reassured that sensible decisions are being made in appeals brought by individuals such as the Appellant in relation to their proposed deportation. In deportation appeals, the scales are accordingly weighted significantly in favour of open justice and transparency.

c. Even in protection appeals, there must be a justification for the interference with open justice that anonymity orders constitute: Kambadzi v Secretary of State for the Home Department [2011] UKSC 23, [2011] 1 WLR 1299 at [6] per Lord Hope. In this case, at the hearing before the FTT the Appellant withdrew reliance on his asylum claim and relied solely on Articles 3 and 8 ECHR. It was not suggested that his being identified in these appeal proceedings would of itself put him at any risk in Zimbabwe.

d. Similarly, there is no general exception to naming a party or witness where private matters or matters relating to an individual's physical or mental health are in issue: XXX v Camden LBC [2020] EWCA Civ 1468, [2020] 4 WLR 165 at [27] per Dingemans LJ. Without more, the fact that this case involves the Appellant's claimed schizophrenia does not justify an anonymity order.

3. In light of the above, we set aside the anonymity order in this case.

Background

4. The Appellant is 39. He came to the UK in January 2002, when he was 17 and claimed asylum. This was refused but he was granted leave to remain until shortly after his 18th birthday. He has at all times since then been in the UK illegally.

5. On 10 September 2008, the Appellant was convicted of robbery and sentenced to four years' imprisonment. It is clear from the sentencing judge's remarks (and the sentence imposed, notwithstanding his guilty plea) that this was a particularly nasty robbery, against a vulnerable woman on her way home from work at night, which was prolonged and left her with injuries.

6. On 9 June 2009, the Respondent decided that it was in principle appropriate to deport the Appellant. In response, the Appellant submitted representations that he was entitled to asylum and that his removal would violate his human rights. On 12 December 2013, the Respondent concluded that his deportation would not have that effect and on 16 December 2013, the Respondent made a deportation order. The Appellant exercised his right of appeal, which appeal was dismissed by a decision of the First-tier Tribunal dated 15 December 2014. The Upper Tribunal refused permission to appeal on 29 April 2015 and appellant's claim for judicial review of that decision was refused as totally without merit on 10 November 2015.

7. Various further applications were then made for leave, each of which was refused.

8. On 14 July 2021, the Respondent sought confirmation of the Appellant's current circumstances, in light of the fact that the Appellant had reported with his daughter, of whom the Respondent was apparently previously unaware. That led to the submission of further representations on 26 July 2021, the rejection of which forms the decision which gives rise to these proceedings.

The appeal to the FTT

The Appeal Skeleton Argument(s)

9. As already noted, the Appellant's protection claim was maintained until the hearing before the Judge, including in the Appellant's Appeal Skeleton Argument ("ASA"). There were in fact two ASAs in the bundle before us. This appears to be because the first of them was rejected by the FTT on 25 August 2022. In doing so, the Legal Officer stated as follows:

> "*I have reviewed the appellant's skeleton argument ('ASA') submitted and I am rejecting it as it does not meet the Pilot Directions for the following reasons:*
> *(a) The ASA does not begin with a suitable summary section as it advances arguments and refers to the law;*
> *(b) The ASA does not end with a suitable submission section as it does not set out the appellant's submissions on the issues.*

10. It is necessary to say something about their quality:

a. First of all, neither is signed or dated by their author.

b. Second, in each skeleton it is asserted that "The Respondent submitted that the circumstances in Zimbabwe, have changed to warrant the invocation of Article 1C of the 1951 Convention". The Respondent's decision however said nothing of the sort. It was not suggested that the Appellant had been a refugee, but no longer was. The decision, rather, rejected the Appellant's claim for asylum on (a) its merits, and (b) on the basis that he was excluded from the protection of the Convention under Article 33(2). There is no mention of Article 1C. Its inclusion is misleading and meritless.

c. Under the heading "Legal Framework", the first skeleton argument:
   i. sets out verbatim the whole (20 lines) of Article 1A of the Refugee Convention, contrary to the direction in para. 1 of the Practice Direction of the Immigration and Asylum Chamber of the First-tier Tribunal which

states that an ASA "must not include extensive quotations from documents or authorities".

ii. In like breach of para.1 of PDIAC, it then sets out the whole of s.117D of the 2002 Act. Given that that is the interpretation section of Part 5A of the 2002 Act, it is not clear why this section has been referred to, at length.

iii. It then has a heading "Article 8 of the 1950 ECHR", following which there is no text.

d. In the Appellant's Brief Submissions section of each ASA, the submission is made that the case is distinguishable from JS (Uganda) [2019] EWCA Civ 1670, [2020] 1 WLR 43 on the basis that "although the Appellant is an offender he is no [sic] so serious offender in the mould of JS Uganda. They do not share any other characteristics." JS (Uganda) was concerned with two issues: first, whether you could be a refugee within the meaning of the Refugee Convention by virtue of a family member's recognition as such and a grant of leave as the family member of a refugee; and second, whether in any event JS would have lost refugee status by virtue of the change of circumstances pertaining in Uganda, pursuant to Article 1C(5). This submission appears to have been included on the basis that Article 1C(5) was engaged in this case, which, as already noted, it was not. Moreover, the seriousness of the offending was not relevant to either of the issues in JS. In those circumstances, the attempt to distinguish it on that basis is also misconceived.

e. In a further submission, the ASA seeks to rely on Hesham Ali [2014] EWCA Civ 1304 "to determine whether his offending is an enough [sic] indicator of his likelihood to offend in the future". This reference to the Court of Appeal's judgment in Ali may be a oversight, given that the Court of Appeal did not consider the issue of rehabilitation (and therefore the decreased public interest in removal deriving from a lower likelihood of reoffending on which the Appellant sought to rely), but the Supreme Court did do so: see [2016] UKSC 60, [2016] 1 WLR 4799 at [38] per Lord Reed. It is somewhat more surprising that no reference is made (if reference to authority was to be made) to the in-depth consideration by the Supreme Court of the role of rehabilitation in deportation cases in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22, [2022] 1 WLR 3784 at [53] *et seq*. per Lord Hamblen.

f. In the second ASA, under the Legal Framework heading, it is said that the appeal is an appeal against the refusal of Leave to Remain under, among other things, "Article 4 of the 1950 ECHR", "Articles… 1C of the 1951 UN Refugee Convention", "117BArticle [sic] 8: public interest considerations applicable in all cases" and "Nationality, Immigration and Asylum Act 2002", which is included twice in the list. The reference to Article 4 ECHR (which prohibits slavery and forced labour) is not understood. As already noted, Article 1C of the Refugee Convention has nothing to do with this case. No mention is made of s.117C of the 2002 Act, despite being the more pertinent provision in respect of Article 8 in a deportation appeal. It is unclear why generic reference, without more, is made to the 2002 Act on two occasions.

g. An identical paragraph appears in both ASAs (though in the first under the heading "Humanitarian Reasons" and in the latter under "The Legal Framework") in which it is submitted that "AM (Zimbabwe) [2020] UKSC and Ainte (material deprivation – Art 3 – AM (Zimbabwe)) [2021] UKUT 00203 (IAC) apply to the Appellant as he will face material deprivation. It is

irrelevant whether this will be deliberate or not…" This is not however a material deprivation case. AM (Zimbabwe) is relevant to this case because it is an Article 3 healthcare case. Ainte is therefore not relevant. What is highly relevant is AM (Art 3; health cases) Zimbabwe [2022] UKUT 131 (IAC), which is notable by its absence from the ASAs.

11. These inadequacies in the ASAs give rise to significant concerns. It is clear, given that there are two ASAs that contain much identical text, that passages have been copied and pasted. The concern here however is that passages appear to have been copied from documents in other appeals with different issues which are of no relevance to this case. Either that, or the case has been fundamentally misunderstood by the Appellant's representative. The omission of centrally relevant cases may also be indicative of (a) a failure to consider what the applicable legal principles that applied to this appellant's case were, and/or (b) a failure to keep up to date with relevant legal developments, given that the judgments omitted were from 2022.

12. We hope that it is obvious from the above, but for the avoidance of doubt, these concerns do not relate to mere errors of judgement by the Appellant's representative. Rather, our concerns are as to whether (and we have not reached a finding in this regard) he has failed to meet expected professional standards.

The FTT Decision

13. As already noted, the protection claim was abandoned at the hearing before the Judge. There were accordingly two issues before the FTT. First, whether the Appellant's removal would violate Article 3 ECHR on account of his claimed schizophrenia. Second, whether it would violate his Article 8 ECHR right to respect for his family life. The Judge, having set out the background, grounds of appeal, burden of proof and the details of what happened at the hearing, considered each of those issues in turn.

14. In relation to his claimed schizophrenia, the Judge concluded that the Appellant's circumstances came nowhere near satisfying the test in AM (Zimbabwe) [2020] UKSC 17. In summary, the Appellant had produced no medical evidence of his diagnosis, present condition or prognosis. He did not know, beyond that it was a fortnightly depot injection, what medication he was taking and there was no reason why, even if it was not available in Zimbabwe, it could not be sourced elsewhere by the Appellant or his family. The country report which asserted that his schizophrenia might lead to him being treated as a witch was not based on evidence and little weight could be attached to it. This claim therefore failed.

15. In relation to Article 8, the Judge noted that this claim must be assessed through the lens of s.117C of the Nationality, Immigration and Asylum Act 2002 as interpreted by relevant recent cases. The Judge noted that the family circumstances were not in dispute; that the Appellant and his wife live with their 3 children and a child from the wife's previous relationship, with all of whom the Judge accepted the Appellant had a genuine and subsisting parental relationship. The Judge accepted that the best interests of the children was for the Appellant to remain in the UK with them. This was, the Judge noted, a primary consideration. The Judge then adopted a balance sheet approach to proportionality, and considered each of the factors in s.117B of the 2002 Act. Turning to the factors in s.117C, he said, at paras. 61-64 as follows:

> *"61. The deportation of foreign criminals is in the public interest. The more serious the offence committed by a foreign criminal the greater is the public interest in the deportation of the criminal. The appellant has been sentenced to a period of imprisonment of four years. The public interest requires his deportation unless Exception 1 or Exception 2 in section 117C applies. Exception 1 does not apply.*
> *62. The public interest in removing the appellant from the United Kingdom is immense. It recognizes the seriousness of the offence, protects the public, discourages others from behaving in the same way, and gives the public confidence that the United Kingdom is capable of managing its own immigration policies and protecting its citizens and those lawfully here.*
> *63. Taking all these matters into account I do not find that the effect of the appellant's deportation on his wife and child would be unduly harsh, bearing in mind the public interest in removing him.*
> *64. In view of the length of his sentence there would have to be in any event very compelling circumstances over and above those set out in Exception 2 to overcome the public interest. There are no such very compelling circumstances in the appellant's case."*

16. The Judge was accordingly satisfied that the public interest in deportation outweighed his private and family life rights and accordingly dismissed this ground.

The Appeal to the Upper Tribunal

Grounds of appeal and rule 24 response

17. The Appellant advances one overarching ground in his grounds of appeal, in respect of each aspect of the claim, namely that the Judge failed to give anxious scrutiny to the claim.

18. While there are certain sub-criticisms made in relation to each, we note at this stage that the grounds are inadequately drafted. They fail to specify clearly and coherently, with appropriate particulars, the errors of law said to contaminate the Judge's decision, as required by Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC). The normal expectation is that a ground of appeal identify, precisely, a single error of law which it is alleged the Tribunal has made and then, shortly, explains in what way that is alleged to have occurred. The grounds in this case comprise long, discursive, paragraphs which in reality potentially cover a multitude of possible errors, though without properly particularising any of them, and many of which are then (notwithstanding the length of the ground) not explained. The grounds read as a disagreement with the judge's conclusions seeking to be dressed up as errors of law.

19. Notwithstanding the lack of clarity and particularity in the grounds of appeal, permission was granted by First-tier Tribunal Judge Gibbs on 19 May 2023. Her reasons for granting permission are expressed in paragraph 2 of her decision, as follows:

> *"I have concerns regarding the way in which the judge has considered the issue of undue harshness with regards to the appellant's children and his deportation. Particularly it appears at paragraph 63 that the judge has taken into account the public interest in the appellant's deportation in their consideration of whether it would be unduly harsh for his children to remain in the UK without him. I am therefore satisfied that there is an arguable error of law. The grant of permission is not limited."*

20. No rule 24 response was filed by the Respondent.

21. At the hearing before us, Mr Mutyambizi-Dewa withdrew his client's reliance on Article 3.

The Appellant's representative's adjournment applications

22. The notice of hearing was sent to the parties on 13 June 2023. On 14 June 2023, an adjournment request was made on the basis that Mr Mutyambizi-Dewa was currently abroad and would not be returning until 1 July 2023. This was refused by an Upper Tribunal lawyer on the principal basis that no information had been provided why an alternative representative could not attend.

23. On 19 June 2023, Mr Mutyambizi-Dewa asked for that decision to be reconsidered. He stated,

> "*I have read the Decision and do accept your concerns. However, I request you to consider fully the circumstances of the Applicant. He has a history of mental health problems and may not understand why another Advocate is being introduced so late for his case. The only practical step that I can take is to pay for another ticket so that I can return and represent him. This will cause financial strain on me as the cheapest ticket is $800.00 which I will struggle to raise. I had no prior knowledge of the date of Hearing before I travelled and neither did the Applicant.*"

24. The reliance on the Appellant's mental ill-health was surprising, given that the Judge had had the opportunity to see the appellant at the hearing in the FTT and recorded that he "presented as well-kempt. He showed no signs of self-neglect. He showed no signs of cognitive impairment. He was able to understand and answer questions."

25. On 21 June 2023, Upper Tribunal Judge O'Callaghan refused the adjournment request in the following terms:

> "*[Judge O'Callaghan] has noted that Dewa Legal Services Ltd are regulated by the OISC. The regulator issued extant guidance, 'Cover in the absence of an advisor' (24 April 2017), establishing that during planned absences, there is a continuing duty on a registered organisation and the authorised advisor to ensure that during such periods the adviser's practice will carry on with minimum interruption and inconvenience to their clients. The guidance is clear that, 'arrangements must be made to ensure the continued effective delivery of service, to clients'.*
>
> *The guidance further establishes, 'When an authorised adviser expects to be away for longer than five working days, they must have a system in place to cover any emergencies that may arise on their case files. Such a system could include a reciprocal arrangement with another suitably qualified adviser whereby the latter will check the former's hard and electronic mail and telephone messages at least three times a week and agreed to undertake all necessary work on any urgent matters, where the submission of documents is time critical.' The Judge considers that, by extension, such guidance is applicable in respect of instructing counsel, and preparing papers, for hearings listed before the First-tier Tribunal and the Upper Tribunal.*

The recent application of 19 June 2023 relies upon the applicant having a history of mental health problems, and so 'may not understand why another advocate is being introduced so late for his case.' This representation sails very close to an assertion that the appellant does not have capacity to understand information provided by his legal representatives, who have to date been content to represent without a litigation friend. The filed medical evidence does not seek to establish that the appellant does not have capacity. Indeed, the appellant gave evidence before the First-tier Tribunal.

The second reason advanced is that Mr. Mutyambizi-Dewa would be required to return back to the United Kingdom earlier than planned, at expense. No cogent reasoning is given as to why such circumstances should arise when counsel can be instructed.

In the circumstances, considering the overriding objective, it is in the interests of justice that the hearing on 28 June 2023 proceed."

26. The next day, the Upper Tribunal received an email from the Appellant directly. So far as relevant, it stated:

> "*further to your correspondence dated 21/06/2023, I was unaware that my lawyer had requested for my case to be adjourned and also that he is on holiday and could be away on the 28/06/2023.*
> *I have now managed to make contact with my lawyer and he has reassured me that he will be in attendance on the 28th of June 2023. However in the event that he doesn't attend, May [sic] I kindly ask that my case not be decided on the date and be instead adjourned*."

27. This is a surprising email for the Tribunal to receive. It indicates prima facie that the previous adjournment requests had been made by the Appellant's representative without his client's knowledge or instructions to do so.

28. Further, given that the Appellant's schizophrenia has never been said to be anything other than well managed (at least at present), and that he did not appear either to the FTT or to us on receipt of his email as remotely incapable of understanding why, if Mr Mutyambizi-Dewa were unable to attend because he was abroad, another representative would need to be instructed, we have real concerns that the basis of the second adjournment request was inaccurate. While at present we make no findings in this regard, on the face of it, it is difficult to see how, if the basis of the second application was indeed inaccurate, Mr Mutyambizi-Dewa would not have known this, given that he would presumably had had contact with his client on a number of occasions and over a significant period of time.

Discussion

Article 3

29. As already noted, the appeal against the Judge's conclusions in respect of Article 3 was withdrawn by the Appellant at the hearing before us. He was obviously correct to do so.

30. As this Tribunal held in AM (Article 3, health cases) Zimbabwe [2022] UKUT 131 (IAC), following the Supreme Court's decision in the same case, the first matter that must be proven by an appellant where it is being suggested that their health means that it would violate Article 3 for them to be removed from the UK is that they are a seriously ill person. As paragraph 2 of the headnote makes clear, it

"will generally require clear and cogent medical evidence from treating physicians in the UK". The Appellant did not adduce any evidence (still less clear and cogent evidence) from treating physicians. His Article 3 claim based on his claimed schizophrenia was, without such evidence, always bound to fail.

31. Because it was not clear to us whether the absence of evidence of this claim was due to the Appellant's (previously found) lack of credibility, or a lack of understanding by his representative of the sorts of evidence that are generally expected when bringing Article 3 healthcare cases (or something else), and because it was similarly unclear whether Mr Mutwambizi-Dewa in fact had instructions to withdraw this claim (the Appellant not being in attendance), we probed Mr Mutyambizi-Dewa at the hearing on this withdrawal. There were two noteworthy aspects of the responses to our questions:

a. First, Mr Mutyambizi-Dewa told us that he had tried to get medical evidence, but that the treating psychiatrist was on holiday. When then asked why the name of the medication was not sought to be obtained from the Appellant's GP, Mr Mutyambizi-Dewa told us that in fact it had been the GP, not the psychiatrist, from whom the medical evidence had been sought. Given that this appeared to be inconsistent with what we were previously told, we reminded Mr Mutyambizi-Dewa that it was essential that he be very careful about ensuring that he was providing accurate answers to our questions. We then asked whether any application for an adjournment was sought on the basis that the psychiatrist (or perhaps GP) was on holiday, given that this was obviously centrally important evidence that was, on the face of it, only not available for a limited period of time. We were told that an adjournment application was considered but none was made.

b. Second, Mr Mutyambizi-Dewa told us that there was evidence of the anti-psychotic medication that the Appellant was on. We were told that this was both brought to the hearing and uploaded. Mr Mutyambizi-Dewa initially said that this was uploaded to CCD prior to the hearing, then said that it was uploaded at the hearing, and then said that it was uploaded after the hearing bundle had been uploaded, but before the hearing. Given that this evidence was not considered by the Judge in his decision and, although a failure to consider obviously relevant evidence was not a ground that had been relied on by the Appellant in his grounds to this Tribunal, it was potentially Robinson obvious, and so we looked for it on CCD and asked Mr Mutyambizi-Dewa if he had a copy. It was not online, and he did not have a copy in his client file on his laptop. Given that he is the representative with conduct of the case, it was remarkable that this evidence could not be located in either location. This gave rise to concerns about the accuracy of what we were being told by Mr Mutyambizi-Dewa. We were also concerned by the fact that the evidence said to have been available appeared to be a packet of medication, yet the Appellant's case was that he received his anti-psychotic medication by way of depot injection, which, so far as we are aware, is generally administered by a healthcare professional in a clinical setting and would not generally result in a box with the drug's name on it being provided to the patient. It may be that the packet of medication was not in fact of the Appellant's anti-psychotic medication, but of, for example, tablets to address side effects from the anti-psychotic medication (or something else), but Mr Mutyambizi-Dewa was unable to assist us in this regard.

32. Notwithstanding the above, as this ground was withdrawn, we need not say anything more about it, save in respect of our Hamid direction below.

Article 8

33. We address first the point raised in the grant of permission (see para. 19 above), namely that the Judge erred in taking into account the public interest in the removal of foreign criminals in determining whether the Appellant's removal would be "unduly harsh" on his family members. That this was an error of law was accepted by Mr Basra on behalf of the Respondent, given that in KO (Nigeria) [2018] UKSC 53, [2018] 1 WLR 5273 the Supreme Court held that it was not permissible to consider the public interest in removal in determining whether the consequences of the removal would be unduly harsh on other family members. Mr Basra did however submit that, as it had been in KO, the error was immaterial.

34. In considering the issue of materiality, it is essential to understand that this was a case in which, as the Appellant had been sentenced to 4 years imprisonment, he was not entitled to succeed by meeting either of the "Exceptions" contained in s. 117C(4)-(5) of the 2002 Act. It is Exception 2 that is met where, inter alia, someone's deportation would be "unduly harsh" on other family members. As s. 117C(3) makes clear however, the Exceptions only apply to someone "who has not been sentenced to a period of imprisonment of four years or more". It is not entirely clear why the Judge therefore considered the question of whether the Appellant's removal would be "unduly harsh" in itself. Nonetheless, plainly not meeting a test that does not apply cannot make any difference and so the error is not material in any direct way.

35. It is nonetheless necessary to consider whether it may be indirectly material also, as someone sentenced to 4 years or more imprisonment may succeed under s. 117C(6) if there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" and the Tribunal is entitled to consider the same facts which go to the Exceptions, such as the effect on any family members, in considering whether that test is met: see NA (Pakistan) v SSHD [2016] EWCA Civ 662, [2017] 1 WLR 207.

36. We are satisfied that there was simply nothing in this case that could come close to meeting that very exacting test and that the Judge would have accordingly been bound, had she not made the error which Mr Basra accepted, to dismiss the Article 8 claim on the basis of the facts as found. As Jackson LJ said in NA, supra, at para.30, if one wishes to rely on factors identified in the descriptions of Exceptions 1 and 2, they must be of an especially compelling kind going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, whether taken by themselves or in addition to other factors. While, as the Judge found, there would be an impact on the Appellant's family by virtue of his removal and the (British national) children's best interests would be better served by the Appellant remaining in the UK with them, the children are (as Mr Mutyambizi-Dewa confirmed to us) healthy. There is nothing in the relationship with the children that is even arguably "especially compelling" in the necessary sense.

37. In relation to other factors identified by the Grand Chamber in Boultif v Switzerland (2001) 33 EHRR 50 and Uner v The Netherlands (2006) 45 EHRR 14, Mr Mutyambizi-Dewa relied in particular on the length of time that the Appellant had been in the UK and the period that has elapsed since he last offended. It is true that the Appellant has been in the UK for a long period of time and does not appear to have committed an offence since 2008. However, his presence has at all times since April 2002 been unlawful and as such little weight can be given to his private life and family life with his wife (s. 117B(4) of the 2002 Act). Further, as the Supreme Court held in HA (Iraq) [2022] UKSC 22, [2022] 1 WLR 3784 at

[58] per Lord Hamblen, the mere fact of not having committed further offences, without evidence of positive rehabilitation (of which there was none here), is of little or no material weight in the proportionality balance.

38. As Mr Mutyambizi-Dewa drew our attention to the judgment of the Court of Appeal in Sicwebu v Secretary of State for the Home Department [2023] EWCA Civ 550 we should address it. We note, firstly, that that was a case in which the appellant had been sentenced to 32 months imprisonment and therefore was, unlike the Appellant, in principle able to rely on s.117C(5). It was not considering the very compelling circumstances test in s.117C(6). Mr Mutyambizi-Dewa relied in particular on two passages:

    a. First, he relied on [28] where Simler LJ reiterated that, in applying the "unduly harsh" test in s.117C(5), the seriousness of the parent's offending is not a factor to be weighed in the balance when assessing the interests of the child in applying the unduly harsh test, and that the child is not to be held responsible for the conduct of the parent. This is correct in so far as it goes, but that is the error which the Respondent has conceded, and does not go to the materiality of it.

    b. Second, Mr Mutyambizi-Dewa also drew our attention to [63]-[64]. These paragraphs contain part of Simler LJ's analysis of the Upper Tribunal Judge's consideration of the facts of that case. They do not set out any principles to be applied, nor do they relate to the question of materiality, and they therefore do not assist us in determining whether the error which the Judge has made here is material.

39. In short, although we accept, as Mr Basra did, that the Judge made an error in the way that she considered whether removal would be unduly harsh on the Appellant's children, we do not consider that that error could have affected the outcome of his Article 8 claim. The unduly harsh test did not apply and there were no circumstances that could even arguably be said to be very compelling so as to outweigh the public interest in his deportation. The Judge's error was accordingly not material.

40. The appeal is accordingly dismissed.

Hamid Direction

41. The Upper Tribunal can properly expect OISC regulated firms working in deportation matters to meet expected professional standards. Dewa Legal Services Ltd and Mr. J Mutyambizi-Dewa are aware of the Upper Tribunal's inherent jurisdiction to govern proceedings before it and to hold to account the behaviour of representatives whose conduct of litigation falls below the minimum professional standards: R (on the application of Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin); Okondu v Secretary of State for the Home Department [2014] UKUT 377 (IAC).

42. As will be apparent from the above, we have a number of concerns in relation to the way these proceedings have been conducted. We have therefore decided that it is appropriate in this matter to make a "Hamid" direction, as set out below, requiring Mr Mutyambizi-Dewa of Dewa Legal Services Ltd to show cause.

Notice of Decision

The First-tier Tribunal's anonymity direction is set aside.
The Decision of the First-tier Tribunal does not involve the making of a material error of law. The appeal is accordingly dismissed and the Decision of the FTT shall stand.

NOTICE TO SHOW CAUSE
(JULIUS MUTYAMBIZI-DEWA)

Further to the decisions in R (Hamid) v Secretary of State for the Home Department [2012] EWHC 3070 (Admin), R (Akram) v Secretary of State for the Home Department [2015] EWHC 1359 (Admin), R (Sathivel & ors) v Secretary of State for the Home Department [2018] EWHC 913 (Admin), [2018] 4 WLR 89, R (Shrestha) v Secretary of State for the Home Department (Hamid jurisdiction: nature and purposes) [2018] UKUT 242 (IAC), R (Al Mahfuz) v Secretary of State for the Home Department [2019] EWHC 2318 (Admin) and R (DVP) v Secretary of State for the Home Department [2021] EWHC 606 (Admin), [2021] 4 WLR 75, we issue the following direction:

Mr Julius Mutyambizi-Dewa of Dewa Legal Services Ltd, The Old Town House, 123-125 Green Lane, Derby, DE1 1RZ, is hereby directed to file with the Upper Tribunal, marked For The Attention of Upper Tribunal Judge O'Callaghan, by no later than 4pm on 28 July 2023 a witness statement, signed and verified by a statement of truth explaining his conduct in this matter and responding to the following points:

(1) Explaining, in respect of the ASAs filed in the FTT:

- **a. why neither ASA is signed nor dated;**
- **b. on what basis they asserted that the Respondent relied on Article 1C of the Refugee Convention in refusing the Appellant's protection claim;**
- **c. why they set out verbatim the entirety of Article 1A of the Refugee Convention and s. 117D of the Nationality, Immigration and Asylum Act 2002;**
- **d. why the Court of Appeal's decision, and not that of the Supreme Court, in Hesham Ali, was relied upon;**
- **e. why no reference was made to either HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22, [2022] 1 WLR 3784 and AM (Art 3; health cases) Zimbabwe [2022] UKUT 131 (IAC);**
- **f. why in the second ASA there is reference under Legal Framework to Article 4 ECHR and s. 117B of the 2002 Act, as well as two references to the whole of the 2002 Act.**

(2) Explaining the precise steps taken, for the purpose of preparing his appeal before the FTT, to obtain evidence from the Appellant's treating doctors in the UK, and in particular what steps were taken to obtain evidence from his treating psychiatrist and/or GP, including the dates on which any requests were made, by whom and for what and details of the response received.

(3) Explaining precisely:

a. what evidence of the Appellant's anti-psychotic or other medication was provided to the FTT;
b. when this was uploaded; and
c. If it was not uploaded, why his oral statement to this Tribunal that it was uploaded should not be regarded as an attempt to mislead us.

(4) Explaining why the Grounds of Appeal to the Upper Tribunal fail to specify clearly and coherently, with appropriate particulars, the errors of law said to contaminate the Judge's decision, as required by Nixon (permission to appeal: grounds) [2014] UKUT 368 (IAC).

(5) Explaining:

a. if, as the Appellant has suggested, and if so why, two adjournment requests were made without the Appellant's knowledge and instructions to do so;
b. what evidence Mr Mutyambizi-Dewa had before him to support the suggestion that the Appellant "may not understand why another advocate is being introduced so late for his case";
c. If that suggestion was made without evidence, why it should not be regarded as an attempt to mislead this Tribunal.

(6) If it is accepted that expected professional standards have not been met, a full explanation as to what steps are to be undertaken by Dewa Legal Services Ltd to ensure that such failings do not occur in the future, including details of any relevant training to be undertaken.

Paul Skinner

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

3 July 2023