IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-000947
FtT No: HU/00209/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 26 June 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
DEPUTY UPPER TRIBUNAL JUDGE CHANA

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

O.H.
(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr T. Lindsay, a Senior Home Office Presenting Officer
For the Respondent: Ms G. Capel, Counsel

Heard at Field House on 7 May 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant has been granted anonymity, and is to be referred to in these proceedings by the initials O.H. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant.

Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision dated 13 October 2022 to refuse to revoke a deportation order.

2. For the reasons set out in this decision, we have concluded that the decision of the First-tier Tribunal Judge did not involve a material error of law and we preserve the decision of the First-tier Tribunal.

Background

3. The claimant entered the United Kingdom as a minor with his mother in 2002 with a valid visitor visa. His mother was granted indefinite leave to remain with the claimant and his siblings in 2009.

4. The claimant was convicted on 15 June 2016 of the index offence of the assault causing actual bodily harm and sentenced to 15 months' imprisonment on 5 July 2016. He was served with a notice to make a deportation order on 14 August 2016. He was released from prison and given reporting conditions with which he complied. He made representations for why he should not be deported which were refused in 2017. He appealed against the deportation notice in this appeal was dismissed by a First-tier Tribunal Judge Welsh on 21 August 2019.

5. He was deported by force after he reported on 11 February 2020. He made an application to revoke the deportation order on 11 December 2020. After a delay, the respondent refused his application on 13 October 2022. The claimant appealed that decision on human rights grounds on the basis that his family life with his children in the United Kingdom will be breached by the respondent's decision. His appeal was allowed by First-tier Tribunal Judge Wilsher in a decision sent on 20 November 2023.

6. The claimant has three children with his partner AW. The children are 'R', 'L', and 'A'. He also has a son 'T' from a former relationship. The appellant also has two stepchildren, 'J' and 'C', who are AW's daughter and son from a previous relationship. At the date of the hearing before Judge Wilsher J was over 18 years old, but the rest of the children were under 18 years old. The claimant's daughter A had been born since Judge Welsh's decision and has cerebral palsy.

<u>The decision of the First-tier Tribunal</u>

7. The issue for the First-tier Tribunal, so far as relevant to Article 8 ECHR, was set out at [32(iii)]:

> "*34. … (iii) Does the [claimant] have an exception to deportation on the basis of his claim that his Article 8 of the ECHR Rights will be breached? Does the [claimant] come within the perimeters of Paragraph 399 (a)(ii) of*

the Immigration Rules (the 'Rules') and section 117C(5) of the NIAA 2002 (Exception 2) in relation to the undue harshness caused to his son … by his deportation? Are there very compelling circumstances in any event in relation to the present appeal – section 117C(6) of NIAA 2002?"

8. The Judge found as did Judge Welsh there were close family ties between the appellant, his partner and the children. Judge Welsh found that it would be unduly harsh for the partner to live in Jamaica with all the children because that would mean that two children, T and C would lose contact with a biological parent in the United Kingdom. Judge Welsh found that it would not be unduly harsh for the family to stay in the United Kingdom without the appellant because they would have remote contact and State support.

9. Judge Wilsher stated that the test applied by Judge Welsh when he found that there was no likely harm to the children beyond that which is typically caused by deportation, was an incorrect test as the circumstances of each child must be considered on his or her own merits.

10. The Judge took into account that, with the application to revoke, the claimant had submitted fresh evidence in the form of an independent social worker report and a medical report on the mental health of AW, the appellant's partner and mother of three of his children. The Judge found that all the witnesses were credible at the hearing as Judge Welsh had also found.

11. The Judge relied heavily on the reports of the experts which he said were compiled in a professional manner, using appropriate sources and were not challenged in the hearing and the refusal. The Judge assessed and considered the best interests of the children and the effects on each of them of the appellant's deportation.

12. The overall summary of the impact on the children was that there had been no improvement in this family but only deterioration for each of them and the social worker was now "extremely seriously worried about the future that lies ahead of the children of this family in the ongoing absence of their father". She opined that the claimant should be permitted to return to the United Kingdom to resume his parental responsibilities. The claimant's parenting, love and care is desperately needed by his children and his wife, and achieving stability for the whole family will prove impossible without it. The detrimental effects of this sudden and lengthy paternal loss will otherwise continue to bear a serious lifelong consequence for the children in their identity, relationships, well-being and mental health prospects.

13. The Judge considered the medical report by Dr Catherine Wilson on AW who stated that "her depression is severe which was corroborated by clinical interview but all three of the core symptoms and plus difficulty sleeping, poor appetite, difficulties concentrating, low self-esteem, gilded poor concentration, some of which are severe in intensity". The expert

stated that the partner's depressive illness and generalised anxiety disorder is worse by the impact of being a single parent, since the applicant's deportation from the United Kingdom. It is further stated that her partner's ability to cope long-term as a single parent in her current mental state is concerning.

14. The Judge directed himself that "the unduly harsh hurdle is a high one – denoting's that are severe or bleak – given the strong public interest in deporting foreign criminals". The Judge considered the criminality of the claimant in that he assaulted a man in November 2014 because he thought that the man was looking at his wife. He was equally aware that the claimant deliberately armed himself with a real wrench and went into the foyer of the flat where he was waiting for a taxi and he attacked the man viciously, both bulging and knocking him to the ground and then setting upon him with a tyre lever, striking him on the back of the head causing him a significant wound which needed hospital treatment. The claimant left for a while and then returned and when he was standing by the lifts and can be seen delivering a flying kick which was clearly intended to be a serious further attack on this man. This was a completely unprovoked attack. The man offered no resistance and did not fight back. He appears to be baffled to understand "what on earth is happening" to him.

15. The Judge recognised the closeness of the bonds between the claimant and his children, even in the absence of expert evidence. The Judge considered the reality of the effects on each child. He found that it would be unduly harsh to maintain the deportation order despite the strong public interest at stake.

The respondent's grounds of appeal.

16. The Secretary of State stated that the claimant's deportation was conducive to the public good and in the public interest, because he had committed a crime. The Immigration Rules as they then were required deportation unless the claimant could bring himself within the Exceptions to deportation at paragraphs 399 and 399A of the Rules.

17. The Secretary of State stated that the appellant was convicted at Wolverhampton Crown Court of "assaulting a person thereby occasioning actual bodily harm", for which he was sentenced on 8 July 2016 to 15 months' imprisonment. The respondent thereby served the claimant with a notice of decision to make up deportation order against him. After receiving representations from the claimant, on 8 February 2017, a decision was made refusing the claimant's human rights claim. Removal directions were set for 8 March 2017 which were deferred due to the appellant making asylum claim on 14 February 2017. On 6 August 2019 the claimant's human rights claim was reconsidered and refused and his asylum claim was also refused within the decision letter. The appellant subsequent appeals against this decision was dismissed by the First-tier

Tribunal on 21 August 2019 and his permission to appeal to the Upper Tribunal was refused on 1 October 2019. The appellant became appeal rights exhausted on 16 October 2019.

18. The appellant was removed to Jamaica on 11 February 2020 where he remains. An appeal hearing on 31 October 2023, First-tier Tribunal Judge Wilsher found that the continued enforcement of the deportation order to be unduly harsh.

19. The first ground of appeal is that the Judge made of material misdirection of law in the application of Devaseelan (Second Appeals, ECHR, Extra-Territorial Effect) [2002] UKIAT 702, para 39: “(1) The first Adjudicator’s determination should always be the starting point. It is the authoritative assessment of the Appellant’s status at the time it was made. In principle issues such as whether the Appellant was properly represented, or whether he gave evidence, are irrelevant to this. (2) Facts happening since the first Adjudicator’s determination can always be taken into account by the second Adjudicator. If those facts lead the second Adjudicator to the conclusion that, at the date of his determination and on the material before him, the appellant makes his case, so be it. The previous decision, on the material before the first Adjudicator and at that date, is not inconsistent. (3) Facts happening before the first Adjudicator’s determination but having no relevance to the issues before him can always be taken into account by the second Adjudicator. The first Adjudicator will not have been concerned with such facts, and his determination is not an assessment of them.”

20. The respondent submitted that the First-tier Tribunal Judge has failed to take the earlier decision of Judge Welsh as their starting point and has not explicitly stated the new evidence which caused the judge to depart from that decision and this failure to direct themselves to the correct legal test amounts to an error in law.

21. The second ground is that the Judge failed to take into account and resolve conflicts of fact or opinion on the material matter by failing to give reasons or any adequate reasons for findings on the material matter. The Judge has further erred in law by failing to reconsider the “go" scenario as set out in HJ Iraq given there have been significant changes since the previous Tribunal decision. The Judge has failed to have regard to Judge Welsh’s decision where she found it would not be unduly harsh for the whole family to return to Jamaica. Judge Welsh reached a different conclusion in respect of the appellant’s stepson C who has since the decision has lived in Jamaica for two years. In relation to the rest of the family, Judge Wilsher has failed to make any findings and has merely adopted a misreading of Judge Welsh’s decision. The Judge did not take into account the recent undisputed evidence of repeat family visits to Jamaica since the claimant’s deportation and then one such visit, his partner conceived their third child and entered into a marriage.

22. The Judge has not properly considered the “go” scenario given that Judge Wilsher found at paragraph 30 that Judge Welsh’s findings were being maintained. However, there was no concession in the reasons for refusal letter that the go scenario was accepted as being unduly harsh and it is therefore submitted Judge Wilsher has failed to properly consider this key issue.

23. It was further submitted that Judge Wilsher in finding the continued enforcement of the deportation order would be unduly harsh on C which was mainly based on him being separated from his birth parent, his father that the respondent submits that this finding should be revisited as at paragraph 30 Judge Wilsher records that C’s father left him.

Permission to appeal

24. Permission to appeal was granted by First-tier Tribunal Judge FE Robinson as follows:

> “…Ground 2 asserts that the Judge, in finding that it would be unduly harsh for the whole family to return to Jamaica, has failed to properly consider the unduly harsh test under section 117C of the Nationality, Immigration and Asylum Act 2002, bearing in mind the previous determination of the First-tier Tribunal in 2019, and the position of the Respondent. 3. Whilst it was held in 2019 that it would be unduly harsh for the family to go to Jamaica, it is arguable that the Judge has erred in failing to give proper consideration to the issue of whether it would be unduly harsh for the whole family to move to Jamaica given that the refusal letter does not appear to concede that it would be unduly harsh as stated by the Judge and no other reasons have been given by the Judge for maintaining the 2019 finding. 4. I am not persuaded by Ground 1 which asserts that the Judge has failed to properly apply the principles in *Devaseelan* [2002] UKIAT 00702; whilst the Judge does not expressly refer to these principles it is clear that he is considering evidence which postdates the previous determination of 2019. Accordingly permission is granted on the basis identified only”.

The hearing

25. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. We had access to all of the documents before the First-tier Tribunal. We reserved our decision, which we now give.

26. For the Secretary of State, Mr Lindsay, as is his practice, helpfully prepared and served a skeleton argument before the hearing. His oral submissions closely followed the grounds of appeal.

27. For the claimant, Ms Capel argued that there was no material error of law other than the one mistake made by the First-tier Tribunal Judge in the name of the child which is not material.

28. We reserved our decision, which we now give.

Analysis

29. Permission to appeal was granted in relation to ground 2 and refused in relation to ground 1, which was a Devaseelan point. We find it difficult to understand where the grounds of appeal can be severed from one another. The Judge's failure to apply Devaseelan is relevant to ground 2 as well and therefore we have considered both grounds.

30. In the previous decision of Judge Welsh in 2019, it was found that the claimant's family can remain in the United Kingdom and that the claimant can return to Jamaica and that his exclusion would not be unduly harsh on his children and partner (the 'stay' scenario). Judge Welsh found that it would be unduly harsh to expect T and C to relocate to Jamaica, largely because relocation would separate T and C from their other biological parents in the UK (the 'go' scenario). Judge Welsh also found that it would not be unduly harsh for the other children to relocate to Jamaica.

31. The First-tier Tribunal Judge Wilsher departed from that finding and gave cogent reasons for doing so. He recognised the closeness of the bonds between the appellant and his biological children, stepchildren and his partner in the United Kingdom. He relied on the independent evidence provided from the appellant's partner, independent social worker reports, and evidence from the children's school. Judge Wilsher stated that the family's circumstances since the previous decision of Judge Welsh in 2019, have changed from the circumstances that were before Judge Welsh. Therefore, the Judge took into account the previous decision and evidence which was not before Judge Welsh, which he was entitled to do as set out in Devaseelan that evidence not before the previous Judge must be taken into account.

32. Judge Wilsher considered all the evidence in the round, and found that it would be unduly harsh for the claimant's family to relocate with him to Jamaica. It was found that the claimant came within the exception in the "go" scenario.

33. Judge Wilsher carefully considered the effects on each child of the claimant's deportation in considerable detail. The Judge found that it would be unduly harsh to maintain the deportation order despite the strong public interest at stake, thus recognising the public interest in the deportation of a foreign criminal.

34. Judge Wilsher took into account the family's past history and especially the emotional upset in the life of J and C, the appellant's two stepchildren, whose birth parent had left them. The Judge took into account the independent evidence of the social worker and the school of the serious emotional and practical harm to all the children. He noted the evidence that the children's educational development caused by the claimant's exclusion and the mental health of his partner was being adversely affected. He added that the extra pressure of coping with a recently born infant with cerebral palsy are circumstances which makes it unduly harsh for the family to relocate with the claimant to Jamaica.

35. The Judge relied heavily on the reports of the various independent sources. The Judge noted that the additional evidence provided by the claimant, was not challenged by the respondent at the hearing or in the reasons for refusal letter. Therefore, the additional independent evidence was uncontested, and the Judge was entitled to rely on it and give it as much weight as was deemed appropriate. The Judge did in fact place a great deal of reliance on this evidence. Credibility was not an issue in this appeal because Judge Welsh found that all the witnesses were credible as did Judge Wilsher.

36. The Judge noted that Mrs Walker, the social worker prepared her report in 2020 and a follow-up report was done in 2022. Therefore, the Judge considered the position of this family as at the date of hearing and found that since 2019, there are changes of circumstances regarding all the children and the partner. He relied on those changes of circumstances to reverse Judge Welsh's decision.

37. The Judge noted the medical conditions suffered by the children and his partner as set out in the uncontested independent evidence. The judge found that the evidence demonstrated that the claimant's contribution to the children and his partner are essential to their well-being. On the evidence, this was a conclusion available to him. He further noted that the independent evidence states that the social worker believes that the family needed the contribution of the claimant as a positive male carer role model.

38. The Judge took into account the assessment of the Family Services Officer at Glenbrook School in respect of R, the appellant's daughter who provided an assessment that she has changed since the claimant's deportation, from a confident and engaging pupil and her demeanour and mood has deteriorated which is significantly affecting her ability to access her learning and that she has not been in school since 17 March 2020. Ms Fernandez reports a high degree of concern in school for her emotional well-being, educational future and emotional fragility. The independent evidence which was also taken into account that she is not only suffering the claimant's loss but is also suffering the unavailability of her mother.

39. As regards, L, the independent evidence was that in 2020, everything that is familiar to her, in terms of her family, friends, routines,

the familiar environment has been affected because her father is not available to her and her memory of that positive paternal influence is likely to evaporate due to her age and such a fundamental change in her life is causing her confusion and disruption to her established parental attachments and therefore resulting in significant emotional harm.

40. In respect of AW, the appellant's partner, the independent evidence is that the children's reported emotional behaviour and stress related health difficulties demonstrate that key protective systems have been disrupted and stress from enduring their father's deportation. Due to this the children have to rely upon AW and each other for their stability and are confused at being left by their father and wondering what they could have done to deserve that.

41. In the addendum report of 2022, it was stated that the independent evidence was that since the claimant's departure the children have experienced ongoing instability in relation to their mother's mental health. C's attitude, behaviour and social profile has deteriorated in the absence of his stepfather's stabilising presence and guidance. The partner started depending upon her own mother. The fracturing of this family means that the partner could no longer manage C, so he was sent away to live with relatives in Jamaica. Similarly, J was unable to manage the burden of being a carer for her siblings, so she also distanced herself.

42. The Judge considered the overall impact on the children relying on the independent evidence which stated that "they are now extremely seriously worried about the future that lies ahead of the children of this family in the ongoing absence of their father". The independent evidence was that the claimant's parenting, love and care is desperately needed by his children and his wife, and to achieve stability for the whole family will prove impossible without it and that the detrimental effects of this sudden and lengthy paternal loss will continue to bear a serious lifelong consequences for the children in their identity, relationships, well-being and mental health prospects.

43. The Judge did not make his decision lightly that took into account all the evidence was before him which was not contested by the respondent. It cannot be said that these findings were irrational and not within the parameters of the evidence. Therefore, the First-tier Judge's decision is rationally supportable.

44. We remind ourselves of the guidance given by the Supreme Court in *HA (Iraq).* The guidance given regarding the unduly harsh test is at [41]-[43]: We consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:

> "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or

> bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

45. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - i.e. it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C (6).

46. We find that the Judge applied this test and self-directed himself in his assessment whether it would be unduly harsh for the deportation order to stand, given the devastating effects on the British citizens family of the claimant in the United Kingdom. The Judge self-directed himself on the unduly harsh hurdle which he stated is "is a high one – denoting's that are severe or bleak – given the strong public interest in deporting foreign criminals". We considered that the Judge directed himself correctly in respect of the unduly harsh test.

47. We remind ourselves that we must exercise caution in interfering with findings of fact and credibility by the First-tier Tribunal: see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed.

48. We find no merit in the respondent's argument that the Judge did not consider the previous decision of Judge Welsh in terms of the principles set out in Devaseelan. We acknowledged that the Judge did not specifically mention this case, however the Judge makes continuous reference to Judge Welsh's findings in his decision. The Judge did apply the principles set out therein and was entitled to come to a different conclusion on the 'stay' scenario to Judge Welsh on the up-to-date evidence before him. The Judge was mindful that there was additional evidence which was incumbent on him to take into account. We consider that the principles were met in substance, if not in form.

49. The respondent relied on the fact that C has been living in Jamaica and that the claimant's partner visited him Jamaica and gave birth to their third child which suggests that the family can return to Jamaica. This evidence is equally consistent with the strength of the relationship of the claimant with his partner and children. We were informed that C has come back to the United Kingdom. It was open to Judge Wilsher to take into account the particular circumstances of the third child, who had been born after Judge Welsh's decision, and who suffers from cerebral palsy, before concluding that it would be unduly harsh for the family to continue to be separated from the claimant.

50. At the hearing, it was submitted that the judge might have made a factual error at [30] in stating that Judge Welsh found that it would be unduly harsh to expect J and C to relocate to Jamaica. In fact, Judge Welsh had found that it would be unduly harsh for T and C to relocate to Jamaica because it would mean separation from one of their birth parents.

51. First, this point was not pleaded in the grounds and was raised for the first time at the hearing. Second, any error in referencing the children would have made no material difference to the outcome. Even if, at the date of the hearing before Judge Wilsher C was living in Jamaica, Judge Welsh's finding relating to T was still likely to have stood. There had been no material change in his circumstances. In any event, we note that, although it was not conceded, the most recent decision letter did not depart from Judge Welsh's finding in relation to the 'go' scenario. The decision did not assert that the family could relocate to Jamaica. Mr Lindsay also accepted that there was no evidence to suggest that a submission was made to that effect to Judge Wilsher.

52. In the circumstances we find that the Judge did not materially error in respect of his findings pursuant to Exception 2 and the proportionality assessment in the Article 8 of the European Convention on Human Rights.

53. The decision stands unchallenged, and we uphold it.

Notice of Decision

54. For the foregoing reasons, our decision is as follows:

The making of the previous decision did not involve the making of a material error on a point of law.

We uphold the previous decision.

Signed by: Dated: 18 June 2024

Sureta Chana

Deputy Judge of the Upper Tribunal