IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001121
UI-2024-001122
First-tier Tribunal No:
EA/00651/2023
HU/01705/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 5th June 2024

Before

UPPER TRIBUNAL JUDGE LANE
DEPUTY UPPER TRIBUNAL JUDGE HUTCHINSON

Between

Mohd Faysal

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Biggs of Counsel instructed by Woodgrange Solicitors
For the Respondent: Ms Ahmed, Senior Home Office Presenting Officer

Heard at Field House on 22 May 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of Portugal born on 11 June 1990. He appealed against the respondent's decision to make a Deportation Order dated 30 December 2022. His appeal against the decision was dismissed by First-tier Tribunal Judge Lingam ('the judge') on 10 January 2024, following a hearing on 18 December 2023. The appellant was sentenced on 28 October 2022, at Harrow Crown Court, to 3 years in prison, having pleaded guilty to the offence of attempting to engage in sexual communication with a child and attempting to arrange/facilitate commission of a child sex offence. The appellant's date for release on licence was 7 December 2023.

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2. Permission to appeal was granted by Upper Tribunal Judge Rintoul, on 17 April 2024, on the basis that it was (just) arguable that the judge had made factual errors as set out in the renewed grounds of appeal at grounds 1 and 2. Whilst there was less merit in ground 3, permission was granted on all grounds. It was noted that if the judge had clearly set out whether Exceptions 1 or 2 had been met, or had addressed undue harshness, the Upper Tribunal Judge's decision may well have been different. It would be for the appellant to demonstrate whether the claimed errors were material.

3. The matter came before us to determine whether the First-tier Tribunal had erred in law, and if so whether any such error was material and thus whether the decision should be set aside.

Discussion

4. It was argued that the judge made errors in her assessment of the significance of the appellant's ties with his family, with the judge said to have erroneously considered that the appellant had lived without his family in Portugal for 19 years (paragraphs [71] and [76]) whereas the evidence was that the appellant had lived with his family in Bangladesh from 2004 to 2010 before moving first to Portugal in January 2011 as set out at [12] of the decision and paragraph 17 of the appellant's witness statement. However the judge relied upon what appears to be an incorrect recording of the appellant's background in his pre-sentence report. It was argued that on the basis of this error the judge reached her conclusion at [99] that the family would be returned to the same situation in which they had lived for nearly 20 years, until 2019.

5. It was further argued that the judge found that the significance of the appellant's family life was diminished because of his lack of attempt before 2019 to bring any of his family to Portugal, which it was argued disregarded evidence that the appellant had, when possible, visited his family in Bangladesh and had been prevented from relocating them to Portugal because of income related immigration requirements (paragraph [12]) and that the appellant had then relocated his family to the UK. Thirdly, the judge found that the significance of family life was further reduced by the professional assessments in the OASys report that the appellant may harbour dissatisfaction on a physical level with his wife, which was described as an important issue which was 'clearly unresolved'. However, even if this was correct, with it being argued that this was overstating the evidence, it was argued that this was no basis in law for finding the significance of family ties may be diminished by the state of their sexual satisfaction.

6. The second ground argued that the judge erred in assessing the consequences of the appellant's deportation for his family, in that the judge made unsupported findings that the appellant's family had access to a support network, including that the appellant had maintained contact with his brother and uncles whereas it was the consistent evidence before the First-tier Tribunal, including in the appellant's

witness statement that his family were not currently receiving support from family members and were living in poverty as a result and that the appellant had expressly stated in his witness statement ([21]) that his brother had failed to help in his absence.

7. It was argued that the judge also erroneously proceeded on the basis that the effect of deportation would be to return the family to their situation prior to joining the appellant in the UK in 2019, whereas the evidence indicated that the appellant's wife now suffered from mental health problems which it was argued distinguished the family from the pre-2019 circumstances. It was argued that it was insufficient for the judge to assert that there was no evidence as to how she managed her anxiety prior to 2019. It was argued that the judge failed to engage with the evidence that the appellant's wife's mental health was now significantly worse than it had been prior to 2019.

8. The Grounds further asserted that the judge, in assessing the re-offending risk erred in attaching too much weight to the OASys report dated 6 March 2023, and too little weight to the letter of Mr L, probation officer, dated 28 November 2023. It was argued that the judge failed to have regard to the appellant's expressions of remorse and to consider how that affected the reasoning in the OASys assessment, which depended upon the appellant's lack of insight into his offending, or irrationally dismissing that evidence along with the Mr L's evidence.

9. It was argued that the identified errors either individually or cumulative were material to the judge's assessment of the proportionality, in terms of Article 8(2) of the ECHR, of the appellant's deportation and that they demonstrated that the judge's application of Article 8, in terms of section 117C(6) of the Nationality, Immigration and Asylum Act 2002.

10. Mr Biggs noted that the appellant is a medium offender and that the case involved minor children whose best interests must be treated as a primary consideration. Mr Biggs submitted that it could not be assumed that the appellant's case could not satisfy the very compelling circumstances threshold following a rehearing. In any event, it was argued that the errors in the judge's decision were such that the appellant and his family did not receive a fair and proper assessment of the interference with their Article 8 rights, which is was submitted was in itself sufficient to establish a material error of law (**ML (Nigeria) v SSHD [2013] EWCA Civ 844**).

Ground 1

11. It was not disputed that the relevant question for the judge was, at set out at paragraph [33], whether there were very compelling circumstances over and above those described in Exception 1 or Exception 2 under section 117C (4) and (5). The judge noted at paragraph [96] that the appellant's representatives accepted that this was the relevant test. At paragraph [61] the judge noted that the appellant's skeleton argument accepted that the appellant had not lived

in the UK most of his life, that his wife is neither British, nor settled in the UK and that his children are not British citizens , nor have they lived in the UK for more than 7 years, and as such the Exceptions under section 117C do not apply.

12. **NA (Pakistan) v SSHD & Ors [2016] EWCA Civ 662** confirmed that an appellant sentenced to less than four years in prison who falls outside of the exceptions listed in Paragraphs 117C(4) and 117C(5) may rely on the exception in Paragraph 117C(6). It was held at paragraph 32 that:

> “But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation”.

13. In a careful and comprehensive decision, the judge correctly directed herself in relation to the applicable law and jurisprudence. The judge took into account at [62] that it was argued that there were a number of factors which cumulatively amounted to very compelling circumstances and noted at [60] that it was argued that it would be unduly harsh for the children to leave the UK. The judge adopted the approach in **HA (Iraq) v SSHD [2022] UKSC 22,** (as set out in the appellant’s representative’s skeleton argument) including the relevant factors to be considered and that:

> ‘when considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation’.

14. The appellant is a Portuguese national who has lived lawfully in the UK since 2019. Ground 1 argued that the judge had erred in his assessment of family life in incorrectly finding that the appellant had been away from his family for 19 years (on the basis of the chronology in the OASys report). It is argued that in fact the appellant lived for 13 rather than 19 years in Portugal. On any reading of the evidence, it is difficult to see what material difference it would have made to the judge’s overall conclusions, including her conclusion that the decision would essentially return the family to the situation they were in, in 2019. On any reading of the evidence, the appellant and his family lived apart for well over a decade. Any error by the judge in the time the appellant was in Portugal cannot be material including in light of the judge’s findings at [88] that the appellant had a genuine and subsisting family life with his wife.

15. Similarly, any claimed error by the judge in giving weight to the lack of attempt prior to 2019 to bring his family to Portugal, where it was claimed that the appellant had been prevented from doing so due to the immigration rules in Portugal, and/or in giving weight to the view of the author of the OASys report that the appellant might not be satisfied with his ‘sexual interactions with his wife’, is not material, including in the context of the judge’s acceptance of a subsisting relationship with his wife and that notwithstanding the judge’s concerns in relation to the appellant’s failure to bring his family to Portugal, it was accepted (at [68]) that the appellant enjoyed a genuine and subsisting relationship with his wife and children prior to the appellant’s custody.

16. The judge’s consideration was much broader than the two issues which the grounds identify, in reaching her evidence-based findings and conclusions from paragraphs [33] to [100] that ultimately the appellant’s deportation would not create very compelling circumstances or breach UK's obligations if he were deported to Portugal, and we remind ourselves of the dangers of ‘island-hopping’ whereas the judge has had regard to the whole of the sea of evidence (**Fage UK Ltd. v Chobani UK Ltd. [2014] EWCA Civ 5 at [114]**). Any claimed error in the judge’s approach does not meet the high test of irrationality and the conclusions reached were adequately reasoned. Ground 1 amounts to no more than a disagreement with the judge’s findings.

Ground 2

17. Ground 2 argued that the judge made errors which were relevant to the impact of deportation on family life; it was argued that the judge erred at [69] in finding that the appellant’s family had access to people willing and able ‘to provide financial support’. Whilst the grounds pointed to the appellant’s evidence that his family were not providing support to his family, the judge was entitled to attach weight to the evidence that the appellant had maintained contact with his mother, brother and uncles, as well as with his wife, whilst in custody. The judge was also entitled to attach weight to the evidence that the appellant had support from his extended family member in the UK, when he was in the UK before moving to Portugal.

18. The judge was aware of and recorded, at [69], the appellant’s claim that his family were ‘suffering without his support’. However, it was open to the judge to be satisfied, on the available evidence, that there was a ‘functioning support network available in the UK’ that could provide support and assistance to the appellant and his family after their return to Bangladesh or to Portugal. This finding was reached in the context of the judge’s wider findings, including that the appellant owns a house in Bangladesh, accessible to the appellant and his family.

19. The judge also noted, at [96], that although the issue of housing in the UK was only relevant if the appellant succeeded and his family were allowed to remain in the UK, the judge considered the appellant’s concerns, including as set out in the appellant’s skeleton argument

about his family potentially being made homeless. However, the judge reached sustainable findings that the council was helping the appellant's wife and children with temporary housing in the UK. The judge's findings indicate that the judge took into consideration all of the arguments being made. This included observing, at [94] that his elderly mother had returned to Bangladesh. It was claimed that this was due to a lack of care available form the appellant's wife. The judge took into account however, that she had returned voluntarily, which demonstrated that there was both adequate accommodation and suitable care/support available to her in Bangladesh.

20. Ground 2 also argued that the judge erroneously proceeded on the basis that the decision would be returning the family to the same situation they were in 2019, when they had been successfully conducting family life with the appellant in Portugal and his wife and children in Bangladesh. It was argued that the judge had failed to consider the appellant's wife's evidence that her anxiety had increased.

21. The judge considered the appellant's wife's circumstances in some detail from [88] to [90]. The judge considered that it was probable that his wife would have relied on the appellant for her health issues prior to the appellant's conviction and that since then the family 'probably has alternative arrangements, perhaps with help from relatives in the UK'. The judge considered a medical letter dated 3 October 2023 which noted that the appellant's wife suffered from regular panic attacks 'especially over the last month, exacerbated by the court case'. The letter also indicated that the appellant's wife's history of panic attacks had increased 'owing to the recent incidents'. The judge went on to note that the appellant's wife was the main carer for her children prior to 2019 with contact limited to yearly visits and calls from the appellant. Although the judge was criticised for noting that there was no evidence as to how the appellant's wife managed and controlled her anxiety attacks in the past, the onus was on the appellant to demonstrate very compelling circumstances. It was properly open to the judge on the available evidence to consider the appellant's increased anxiety in that wider context and to take into account that the appellant's wife would 'have access to close family support network to help manage her anxiety'. Ground 2 is not made out.

Ground 3

22. Ground 3 argued that the judge had erred in considering the public interest, in irrationally rejecting evidence of the appellant's remorse. In particular, the appellant relies on an email from the appellant's probation officer and the appellant's witness statement.

23. The judge's findings must be considered holistically. The judge at [36] set out that a balance sheet approach was recommended and observed, at [37], the judicial guidance in relation to 'very compelling circumstances' including that 'very' indicates a very high threshhold and that 'compelling' means circumstances which have a powerful,

irresistible and convincing effect. The judge, throughout the decision and reasons made appropriate self-directions, including reminding herself of what was said in the appellant's skeleton argument.

24. The judge at [38] indicated that she would first assess the short form probation service report completed on 21 September 2022 and then the OASys report dated 6 March 2023. The judge set out her very detailed assessment of these reports from [39] to [54]. This included that the appellant was noted, on learning that the victim was a decoy, as considering that there was no real victim of his offence, and it was further noted in the OASys report that although the appellant had pleaded guilty at his trial, he continued to maintain his 'innocence' despite the sentencing remarks. The report noted that the appellant did not accept responsibility for his index offence and that it was accepted that his current offence was part of an established pattern of similar offending. It was further noted in the OASys report that the appellant was not open on why he had committed the index offence which made it difficult for probation to assess factors linked to the decision to offend. The judge further recorded that the OASys report indicated that the appellant showed very little insight into his offending behaviour and minimised his wrongdoing, including making out that his 8 month communication of sexual content with the victim was a 'joke'. The probation officer noted that the appellant's consideration that it was unnecessary to complete his offence-focused work indicated his lack of insight into the seriousness of the offence and factors in his life which might trigger his behaviour. The report also noted that whilst the risk of the appellant's indecent image reoffending was low, his risk of sexual offending was medium. The judge observed, at [54], that the appellant clearly had the presence of mind to obfuscate the truth.

25. The judge then considered from paragraphs [55] to [57] that to address the above two reports the appellant relied on a short letter from a probation officer Mr L. The judge referred to an unsigned letter dated 28 November 2023. Whilst there was discussion at the hearing before the Upper Tribunal as to whether the letter was signed or not, as Ms Ahmed pointed out, this was not in the appellant's grounds of appeal. The correspondence was by email which may account for the judge referring to the letter as unsigned. In any event, we are of the view that nothing turns on this issue.

26. Whilst there is email correspondence between the appellant's representative and probation on 28 November, it was on 23 November 2023 that Mr L, on being asked to report on a remote meeting with the appellant noted that the appellant 'appeared to be remorseful over his behaviour. He did explain that he wanted to get back into the community as soon as possible to see his family members.' In an earlier email the same day Mr L indicated (in reply to the appellant's representative requesting a copy of his risk assessment) that he did not 'have a full risk assessment for him until his release. His basic assessment has limited information that was conducted by a previous officer.'

27. The judge noted at [55] that Mr L did not specifically address the concerns in the OASys report but noted that there were additional conditions put on the appellant's licence to manage his risk effectively in the community. The judge then considered the email chain of communications between the appellant's representative and probation, including that the appellant was interviewed remotely and that the appellant <u>appeared</u> remorseful (judge's emphasis). Whilst the judge was criticised for stating that 'clearly this interview was at the instigation of the appellant and or his legal reps' when it was argued that there was nothing to suggest that this was anything other than part of normal probation process, we do not find any claimed error to be material. Whilst the judge was also criticised for indicating at [57] that the probation officer appeared to either not be aware of or not have been provided with a copy of the OASys report, which was said to be speculative, the judge was entitled to take into account that Mr L stated that he did not have a full risk assessment until the appellant's release and that 'his basic assessment' had limited information and was conducted by another officer.

28. It was open to the judge therefore to approach the information provided, which included that the appellant 'appeared' to be remorseful, with caution. We take into account however, that the judge did not reject this evidence, but noted that she assessed it in the round. Whilst the short email correspondence from Mr L postdated the OASys report, we accept that the judge was entitled to consider this and the appellant's own expression of remorse in the context of all the evidence, including the comprehensive and much more detailed OASys report which indicated that the appellant did not at that stage accept responsibility and showed little insight. Mr L confirmed that there would not be a full risk assessment until the appellant's release. The judge noted, at [73] onwards the appellant's own expression of remorse and sets out her wider analysis of the appellant's further arguments against deportation, from paragraph [76].

29. It was properly open to the judge therefore, on the available evidence, to attach more weight to the OASys report, which contained a detailed risk assessment. It is evident from a fair and holistic reading of the judge's decision that having considered all the evidence, she was not satisfied that the remorse expressed by the appellant was sufficient to outweigh the public interest in deportation. Ground 3 is not made out.

30. We also address the argument made by Mr Biggs that the claimed errors in the judge's decision meant that the appellant and his family did not receive a fair and proper assessment of the interference with their Article 8 rights which he argued was in itself sufficient to establish a material error of law.

31. We have considered **ML (Nigeria)** as relied on by Mr Biggs. We have in mind what was said by Moses LJ:

"11. In those circumstances, even this claimant (and I underline "even" because undoubtedly he had a very difficult case) was entitled to a fair hearing in which his arguments were advanced. How then is the Upper Tribunal, or for that matter the Court of Appeal, to judge whether someone had a fair hearing? Part of the way that can be judged is by looking at the determination, looking at that which is recorded and looking not only at the cogency of the reasons but the procedures by which the judge reached his adverse conclusion. The submissions were important, yet apparently this judge took into account that which did not exist at all, namely written skeleton arguments and interviews setting out the case in relation to this appellant's claimed homosexuality.

12. In that context, the carelessness which led him to refer to Sri Lanka takes on a more sinister turn. How can it be said that this judge carefully and conscientiously considered the arguments both against and for this claimant before reaching the serious conclusion that he was not to be believed? In my view, it cannot. The procedure was so flawed by which the judge reached his conclusion that, in my view, it was plainly an error of law because this claimant had no proper or fair hearing at all

13.In those circumstances, it seems to me that the only conclusion the Upper Tribunal should have reached was to set aside the decision of the First-tier Tribunal and try the matter again or, if there was not time to do so, although we understand the witnesses were there, send it back for a further hearing. For my part, because the FTT decision was so bad and because of the inability that I have to have any confidence that the judge conscientiously and fairly took into account the arguments deployed on behalf of the appellant, I am led to the conclusion that the Upper Tribunal's decision ought to be quashed.

14. As a second limb, as I have hinted, Mr Rawat said that, even if there were these errors, there is no point in sending this case back for a further hearing. But so bad was the decision that, in my view, it would be wrong to consider the chances of success that the claimant might have a second time round. I am perfectly prepared, as a matter of hypothesis, to assume that he will have a very difficult run on a further occasion. But that cannot displace the obligation for the procedure to provide him with a fair opportunity of deploying his case. It is, after all, the reputation of the courts, and the courts in relation to immigration, which is at stake here. It seems to me that they cannot be preserved and protected as deserving respect if a decision which is so flawed is allowed to stand."

32. We have rejected the grounds of appeal in this case, for the reasons already given. Even if we had not, we find this case to be distinguishable from **ML (Nigeria)** . It cannot be properly said that the claimed errors in this case were such that the decision was flawed to the extent that the appellant in this case was deprived of a fair hearing.

Decision:

33. The making of the decision of the First-tier Tribunal did not involve the making of an error on a point of law. We do not set aside the decision

M M Hutchinson

Deputy Judge of the Upper Tribunal
Immigration and Asylum Chamber

Date: 3 June 2024