**IMMIGRATION AND ASYLUM CHAMBER**

**IN THE UPPER TRIBUNAL**

Case No: UI-2024-001366

First-tier Tribunal No: HU/00866/2022

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

On 27th of June 2024

**Before**

**UPPER TRIBUNAL JUDGE STEPHEN SMITH**
**DEPUTY UPPER TRIBUNAL JUDGE HANBURY**

**Between**

**Lasantha Bodaragama**
**(NO ANONYMITY DIRECTION MADE)**

Appellant

**and**

**Secretary of State for the Home Department**

Respondent

**Representation:**

For the Appellant: Mr G. Lee, Counsel instructed by Kothala & Co.
For the Respondent: Mr E. Tufan, Senior Home Office Presenting Officer

**Heard at Field House on 24 May 2024**

**DECISION AND REASONS**

1. By a decision promulgated on 18 August 2023, First-tier Tribunal Judge Feeney ("the judge"), as she then was, dismissed an appeal brought by the appellant, a citizen of Sri Lanka born in 1980, against a decision of the Secretary of State dated 10 January 2022 to refuse his human rights claim, made in the context of a decision to deport him pursuant to section 32(5) of the UK Borders Act 2007. The judge heard the appeal under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

2. The appellant appeals against the decision of the judge with the permission of First-tier Tribunal Judge L. K. Gibbs.

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## Preliminary issue: validity of the grant of permission to appeal

3. Judge Gibbs granted permission to appeal to this tribunal by a decision dated 3 October 2023. Her order granting permission correctly identified the decision of Judge Feeney by reference to the "HU" reference number, the date the decision was signed (13 August 2023), the name of the appellant, and the fact the decision had been taken by Judge Feeney. However, in the part of her order stating "reasons for decision", Judge Gibbs gave reasons which appear to be wholly unrelated to this appellant and the decision of Judge Feeney.

4. It was common ground at the hearing before us that Judge Gibbs must have had another case in mind when giving her reasons for her decision to grant permission to appeal.

5. Ahead of the hearing in the Upper Tribunal, we took steps to ascertain through the tribunal's administration whether there was another decision granting permission to appeal by Judge Gibbs, by reference to reasons relating to these proceedings. We were told that no such decision could be found.

6. There are any number of explanations for what took place. The most plausible is that the reasons Judge Gibbs had in mind for granting permission to appeal in these proceedings may well feature in another, unidentified case.

7. We do not consider that the absence of reasons relating to these proceedings in the decision of Judge Gibbs renders the grant of permission in these proceedings to appeal invalid. On the face of it, the order by the judge granted permission to appeal by reference to this appellant, with the correct reference number, with key identifying features of Judge Feeney's decision set out in the operative part of the decision granting permission to appeal, namely the date of the decision and the identity of the judge. The reasons for Judge Gibbs' decision are, of course, distinct from the decision to grant permission to appeal itself. There is in fact no requirement in the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014 for decisions *granting* permission to appeal to feature reasons; as a matter of good practice, they should, but it is not a prerequisite for a decision granting permission to appeal to be valid: see *Joseph (permission to appeal requirements)* [2022] UKUT 218 (IAC), at para. (4) of the headnote.

8. There has been no challenge by the Secretary of State to the validity of Judge Gibbs' grant of permission to appeal. Pursuant to *Ndwanyi (Permission to appeal; challenging decision on timeliness)* [2020] UKUT 378 (IAC), a decision granting permission to appeal is valid unless challenged by judicial review. In the absence of such a challenge, we consider that permission to appeal has been granted validly, and that the Upper Tribunal enjoys the jurisdiction to hear the appellant's appeal against Judge Feeney's decision.

## Factual background

9. The appellant arrived in the United Kingdom in 2003 on a visitor's visa valid for one month. He overstayed. In May 2006, he was convicted of obtaining services by deception and possessing criminal property. He was sentenced to a total of nine months' imprisonment. He later claimed asylum, unsuccessfully. Deportation was not pursued at that stage.

10. The appellant was later disqualified from driving following a number of driving offences committed in 2019 and 2020. Those offences did not lead to the Secretary of State pursuing deportation action at that stage, either.

11. On 21 May 2014, the appellant was granted leave to remain on the basis of his private and family life, which was extended until 7 July 2020. On that date he applied for further leave to remain.

12. While the appellant's 7 July 2020 application for further leave to remain was under consideration, he was convicted before the Crown Court at Ipswich of assault occasioning actual bodily harm and driving while disqualified. He was sentenced to 22 months' and two months' imprisonment respectively, to be served concurrently. The sentence of 22 months' imprisonment triggered the automatic deportation provisions in the UK Borders Act 2007, leading to the Secretary of State inviting representations from the appellant as to why he should not be deported. The appellant made a human rights claim in response, and it was the refusal of that human rights claim that was under appeal before Judge Feeney.

13. The offence of assault occasioning actual bodily harm took place as follows, in May 2020. The appellant was driving a car, while disqualified. In the car were his two children, T, born in 2007, R, born in 2011, and his wife, the mother of their children. The appellant attacked his wife while he was driving the car, in front of their two children. The assault caused his wife to occasion actual bodily harm, which was described by the sentencing judge as a sustained attack on a vulnerable victim. The sentencing judge said that she would have been particularly vulnerable through her concern for the children being in the car at the time. The fact that the car was moving was also an aggravating feature. As a consequence of the attack, the appellant's wife had to move out of the family home and seek refuge with a family member. The appellant had committed the offence while subject to another court order, namely disqualification from driving, breaching that order. The appellant denied responsibility for the offence until a relatively late stage in the proceedings, resulting in the sentencing judge awarding only a 18.5% discount from the notional post-trial sentence, which would have been 27 months' imprisonment, rather than the full discount of one third, which applies to a guilty plea entered at the earliest opportunity.

14. The appellant's case before the judge was that he had developed a particularly strong relationship with T. At the time, T was under 16 and was living with the appellant's wife and her new partner. The appellant had no contact with R. On his case, T was unhappy with the arrangements with his mother's new partner, and was not being cared for properly. A friend of the appellant, Mrs J, had had to intervene by speaking to the appellant's wife, in order to improve the care which T was receiving from his mother. That intervention had led to a request from the relevant social services department asking Mrs J to refrain from making contact in that way; it was perceived as being unhelpful. The appellant's conditions under his post-release licence, which came to an end on 9 January 2023, had previously prevented him from having any contact with either T or R without the agreement of the probation service, or the relevant social services department. Once those conditions came to an end, the appellant sought to regularise his relationship with his children through other means. However, as the appellant explained in his witness statement prepared for the First-tier Tribunal, he was unable to afford to take steps to formalise his access to his children through the Family Court, and decided to wait until he could resolve the relationship through other means. It

was the appellant's case that T would come to live with him as soon as he was 16.

15. The appellant's case was that his relationship with T was particularly strong. T was unhappy both at home and at school, and a number of behavioural concerns had been raised in relation to him. The appellant claimed that he needed to maintain his relationship with T, in the UK, because that was in T's best interests. While he did not have a relationship with R at that time, it was his plan to develop such a relationship in time.

**The decision of the First-tier Tribunal**

16. The judge considered the appellant's deportation under the framework contained in section 117C of the 2002 Act. She found that none of the criteria under Exception 1 (section 117C(4)) were met. There has been no challenge to those findings, and we need say no more about them.

17. In relation to Exception 2, under section 117C(5), the judge accepted that the appellant had a "particularly close" relationship with T. He had telephone contact with him regularly, and face-to-face contact at the weekends. T planned to live with the appellant once he turned 16. While there was no medical, psychological, social work or school-based evidence to support the appellant's claims about the extent of the impact of his departure from the United Kingdom on T, she found, at para. 40, that:

> "notwithstanding this, I am prepared to accept that [T] has, particularly over the last 6 – 7 months, forged a close bond with his father."

18. At paras 41 and 42, the judge held:

> "41. I take into account section 55 of the Borders and Citizenship and Immigration Act 2009. My starting point is to consider the best interests of the Children. Social services are no longer involved in the family. They requested Mrs J refrain from contacting the children to enable them to build their relationship with their mother. Based on the evidence before me I find T is not at risk at home and it is in his best interests to continue to live with his mother who is his primary carer. The same applies for Rissi.
>
> 42. The appellant's departure would not be unduly harsh on T. T will still be able to live with his brother and mother, his primary carer, in the family home. He is in good health. He will be able to continue his schooling. The appellant has cordial relations with his ex-wife and T will be able to maintain contact with his father who he can contact for emotional support as he does now. I appreciate it is not the same as seeing his father face to face but it is not unduly harsh on T for contact to be maintained in this way. T will still be able to contact Mrs J if he wishes. He is able to rely on his school and social services for support if required although at this stage any involvement by them appears to be limited."

19. The judge considered whether there were "very compelling circumstances over and above" the Exceptions to deportation at paras 43 to 49. She said (para. 44) that she drew on the factors summarised by *Uner v Netherlands* (2007) 45 EHRR 14. She accepted that the evidence pointed towards the appellant's rehabilitation (para. 46). Her operative conclusions were at paras 48 and 49:

> "48. I turn to consider the factors in his favour. As explained, I am able to consider these cumulatively. I bear in mind that he has now been in the UK for approximately 20 years and some weight does attach to this. During this time he raised his family. I bear in mind he has demonstrated remorse and rehabilitation to which I attach some weight. I bear in mind the emotional consequences his departure will have on T who has come to depend on him for emotional support. However I have already reached the conclusion that the appellant's departure is not unduly harsh on T and the appellant does not meet the requirements of the other sections either.
>
> 49. I find even when taken cumulatively there is nothing very compelling in these circumstances. I weigh the factors set out above and find the weight I attach to the public interest tips the balance in the respondent's favour such that her decision is proportionate."

20. The judge dismissed the appeal.

**Issues on appeal to the Upper Tribunal**

21. There are two grounds of appeal:

    a. Ground 1: the judge failed properly to consider the impact of the appellant's deportation on T by failing to consider a range of factors, summarised at para. 5 of the grounds of appeal, militating in favour of the conclusion that the appellant's deportation *would* be unduly harsh;

    b. Ground 2: the judge failed to address the prospective restoration of the appellant's relationship with R, even though they do not have a relationship at this time.

22. Mr Lee submitted that there was evidence before the judge going to the eight factors summarised in para. 5 of the grounds of appeal, which the judge failed to address. Those factors included T's "extremely close" relationship with the appellant, the impact of separation for an indefinite period upon T, T's expressed desire to live with his father, T's evidence that he was not happy living with his mother, T's evidence that there had been contact with the police over his relationship with his mother's new partner, T's disruptive behaviour at school is a time when the appellant was prevented by the conditions of his licence from making contact with T, and the fact that T was at a crucial juncture in his teenage years. The judge failed to address those factors to the required level of detail, Mr Lee submitted. In relation to the second ground, Mr Lee submitted that the judge had effectively taken a "snapshot" of the present lack of family life between the appellant and R, and failed to address the prospective restoration of the relationship that the appellant could, in principle, enjoy with him in the future.

23. Mr Lee supported his submissions by relying on *R (oao Fawad Ahmadi and Zia Ahmadi) v Secretary of State for the Home Department* [2005] EWCA Civ 1721, in particular at para. 18:

> "There is ample authority for the proposition that the obligations under Article 8 require a state not only to refrain from interference with existing life, but also from inhibiting the development of a real family life in the future."

24. For the Secretary of State, Mr Tufan submitted that the judge reached findings of fact based on the evidence that was before her. There were evidential gaps in relation to key evidence of the sort which would readily be available in order to substantiate the appellant's case, such as a report from an independent social worker, reports from the teachers with responsibility for T at his school. There was no such evidence. Elsewhere in the decision, in relation to the apparent difficulties between T and his mother's new partner, and the interventions of Mrs J, the judge made findings based on the evidence that was available. There had been a reference in the witnesses' evidence to a video apparently documenting the difficulties that T had to endure in the family home with his mother's new partner, but the video had not been before the judge. In relation to the second ground of appeal, the judge reached findings of fact there were rationally open to her on the material before her.

**The law**

25. Part 5A of the 2002 Act contains a number of mandatory public interest considerations to which a court or tribunal must have regard when considering whether an interference with a person's right to respect for private and family life is justified under Article 8(2) of the ECHR. The considerations in section 117C apply in all cases concerning the deportation of foreign criminals: see section 117A(2)(b).

26. Section 117C provides, where relevant:

> "(1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> [...]
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

27. The First-tier Tribunal is a specialist tribunal. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784, [2023] 1 All ER 365 Lord Hamblen said, at para. 72:

> "It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:
>
> > (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
> >
> > (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
> >
> > (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope."

28. The Court of Appeal held in *Re Sprintroom Ltd* [2019] EWCA Civ 932, [2019] BCC 1031 at para. 76:

> "…on a challenge to an evaluative decision of a first instance judge, the appeal court does not carry out a balancing task afresh but must ask whether the decision of the judge was wrong by reason of some identifiable flaw in the judge's treatment of the question to be decided, 'such as a gap in logic, a lack of consistency, or a failure to take account of some material factor, which undermines the cogency of the conclusion'."

**Discussion**

**Ground 1: sufficient consideration of all relevant issues**

29. In our judgment, the first ground of appeal is a disagreement of weight does not demonstrate that the judge failed to take into account some relevant factor, or that the judge's reasoning was infected by an error of the sort summarised in *HA (Iraq)* or *Re Sprintroom Ltd*.

30. By way of a preliminary observation, not surprisingly against the background of domestic violence committed in the circumstances of this appellant's offence, there is a difficult and sensitive family situation which lies beneath the Secretary of State's decision, and that of the judge, in these proceedings. In common with the judge below, we have not been provided with full details relating to what is said to have taken place. There is plainly a dispute of sorts between the appellant and his wife in relation to the child arrangements with T. The appellant

has not pursued an application before the Family Court for a child arrangements order, having explained in his witness statement that it was too expensive to do so. Instead, he appears to have enlisted the assistance of Mrs J, who gave evidence on his behalf before the judge, to make representations on his behalf to his ex-partner (we use the term "representations" in an attempt to be as neutral as possible). That intervention itself led to a request from the relevant social services department from Mrs J to desist from making interventions of that sort in the future. Put another way, there was a sensitive and difficult family dispute, underpinned by domestic violence, unsubstantiated allegations of T's welfare having not been catered for adequately, with a degree of parallel social services involvement, but (so far as we are able to tell) no formal involvement from the relevant local authority in relation to the appellant's post-licence child arrangements with T and R. Those factors would challenge even the most experienced judge in the Family Court, and meant that the judge's fact-finding task had to take place within a similarly challenging context. See, for example para. 25, in which the judge said that it was difficult to assess how extensive the claimed arguments in T's current family home are. She had not been provided with video evidence, and other evidence was missing. This was a challenging factual and evidential matrix for the judge to engage with.

31. We have every confidence that the judge fully appreciated the sensitive context, and the difficult relationships, which now characterise the relationship between the appellant, his wife and their children, T and R. She was sitting as an expert judge in a specialist tribunal. She was fully aware, in our judgment, of the factors summarised at paragraph 5 of the grounds of appeal, and took proper account of those factors in her decision. See, for example, para. 16, in which she referred to the difficult situation that T now finds himself in, namely being unhappy at living with his mother, and feeling abandoned and unwanted. She summarised the appellant's case in this respect at para. 17. Against that background, at para. 19, the judge accepted that the appellant had a "particularly close" relationship with T, and that it would be "very difficult" for T in the event of the appellant's deportation. She also accepted that the appellant's imprisonment had a significant impact on T, whose behaviour at school declined at the time. Plainly the judge had in mind that the appellant's deportation from the United Kingdom would have an effect of at least an equivalent impact on T, if not greater, on account of the prospective indefinite length (from the perception of a child, putting to one side the prospect of the deportation order being revoked under the immigration rules in due course). Throughout these considerations, the judge clearly took into account the issues raised in the grounds of appeal at para. 5.

32. In her findings of fact at para. 25, the judge considered that some of the evidence from the appellant's witnesses, by which she must have meant the evidence of Mrs J, was not impartial, but she accepted that there were some difficulties in the wider family relationship. She noted that there was no documentary evidence (which of course would be readily obtainable) concerning the attendance of the police at family incidents involving T, his mother and his mother's new partner, nor details relating to the outcome of police enquiries.

33. Despite the evidential gaps in the appellant's case, the judge accepted, at para. 26, that the living arrangements for T meant that he was currently not happy and would prefer to live with his father. She noted that there was no evidence that the involvement of social services had resulted in any steps being taken to remove T from his mother's care into that of his father, and noted that there was little

evidence from T's school about concerns in the family home. It was against that background that the judge reached her findings of fact that there was not likely to be a risk to T in the family home, and that his best interests were to remain living with his mother.

34. In our judgment, the judge took into account precisely the factors which the grounds of appeal contend that she failed to address. She noted the family tensions, and the allegations that T is not being cared for by his mother and her new partner, but also noted the absence of evidence of the sort that it would be reasonable to expect addressing those concerns in further depth. The judge was fully aware of T's claimed unhappiness with his current living arrangements, but also noted that there was a dearth of evidence concerning the broader factors which would otherwise feature as part of an assessment of whether the appellant's deportation would be unduly harsh on T. At para. 9, the judge had directed herself by reference to *HA (Iraq)* in relation to what amounts to "unduly harsh". As an expert judge, she would have taken those factors into consideration.

35. We consider that the judge reached findings that were open to her, that took into account all relevant considerations, and which did not involve the making of an error of law.

**Ground 2: disagreement of fact and weight**

36. Properly understood, we consider that the appellant's challenge to the judge's analysis of "very compelling circumstances over and above" is a further disagreement of fact and weight and does not disclose a material error of law.

37. The judge was plainly aware of the possibility of the appellant's relationship with R acquiring a "genuine and subsisting" status in due course. That is clear from the judge's reference at para. 40 to the appellant not enjoying a relationship with R "*at the moment*". We remind ourselves that the judge was an expert judge sitting in a specialist tribunal. The suggestion that she was no aware, or failed to consider, the prospect of the appellant's relationship with R improving in due course is, with respect, without foundation. We should be slow to conclude that the judge did not take a relevant point into consideration. Reading her decision as a whole, the judge plainly did.

38. At its highest, we do not consider that the mere potential for the appellant's relationship with R to develop in the future to be a factor that could have attracted such significant weight that it was an error for the judge not to refer it in further depth, for the following reasons.

39. First, there was no evidence that the relationship was improving, or that the appellant had even taken any concrete steps to pursue it. He had not, as he accepted in his witness statement, made an application to the Family Court for a child arrangements order. There was no evidence from his ex-partner about steps he had taken to restore his relationship with R, despite his evidence being that he had a cordial relationship with her (see para. 42). The suggestion that his relationship could develop in the future was not grounded in reality, on the basis of the evidence before the judge.

40. Secondly, the mere prospect of the relationship developing in the future could not have attracted the determinative weight that it would have to have attracted in order to call the judge's conclusions under section 117C(6) into question. By

enacting Exception 2, Parliament made provision for genuine and subsisting relationships with qualifying children to amount to an exception to the public interest in the deportation of foreign criminals, provided the effect would be "unduly harsh" on the child in question. The situation in relation to R is several steps removed from meeting that threshold; the appellant's relationship with him is not genuine and subsisting, and there is nothing to suggest his deportation would be unduly harsh on him. It would have been speculative for the judge to have concluded otherwise. That being so, it is very difficult to see how the appellant's future relationship with R could have led to any difference in weight in the overall proportionality assessment, on the material before the judge.

41. Thirdly, we do not consider the judgment in *R (oao Fawad Ahmadi and Zia Ahmadi)* to aid the appellant. Not only did it pre-date the enactment of Part 5A of the 2002 Act, but it related to a decision to certify a human rights claim as "clearly unfounded" under section 94(2) of the 2002 Act, such that the applicant did not enjoy a statutory right of appeal against the refusal of the decision. By contrast, this appellant has enjoyed a statutory right of appeal. The judge considered all relevant factors. She was aware of the prospect of the appellant's relationship with R developing in time (c.f. para. 40, "*at the moment...*"). The public interest favoured the appellant's deportation: see section 117C(1) ("the deportation of foreign criminals is in the public interest"). She found that there were no very compelling circumstances over and above the public interest in the appellant's deportation. *R (oao Fawad Ahmadi and Zia Ahmadi)* simply underlines the uncontroversial proposition that a relationship may develop in time; it is not authority for the proposition that the prospect of a developing relationship may defeat the public interest in the deportation of foreign criminals, in circumstances where, as here, a judge has already considered all relevant factors.

42. This ground is without merit.

43. This appeal is dismissed.

## Notice of Decision

The decision of Judge Feeney did not involve the making of an error of law.

This appeal is dismissed.

**Stephen H Smith**

Judge of the Upper Tribunal
Immigration and Asylum Chamber

**21 June 2024**