IAC-AH-DN/FH-CK-V2

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/19232/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 March 2021	**On 27 May 2021**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

DUANE JUSTIN DAVIS
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr T Aitken instructed by UK Migration Lawyers Ltd
For the Respondent: Mr A Tan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant is a national of Trinidad and Tobago. He appealed to the First-tier Tribunal against the respondent's decision of 4 September 2018 refusing a human rights claim.

2. The judge noted the appellant's immigration history. He had arrived in the United Kingdom on 28 June 2005 (at which time he was 22 years old) with entry clearance as a working holidaymaker valid to 27 June 2007. He had subsequent periods of leave as a spouse but applications for leave after

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the most recent grant of leave expired on 28 September 2002 were refused.

3. The appellant was convicted at Aylesbury Crown Court on 15 August 2017 of possessing with intent to supply a controlled drug, class A – heroin and possessing with intent to supply a controlled drug, class A – crack cocaine, for which he was subsequently sentenced to fourteen months' imprisonment. The judge noted that given the length of imprisonment imposed in accordance with paragraph 398 of the Immigration Rules the public interest required the appellant's deportation unless an exception to deportation applied. The judge noted the terms of the exceptions at paragraph 399 and paragraph 399A.

4. The appellant stated that he had family life in the United Kingdom with his three children. It was accepted that he had a genuine and subsisting parental relationship with them, and that it would be unduly harsh for the children to live in Trinidad and Tobago. The respondent however did not accept that it would be unduly harsh for the children to remain in the United Kingdom even though the appellant was deported. It was not accepted that he was socially and culturally integrated into the United Kingdom due to his criminal conviction, and it was considered that he still had social, cultural and family ties in Trinidad and Tobago. Also the respondent did not accept that there were very compelling circumstances which would outweigh the public interest in seeing the appellant being deported.

5. The judge heard oral evidence from the appellant who also adopted his statement.

6. The judge went on then to set out the relevant legal provisions and to make findings of fact. He noted the test set out in **Hesham Ali [2016] UKSC 60** and **MF (Nigeria) [2014] 1 WLR 544**. He set out the terms of paragraph 399 and paragraph 399A. He also reminded himself of the need to consider Section 117A-D of the Nationality, Immigration and Asylum Act 2002. He set out the guidance in **KO (Nigeria) [2018] UKSC 53** and in **PG (Jamaica) [2019] EWCA Civ 1213**. He noted the submission on the appellant's behalf that it would be unduly harsh for the children to remain in the United Kingdom without him and that there would be very compelling circumstances which would outweigh the public interest in his deportation by reference to his relationship with his partner Ms B, and her children.

7. With regards to the appellant's family circumstances, after coming to the United Kingdom he had married a British citizen Ms A-D. That relationship had now broken down and he was now in a relationship with Ms B. He has three British children with his wife, born respectively in 2007, 2009 and 2015. He said in his statement that he was heavily involved in the lives of his children and had always ensured that their needs were met. He said that prior to his imprisonment and when his relationship with his wife was

ongoing he resided with them on a full-time permanent basis. After he left the family home he still saw them daily and would take them and pick the up from school several times a week, take them out on family trips and even while he was in prison he ensured that his current partner gave them money, purchased items that they needed and gave them presents on birthdays and special occasions. He said that he spoke to his children on a regular basis although due to an error by the prison services the children were not allowed to visit him while he was in prison. Since his release he saw them more or less daily.

8. The appellant also referred to the behaviour of the eldest child deteriorating during the time when the appellant was in prison and since his release he had been spending as much time with him and the other children as possible and the child's behaviour was now improving although there was a long way to go. He also referred to the fact that Ms A-D had been suffering from a deterioration in her mental health and social services had concerns about the care of the children. He was concerned that they were living in overcrowded circumstances and stated that if he was allowed to remain in the United Kingdom he would obtain full care of his children to ensure they were provided with a stable home.

9. His relationship with Ms B had begun in 2013, although they had had a break during which he had conceived the youngest child with his wife. He and Ms B had reconciled and had been living together since 2014 until his incarceration. He was not presently living with her due to bail conditions, but wished to resume cohabitation with her. She has two children from a previous relationship for whom he cares. He said that he supported his partner and her children and they would be unwilling to relocate to Trinidad and Tobago.

10. The appellant had said that he had resolved to change his ways and he could not imagine spending lengthy periods of time away from his children again. He had not been back to Trinidad and Tobago since he entered the United Kingdom.

11. In his oral evidence he said he saw the children every weekend and would go to the cinema or park and sometimes saw them in the evenings after school. There was no new court order but social services had given the go ahead for him to have contact.

12. The appellant was sentenced to twenty weeks' imprisonment and a restraining order on 24 October 2016 for an offence of battery committed in May of that year. This, it appears from paragraph 77 of the judge's decision, was in consequence of an assault he made on his wife which resulted in the restraining order and the appellant confirmed that that was still in place and he could not go to the children's school although his son now went to a different school and he was going to go to a forthcoming parents' evening.

13. The three children currently live with their mother in a one-bedroom property with her nephew and her mother and there were serious concerns regarding overcrowding. He said that she did not cope very well with raising the children due to her medical conditions and her depression, and social services had been involved. He said that if he were deported this would have a negative impact on the children as they got anxious and worried that they would not see him again and when he had gone to prison his son had started to act up as he had no other male role model.

14. Ms B was not at court as her eldest daughter was ill and she had to stay home with her. The appellant said that while in prison he was responsible for the children's financial needs as in 2016 he resumed a relationship with his father and his father sent money. He did not want to leave his children in the United Kingdom without a father and did not want them to have to be provided for by the state. He still had a bank card provided to him by his father and would be able to use this in Trinidad and Tobago. He saw the children at weekends and also after school if they wanted to see him.

15. Ms A-D provided a statement of March 2016 stating that the appellant had parental responsibility and he would take and collect the children to and from school and attended school plays and parents' evenings. In a letter of 29 November 2019 she said that the appellant played an important role in the children's lives and they were working together for the children's best interests and it was imperative for him to be given the opportunity to continue to provide financial and emotional support to raise the children into responsible adults.

16. She also said that she had recently been diagnosed with a severe medical condition and had been hospitalised for a few weeks during which time the appellant played an important and significant role in the lives of the children.

17. Ms B stated she was the appellant's partner and mother of his two stepchildren and they had been living together since 2014 to the time when he went to prison and would be living together now but for his bail condition. She said that he was a devoted father to the children who doted on him and her children's biological father was not around as he had been in prison and the appellant was the only father figure in her children's lives. She feared what would happen to her family and her partner's biological children if he was unable to remain in the United Kingdom as her children had already suffered emotionally with the separation from her partner, and she believed it would be extremely upsetting for all concerned if he were required to leave the United Kingdom permanently. She said that she could care for and support her children but the appellant's biological children did not have the ideal family life and social services had been informed and they were concerned about the children and the mother's mental health. She said that she would never go to live in Trinidad and Tobago or allow the children to

relocate there and it would not be in their best interests to live there or be separated from their father and she wanted her partner to play an active role in the lives of the children.

18. The judge also had letters from the appellant's two older children who spoke of their love for their father and the strength of their relationship with him. The judge also had a letter from a social worker at the Family Support Child Protection Team of the London Borough of Lambeth. She said that she was the allocated social worker for the appellant's three children who were subjected to a Child Protection Plan on 30 April 2019 under the category of neglect and subsequently stepped down to the Child in Need Plan on 5 November 2019 due to the children no longer being at significant harm. She confirmed that the Appellant had had regular contact with his children since he came out of prison, valued his relationship and contact with them and played an active role in their lives. She said that Ms A-D had been open and honest regarding the amount of contact the appellant had had and said that the children were always on the phone to their father and that he had been a positive influence in their lives and had also been a great support to her and the maternal grandmother when she was in hospital. She said it was clear when working with the children that they valued their relationship with their father and often spoke about him and the activities they did together and the appellant provided emotional and financial support for the children and provided them with essential things for school and everyday use.

19. There was also a letter from the Probation Services in Lambeth who confirmed that the appellant was reporting regularly and there were no concerns or issues with regard to supervision. She noted that he was very remorseful about the offence he committed and had abstained from any form of drug use and had not shown any signs that he would return to that lifestyle and was very motivated to keep a positive healthy behaviour for the sake of his children and was a positive role model to them and had been taking his parental skills seriously and taking care of the children. She said that he had shown great signs of rehabilitation and readiness and willingness to change his life around for the betterment of himself and the children and that given the chance he would continue to do well and in turn become an upstanding and productive member of society.

20. The judge noted that the decision letter did not address the appellant's current partner or her two children and the appellant's relationship with them. The evidence was that they had nothing to do with their father but the judge noted that he had not received any reports in relation to the stepchildren. He accepted on the balance of probabilities that the appellant has a genuine and subsisting relationship with Ms B, but although she said the appellant had a relationship with her children the judge had very little information about them, the appellant did not currently live with them, and he was not satisfied on the evidence he had received that it could be said that he had a genuine and subsisting parental relationship with Ms B's children. He was satisfied that it would

be unduly harsh to expect her and the children to go to Trinidad and Tobago to maintain family life with the appellant.

21. The judge accepted the evidence that the appellant played a very important role in his children's lives and saw them on a very regular basis and that he had always played a part in their lives and it was only due to an administrative issue during his imprisonment that he was not able to see them but he did remain in contact through the telephone. Since his release he had maintained essentially daily contact with his children and stepchildren. He noted also the evidence that his ex-wife the children's mother was experiencing difficulties both concerning her physical health and her mental health and that the children's living conditions were far from suitable. The child and family assessment report noted that the children lived in overcrowded accommodation and referred to problems with their attendance at school. The judge considered however that it was relevant to note that the author believed that all the children were in good health and meeting normal milestones. The report referred to concerns with regard to both the mother and grandmother drinking and that the mother suffered from depression and anxiety and during the assessment her mental health was clearly unstable as she was observed from going to being elated to quickly becoming tearful. The report also dealt with the issues in relation to previous domestic violence by the appellant.

22. The judge remarked that it was clear from the assessment that social services were concerned about Ms A-D's emotional and physical health and the care she was providing for the children. The report confirmed that they lived in overcrowded accommodation and that alternative accommodation should be sought. The judge considered however that it was relevant that the report concluded that there was no evidence to indicate that the children were at imminent risk of harm and the children themselves said they felt safe and secure in the care of their mother. The assessment concluded that the family should continue to access support under a child protection plan. It was also relevant to note that the most up-to-date information from the social worker at the Family Support Child Protection Team noted that the Child Protection Plan made on 30 April 2019 had now been stepped down to a Child in Need Plan and obviously the children were still with their mother.

23. The judge took into account the child and family assessment and stated that on the basis of the current case law it was clear that the notion of undue harshness was intended to introduce a higher hurdle all out of reasonableness. He said that any removal of the father by way of deportation would cause difficulties for a partner or children. Deportation would clearly cause great distress to both the appellant's current partner, his children and stepchildren and he took into account the fact that the son's behaviour deteriorated when the appellant was in prison. He commented that that was however again not an unusual reaction by a child whose father was in prison and absent. He considered that the fact that the children were currently living in overcrowded accommodation was

not an additional factor which assisted the appellant as this had been the position for a number of years. Although social services were involved with the family, they appeared to be satisfied that the children were being looked after by their mother and this would continue in the appellant's absence.

24. With regard to the stepchildren they would continue to be looked after by their own mother and again there was nothing in the papers before the judge which would indicate that either of the stepchildren would be at risk or seriously affected without his being present. This was clearly the case given that he had not lived with them since his imprisonment.

25. The judge was clear that the lives of the appellant's partner and children and stepchildren would undoubtedly be made more difficult than as had been stated in cases such as **KO (Nigeria)** and these were sadly the likely consequences of a deportation of any foreign criminal who had a genuine and subsisting relationship with a partner and/or children in this country. Taking into account all of the evidence available to him and notwithstanding that he accepted that the best interests of the children would be to have both their parents in their lives, he was not satisfied that the effect of the appellant's removal would be unduly harsh to the extent that the appellant could rely upon the exception in either paragraph 399(a) or Section 117C(5).

26. The judge went on to note the relevance of the other factors listed in paragraph 399A and Section 117C(4). The appellant had been in the country for approximately fourteen years during which time he had formed two substantive relationships and had three children from his previous marriage, his eldest son now being 12. He had committed a number of offences including the serious offence of possessing with intent to supply two class A drugs which was a serious offence which had an impact on the public. The judge took into account the fact that the appellant was currently doing well within his probation order, however if he did not do so he would be liable to further action being taken against him. He took into account the positive reports in the appellant's favour in relation to his involvement with the children and overall was satisfied that he was socially and culturally integrated into the United Kingdom. The evidence was that his father and mother now lived in the USA and his grandmother had died but he had spent his formative years in Trinidad and Tobago. Although he had said he would have nowhere to live and would not be able to financially support himself if returned, he had confirmed that his father had provided him with a bank card which he was able to use to provide money to his family during his incarceration, he still retained the bank card and had accepted during his oral evidence that he would be able to use those funds if returned to Trinidad and Tobago. There was no evidence that such mental health issues as he had could not be treated adequately in Trinidad and Tobago and taken overall he was not satisfied that the appellant had shown there would be very significant obstacles to his reintegration into society in Trinidad and Tobago. The judge noted the

clear public interest in the removal of foreign criminals and bore in mind that the appellant had spent his formative years in Trinidad and Tobago and the financial support he would be able to obtain from his father. He was not satisfied that the evidence showed he would not be able to obtain work and therefore accommodation in Trinidad and Tobago.

27. The judge went on to consider whether there were any very compelling circumstances which would justify allowing the appeal above those described in exceptions 1 and 2. He took into account the serious offence committed and the impact on the partner and children and stepchildren and the weight to be given to the public interest in deporting foreign criminals and was not satisfied that the appellant had shown that there were compelling factors outweighing the public interest. As a consequence the appeal was dismissed.

28. The appellant sought and was granted permission to appeal on grounds which were drafted by Mr Aitken who developed the points made in them in his oral submissions before me. He also relied on the skeleton argument that had been provided. The first point was the argument summarised at paragraph 5 of the grant of permission that the judge had erred in law in applying a test which found that commonly occurring harshness was not undue harshness and/or effectively applying a test which was so elevated as to equate it with a more exacting very compelling circumstances test as set out in **HA (Iraq) [2020] EWCA Civ 1176**. This could be seen at paragraph 103 of the judge's decision. He was correct to direct himself about **KO (Nigeria)**, but had erred in the latter part of the paragraph about the likely consequences of deportation. It was clear from what was said for example at paragraph 56 of **HA (Iraq)** that it was incorrect to treat "ordinary" as meaning anything which was not exceptional or in any event rare, also it was a risk that in treating the essential question as being "is this level of harshness out of the ordinary?" as a risk of finding that exception 2 did not apply simply on the basis that a situation fitted into some commonly encountered pattern would be dangerous. How a child would be affected by a parents' deportation would depend on an almost infinitely variable range of circumstances and it was not possible to identify a base line of "ordinariness". It was also relevant to note what the judge had said at paragraph 100 that any removal of the father by way of deportation would cause difficulties for a partner or children. Given these two paragraphs the judge had fallen into error. Bearing in mind the findings at paragraph 90 about the degree of emotional and financial support provided by the appellant and the very important role he plays in his children's lives, the judge applied too high a test with regard to undue harshness. The judge had failed to have regard to material evidence. Attention was drawn to the ex-wife's letter and the discharge notification with regard to her medical condition. The judge had noted that evidence, at paragraph 58 of his decision. The appellant had explained in evidence that his ex-wife had been struggling with her various health problems. Her father had died from leukaemia or a similar illness. The probation officer referred to it

also. There was an issue of her ability to care for her children and the judge had failed to engage with this evidence when considering the issue of undue harshness and given that he accepted that the appellant played an important role in the children's lives this had not been adequately weighed or at all and it was an error of law.

29. In his submissions Mr Tan argued that with regard to **HA** this guided judges to make a broad-brush application of undue harshness and to make a case-by-case analysis. Both paragraphs 100 and 103 reflected the reality of the situation as set out in **KO** concerning the consequences of separation for family members which was not in dispute. It would be problematic if that was all, but this ignored the preceding paragraphs where the judge had considered accommodation and social services and help from other family members and health issues. It was necessary to read the judge's determination as a whole. There was a detailed consideration of the evidence.

30. What had been said in **HA** was not inconsistent. With regard to the two items of evidence, the judge had noted these at paragraph 3 and paragraphs 57 and 58 and also paragraph 71. He had therefore had regard to the context of that evidence and there was also reference here to paragraphs 92 and 97 concerning the health problems of the ex-wife.

31. Mr Tan also played reliance on the skeleton argument put in on behalf of the Secretary of State. Beyond the wife's statement there was no further elaboration of her evidence or oral evidence or evidence about her medical conditions and at best this involved monitoring/exploratory work being referred to. There was no reference to potential deterioration and any unknown medical condition. It was a matter of speculation and it was unclear how the judge could make a finding on that so one could not expect a particular finding on it. The skeleton addressed the real threat otherwise and the grounds and the challenge were a matter of disagreement.

32. By way of reply Mr Aitken argued that the judge had fallen into the trap set out in **HA (Iraq)**. It was a lengthy and detailed determination and there were concerns about the failure to weigh the evidence adequately or at all. There was no reference to the evidence in the judge's analysis of undue harshness at paragraph 89 to paragraph 104 and he had failed adequately to engage with the evidence. This amounted to a material error of law.

33. I reserved my decision.

34. I have set out in some detail the evidence and the judge's consideration of it. It is necessary also to address the particular two pieces of evidence that were referred to by Mr Aitken with regard to the second ground. There is a discharge notification from King's College Hospital NHS Trust referring to an admission on 9 August and the discharge on 20 August

2019. It refers to the appellant's ex-wife as having been admitted due to lower abdominal/pelvic pain accompanied by PR bleeding and 2 year hx of amenorrhoea. She had had multiple investigations. It was recommended that she was at high risk of PID which might contribute to pelvic pain and an unclear cause amenorrhoea. There was a recommendation for microbiology triple swabs, PID antibiotics and analgesia for discharge and outpatient TVUSS. There is reference to a previous colonoscopy with reference to a haemangioma or on a background of hepatic steatosis and examination of the liver. A colonoscopy was advised and CT abdomen and pelvis might be required. There was no reference to further tests arranged and the follow up arranged was OP gynaecology follow up and a recommendation for the GP was no more than please be aware of admission and thanks for ongoing care of the patient. Various medicines were provided.

35. In her letter of 29 November 2019 the appellant's former wife said that she had recently been diagnosed with a severe medical condition and was hospitalised for a few weeks.

36. The discharge notification does not seem to bear that out. It appears that she was regarded as a high risk for PID, which I take to be pelvic inflammatory disorder, and a reference to a two year history of amenorrhoea which is a medical term for when a woman does not have menstrual periods. The cause for that was regarded as unclear. The conclusion was that a colonoscopy was advised and a CT abdomen and pelvis might be required and gastroenterology referral was needed particularly as she reported passing a large volume of PR blood. There is no medical evidence concerning the appellant's former wife subsequent to this document from August 2019. The hearing before the judge was in the following month. The judge noted the reference to the appellant's ex-wife's evidence at paragraph 58 of the decision and there are further references to her physical health problems at paragraph 92 and paragraph 97.

37. It does not appear to me that the judge erred in his evaluation of this evidence. Upon careful scrutiny, as was contended by the Secretary of State in the skeleton and by Mr Tan, it is evidence that is no more than speculative as to potential future difficulties that the ex-wife might experience. She was in hospital for a number of days and a diagnosis was made but there was no follow up of any significance recommended and in my view the judge was entitled to conclude as he did about the evidence in this regard. I also consider that he did not err his contention with regard to what may essentially said to be the guidance at paragraph 56 of **HA (Iraq)**. The fact that he referred to the point that any removal of the father by way of deportation would cause difficulties for a partner or children, at paragraph 100, and at paragraph 103 of the likely consequences of deportation of any foreign criminal or a genuine and subsisting relationship with a partner and or children in this country has to be seen, as Mr Tan argued, in the context of the very detailed and careful

consideration given by the judge to the particular circumstances of the case which is of course exactly the point emphasised in paragraph 56 of **HA (Iraq)**. There is reference there to emotional and financial support provided by the appellant, the role he plays in the children's lives, the updated child and family assessment, including a reference to the overcrowded accommodation and problems with the children's attendance at school but bearing in mind that they were in good health and meeting normal milestones. He took into account the concerns about the mother and grandmother drinking and clearly was fully aware of the difficulties experienced by the family that would be augmented by the appellant's departure. The two general comments made at paragraphs 100 and 103 have to be seen in the context of the detailed evaluation of the particular facts of this case and the reasons set out as to why the judge concluded on the particular facts of this case that the undue harshness threshold was not crossed. In my view the judge was fully entitled to conclude as he did for the reasons that he gave. The challenge to his decision is one that amounts to no more than a disagreement. The judge set out the legal tests correctly, evaluated the evidence carefully and came to sustainable conclusions on that evidence.

38. As a consequence this appeal is dismissed.

Notice of Decision

The appeal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 7th April 2021
Upper Tribunal Judge Allen