IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Appeal No: UI-2023-004266
First-Tier No: HU/01555/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 28th May 2024

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPUTY UPPER TRIBUNAL JUDGE SHEPHERD

Between

B O K
(Anonymity Direction Made)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Ms R Chapman instructed by Bostanci and Rahman Solicitors
For the Respondent: Mr E Tufan, Home Office Presenting Officer

Heard at Field House on 6 February 2024

DECISION AND REASONS

1. The appellant appealed, with permission, against the decision of First-tier Tribunal (FtT) Judge Abdar ('the judge') who on 25th August 2023 dismissed the appellant's appeal against the Secretary of State's refusal of his human rights claim.

2. The appellant is a Ghanaian national born on 8th February 1991 and he entered the UK aged 10 years as a visitor and overstayed. An application for

Leave to Remain under Article 8 was made on 5th March 2007 but on 25th April 2008 he was convicted of possessing Class A drugs (heroin and cocaine) with intent to supply. He received 4 years in a Young Offender's Institution. He was also convicted for violent disorder. On 21st July 2009 the appellant's Leave to Remain application was refused but he appealed and his appeal was ultimately allowed by a panel of the Upper Tribunal. The appellant was given a second warning letter on the possibility of deportation following a further conviction on 27th June 2011 for a motoring offence for which he was given six months imprisonment. His Discretionary Leave to Remain granted on 11 January 2011 was variously extended to 14th February 2016.

3. However, on 8th April 2016 the appellant was convicted, following a jury trial, of conspiracy to supply class A drugs for which he received 10 ½ years in prison. He was served with a deportation notice but resisted the automatic deportation order pursuant to the UK Borders Act 2007 and his representations on the basis of Article 8 grounds were refused on 5th November 2019. That decision generated the appeal before the FtT.

The FtT decision

4. The judge summarised the Upper Tribunal's ('UT') findings in 2009 at [18] which referenced the appellant's abusive background. The UT's findings also referenced the appellant's intention to have no further involvement with drugs on his release and that he was aware he had been given a 'last chance'.

5. The UT findings also included a record that the appellant conceded that Articles 2 and 3 were not engaged and 'in any event rejected the evidence of there being any threat to the appellant's life from his father'. The UT also accepted that the appellant had no real connections with either Ghana or another country apart from the United Kingdom. Additionally, the only member of his family with whom he had any real contact was Miss [Ampadu] his sister (she lived in the UK.) It was noted that the appellant was 16 at the time of the offence and was led into his involvement by others older and more wicked than the appellant. He was given a trial at the West Bromwich Albion Football Club on his release from prison.

6. As the judge cited at [26] the appellant continues to rely on Article 8 against the respondent's decision to refuse the appellant's leave application.

7. The judge found at [28] that the appellant only had lawful residence for just five and a half years and he was found to be 'very far from Exception 1' (having been lawfully resident in the UK for most of the appellant's life). That was not challenged.

8. The judge also found at [29] a conspicuous lack of evidence on [his said partner and his child's] relationship. On release from prison, as the judge

recorded from the OASys report, the appellant declined the option of staying with his partner because he 'did not want the added pressure of residing with his partner [sic] mother' [31]. The judge found not credible the evidence of the relationship continuing at [33] not least, on the basis that contrary to a Tribunal direction on 25th March 2022, no updated statement from his partner was served with proof of identity and proof of residence together. Further the partner did not attend the hearing on 18th July 2022 because it was said by the appellant that she could not take time off work to attend the hearing.

9. Having made findings on the evidence in relation to the family life, the judge considered the evidence of Ms McKie, a private social worker, although the judge remarked that she had not provided a curriculum vitae. The judge noted that the report was based on a summary of the written evidence rather than having interviewed either the appellant or his former partner. The judge also considered the relationship between the appellant and his daughter at [40].

10. The judge then considered 'very compelling circumstances', addressed the appellant's conduct in prison, referenced the Probation Officer's assessment dated 12th May 2022 and considered the number of supporting letters from the appellant's friends, specifically noting the witnesses who attended the hearing.

11. The judge took into account the appellant's mental health at [57]-[58] and finally addressed the evidence holistically having directed himself in accordance with Section 117C(6) of the Immigration and Asylum Act 2002. 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.

Permission to appeal

12. The grounds for permission rested on five grounds:

    (i) in relation to his mental health the judge failed to take into account material/failed to make a finding on a material matter
    (ii) there was a failure to engage with material evidence in relation to rehabilitation and a risk of re-offending.
    (iii) a misdirection in the law in relation to rehabilitation
    (iv) there was a failure to give adequate reasons on the best interest of the child
    (v) the decision making process in the best interests of the child was flawed.

When refused permission by the FtT, the grounds were recast on renewal and although Ms Chapman did not disavow the initial grounds she concentrated on the following:

a. there was a failure to follow Presidential Guidance Note No 2 of 2010 on vulnerable witnesses.
b. the judge had failed to take into account a material matter, being the abuse the appellant had experienced as a child prior to entering the UK.
c. the judge had procedurally erred in his approach to the prescription medication.

13. Permission was granted on the following basis:

'The grounds are very much focussed on the appellant's vulnerability and mental health issues, in particular arising from childhood trauma. Whilst it is far from clear that these were matters relied upon or drawn to the judge's attention at the hearing, as opposed to being new arguments made subsequent to the proceedings in the grounds of appeal, it is at least arguable that there was a failure by the judge properly to engage with the issues when considering the question of 'very compelling circumstances'. That is particularly so because the appellant was unrepresented at the hearing. Whether or not there is anything material arising from this is a matter which can best be considered at a hearing.'

Conclusions

14. Ground (i) asserted there was a failure to take into account the Joint Presidential Guidance Note No 2 of 2010: Child, vulnerable adult and sensitive appellant guidance ('Vulnerable Witness Guidelines') and material evidence which included significant aspects of the appellant's clinical history and past trauma relevant to his mental health.

15. Ms Chapman took us to the witness letters and statements and documentary evidence. There was a letter from Kenny Imafidon whom the appellant had known since 2011 and who referenced the appellant's difficult and complex upbringing and that he was diagnosed with poor mental health, and a letter from Wallace Hermitt dated 10th February 2020 who also referred to abuse and trauma and that the appellant's father 'fatally' shot him. Also in the bundle was a hand written letter from the appellant's sister Mavis dated 14th August 2020 which referenced the appellant battling with great mental health issues for so many years and that he did not get help until 2012; a letter from Rethink Mental Illness noting the appellant was referred to them on 8th May 2019 for anxiety and was discharged on 17th September 2019; a letter from his GP; a letter from Tower Hamlets Talking Therapies dated 21st September 2021; and a report from the private social worker identifying that the appellant was still in need of sertraline. The appellant's mental health difficulties were identified in the OASys report, the appellant's own statement

and that of Andrew Simpson who had worked with the appellant since his release from prison in 2010/2011.

16. Ms Chapman submitted that the appellant was unrepresented and it was clear that the judge erred in failing to reference the Vulnerable Witness Guidelines and to take into consideration the material evidence of the clinical history and past trauma which was relevant to the assessment of the appellant's past offending and the risk of re-offending, but also as part of a holistic assessment of whether there were 'very compelling circumstances' over and above the exceptions in accordance with paragraph 398 of the Immigration Rules and Section 117C of the Nationality Immigration and Asylum Act 2002.

17. We reject this argument. The appellant was represented until some time before the hearing, the grounds filed were dated in 2019 and a skeleton argument was provided on 31st August 2020 by legal representatives. Neither stated in terms that the appellant was to be treated as a vulnerable witness nor made any reference to the Vulnerable Witness Guidelines nor **AM Afghanistan**.

18. Even if the Vulnerable Witness Guidelines were not directly referenced, we are not persuaded the judge failed to consider the appellant's vulnerabilities because at [57] – [58] the judge stated:

> *"57. I also take into consideration the Appellant's health, including mental health. Firstly, in cross-examination, the Appellant accepted to be in good physical health. However, it is the Appellant's evidence that the Appellant is on sertraline, an anti-depressant, which the Appellant has been receiving for 10 years now.*
> *58. On the Appellant's health, I have a letter from Dr Jamieson-Craig, the Appellant's GP, dated 19 May 2021, where Dr Jamieson-Craig confirmed to have spoken with the Appellant on the same date for the first time and authored the letter. In the letter, which appears to be largely based on the Appellant's narrative alone, Dr Jamieson-Craig does also state that the Appellant "was told he suffers with PTSD relating to his childhood (as well as being shot), together with depression and anxiety. From reviewing his notes, I can support this diagnosis". It is not clear to me whether Dr Jamieson-Craig is corroborating the Appellant's account of being shot, no documentary evidence of which has been adduced at all, and Dr Jamieson-Craig certainly does not corroborate the Appellant's evidence of being prescribed sertraline."*

19. Although the evidence cited referred to mental health issues, the only report from an actual medical practitioner was that to which the judge referred when considering the medial evidence at [57]-[58], having already engaged with the witness evidence and the OASys report. The witnesses added little to the letter of the GP which the judge did take into account. That the appellant was on a very common anti-depressant in the form of sertraline added, in our

view, little to the picture and the judge's caution in accepting that, was in accordance with the omission of the GP to confirm that fact. Indeed, Ms Chapman agreed that the judge's statement that the GP did not corroborate the appellant's evidence of being prescribed sertraline was correct.

20. There is no indication that the judge overlooked the OASys report dated 16th July 2021; the issues of sexual abuse and the appellant being shot by his father were recorded in the OASys report but the appellant's 'expressed suicidal thoughts' were in relation to his immigration status and ability to obtain housing and employment as a result not owing to his father. In relation to whether issues of emotional wellbeing were linked to serious harm risks to the individual and others, this was marked 'no'. Although the OASys report did record some mental health concerns, nothing was listed at 13.3 in relation to chronic health problems, disability, current psychiatric /severe psychological problems, leavening difficulties/low IQ, poor communication skills or need for an interpreter. The stated risk (previously or at the time) of suicide contrasted sharply with a negative risk of self harm. At R8.1.1 it was confirmed that there were no current concerns about suicide.

21. It is not apparent that the private social worker was qualified to opine on the appellant's mental health and she did not do so; she merely recorded the information from the documentation and witnesses in her report of 3rd November 2021 It was open to the judge to comment on the fact that no curriculum vitae had been produced and that she had not met the appellant or his partner and thus to give limited weight to the report. That is a matter for the judge. We are not aware of any legal basis for there being (as asserted in the grounds) an "inquisitorial duty" on the Tribunal to ask or direct the Appellant to provide the missing curriculum vitae nor, even if there was, what material difference its provision would have made.

22. The last medical document in the bundle was an email dated 12th January 2022 from Therapist East London NHS Foundation which referred to the appellant's discharge letter from the service and a request he follow up with the GP. Nothing further was produced. Although a letter from the GP was produced the appellant's actual medical notes were not, HA (expert evidence; mental health) Sri Lanka [2022] UKUT 111 (IAC).

23. The judge was clearly aware of the relevant documentation and nothing indicated that he had failed to take it into account. The reported issues of the appellant's childhood and claimed trauma were relayed not least by the witnesses whose evidence the judge dealt with adequately in turn. Some of the witnesses did not attend, including the sister. It is not that the judge was unaware of the issues relating to abuse or that he did not take this into consideration and indeed at [18(ii)] and [18(iv)] the judge specifically referred to the issue. The information was contained in the OASys report which the judge noted at [9] and [31] and, contrary to the appellant's initial request, was

taken into consideration. The judge also acknowledged the witness evidence of Mr Imafidon and Mr Simpson who noted the appellant's 'mental health'.

24. The judge was also aware that the appellant asserted that he was prescribed sertraline. Even if this were accepted this cannot present the appellant's health claims in a light which would be a compelling factor either individually or cumulatively. The judge had noted the GP reference to PTSD and also the OASys report which we have cited above. The appellant had been discharged from Rethink Mental Illness on 17th September 2019 and was merely given techniques to follow. The GP letter cited by the judge dated 19th May 2021 was the most recent information given to the judge at the hearing in 2022, and recorded that the appellant had mental health difficulties, of which the judge was indubitably aware, but also noted that the appellant 'denies any ongoing suicidal ideation or self harm'. Albeit that the judge did not refer to the letter from East London NHS stating that the appellant was identified as presenting with 'complex mental health difficulties and multiple trauma' and a medium risk to self and /or others, he was simply discharged from Tower Hamlets IAPT and referred back to the GP to direct to the local community mental health team. Again, this letter was dated 21st September 2021 and addressed to the same GP but there was no indication of any assessment by a psychiatrist by the time of the hearing before the judge in July 2022 and April 2023 nearly a year and half later.

25. It was clear (from the skeleton argument dated 31st August 2020 submitted by the legal representatives) that the issue of a mental health report had been raised by the appellant's solicitors well before the hearing in July 2022 and April 2023 (specifically no challenge was taken on the lapse of time between these hearings). No mental health report was produced even when the appellant was represented. In the absence of such a report and any professional assessment of the impact of any previous childhood abuse or shooting or in relation to not reoffending, the approach of the judge was not reflective of a material error of law.

26. Although Ms Chapman submitted Article 3 was a ground of appeal, the medical evidence presented which the judge addressed could in no way reach the threshold as set out in **AM (Zimbabwe)** [2020] UKSC 17 or **HA (expert evidence; mental health) Sri Lanka** [2022] UKUT 111 (IAC). Even if the judge did not directly address Article 3 the evidence did not support any claim on that basis and thus the judge's omission (which we do not accept) was not material.

27. Although the grounds of appeal to the FtT referred to the anxiety and depression which the appellant had experienced, the expanded grounds of appeal formally drafted on 19th November 2019 made reference at paragraph 3 that the 'appellant suffers from a mental health condition'. At paragraph 17.7 reference was made to the 'health claim' and the possibility of medical

claims succeeding by contributing to the proportionality exercise in an Article 8 assessment'. Reference was made to **Bensaid** and **Akhalu (health claim: EHCR Article 8)** [2013] UKUT but it was also submitted that this would be relevant to paragraph 276ADE(i) (which in fact was not relevant) and that it was 'potentially being a compelling factor over and above the paragraph 399-399A considerations in a deportation appeal'. This skeleton acknowledged on 31st August 2020 that a medical report had not been obtained and 'this has made it impossible to fully articulate the appellant's case in that [mental health] regard'.

28. Thus, the appellant's appeal was focussed on article 8 grounds not article 3 grounds and not on asylum grounds (on the risk of return to Ghana). For the reasons given above we find no error in the approach of the judge to Article 3.

29. **AM Afghanistan [2017] EWCA Civ 1123** addresses the question of whether proceedings are fair and just when a tribunal does not properly consider the appellant's vulnerability.

30. **In AM Afghanistan** at [18] it was found that the Tribunal

'*did not properly consider the impact of the appellant's age, vulnerability and the evidence of a significant learning disability contained in the Sellwood report on the appellant's ability to participate effectively and fairly in the asylum process and the appeal.*

31. And at [23]

'*Critically, the appellant's age, vulnerability and learning disability could have been recognised and taken into account as factors relevant to the limitations in his oral testimony. Likewise, the tribunals' procedures could have been designed to ensure that the appellant's needs (including his wishes and feelings) as a component of his welfare were considered to ensure that he was able to effectively participate'*.[23].

32. The judge at [57] specifically took into consideration the appellant's health, including his mental health condition. The judge was correct that there was no medical evidence that the appellant was on sertraline. The judge was also aware that the appellant was now an adult of 31 years and there was no indication that he experienced special education needs or literacy needs. That was evident from the OASys report which actively recorded no 'current psychiatric /severe psychological problems, learning difficulties/low IQ, poor communication skills'.

33. In relation to the appellant's ability, the remarks of the sentencing judge identified the leading role the appellant had in the offence of conspiracy to supply of Class A drugs and that although his role was denied the appellant was 'anything but' a victim.

34. Despite being unrepresented, grounds of appeal and evidence were submitted and there was no indication that the appellant had been unable to participate in the proceedings before the judge and the burden of proof in the appeal was not that of asylum.

35. In our view the judge complied with the overriding objective set out at rule 2 of the Tribunal Procedure (First-tier Tribunal) (Immigration and Asylum Chamber) Rules 2014.

36. There is nothing to suggest that the judge did not properly direct himself or in line with **KE (Nigeria**) [2017] EWCA Civ 1382 where the significant illness of that individual militated against him being removed from the UK where he had lived since childhood. In that case the appellant had schizophrenia and there was a report from a consultant psychiatrist confirming 'the stress of managing by himself would make a relapse of the Respondent's condition "inevitable" on removal'.

37. That was wholly distinguishable from this appeal where the findings at [61] on difficulties on return were adequately addressed and were open to the judge. The judge found the appellant was a capable young man with some qualifications and work experience through volunteering and there was no credible reason why the appellant would not be able to do that [work] in Ghana. The need to produce evidence rested with the appellant, whether represented or not, and as the judge stated, there was no evidence that Ghana lacked adequate health services to assist the appellant should it be necessary. Even though **Kaur v SSHD** [2018] EWCA [57] held that bare assertions are just that and that more than mere practical difficulty is required, in this case there was not even an assertion in the legal pleadings that there were no medical facilities for mental health in Ghana. Not least the judge found that the appellant could derive assistance from his supporters in the UK in Ghana itself. That was not challenged.

38. In sum, in the absence of a medical assessment or report which identified the impact of trauma and sexual abuse on the overall circumstances not least the offending behaviour, we are not persuaded that the judge erred in approach either to the evidence or findings. Nor on the actual evidence before the FtT are we persuaded that the judge erred in approach to the appellant and his mental health condition.

39. Ground (ii) in relation to rehabilitation and risk of reoffending asserted that the analysis of the judge at [55] to [56] failed to engage with the view of the Probation Service and Ms V Fadiya in her letter of 12th May 2022 which deemed the appellant as a low risk of reoffending. In fact, in her letter was a section which the grounds did not underline, identifying that the appellant was deemed as a medium risk to children and the public although there was no imminent risk. The judge at [45] clearly took into account this letter and

noted that the appellant's record in prison was not 'as clean as the appellant suggests'; we have already accepted that the judge properly considered the OASys report. Although the appellant's predictor scores on OGRS3 were classified as low, the appellant had a 23% probability of proven reoffending. As the Court of Appeal said at para 18 of Herrera v SSHD [2018] EWCA Civ 412, it is necessary to guard against the temptation to characterise as errors of law what are in truth no more than disagreements about the weight to be given to different factors, particularly if the judge who decided the appeal had the advantage of hearing oral evidence, Durueke (PTA: AZ applied, proper approach) [2019] UKUT 197 (IAC).

40. Bearing in mind the previous offending and sentences of the appellant and his reconviction on a similar but more serious offence, it was entirely open to the judge to place little weight on the evidence of the witnesses who had confidence the appellant would reform [56] and that he could rehabilitate.

41. Ground (iii): in the light of our observations on ground (ii) above, and despite the statement that the reform and lack of risk of re-offending was a 'neutral' matter, the judge clearly did not accept that the appellant had demonstrated a propensity to reform or desist from offending. The judge acknowledged that reform and lack of risk of re-offending was material in the balance.

42. Nothing in the judge's approach contradicted **HA (Iraq)** [2022] UKSC 22 at [58]-[59] not least that

'*In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance*.'

43. In relation to grounds (iv) and (v) it was entirely open to the judge to find a lack of relationship with the said partner Ms Nunes, bearing in mind the child's mother failed not just at the first hearing but also the second hearing to attend. Not only did she not attend but nor, as the judge recorded at [34], was there any response to the direction of the judge 'to admit evidence from Ms Nunes to update on the family circumstances' [34]. As the judge cogently reasoned, if Ms Nunes genuinely had concerns about the appellant being deported and affecting the family relationships, she would have arranged time off or at least provided updated evidence or given reasons herself why she could not attend. Although Ms Chapman submitted that Ms Nunes had previously attended a hearing, she did not attend either of the hearings and, as the judge noted at [33], her evidence predated the appellant's release on licence.

44. Overall, the judge for sound reasoning found the appellant did not have a genuine and subsisting relationship with the child. The judge nonetheless proceeded to address the matter in the alternative should there be a

relationship. The judge's reasoning that the best interests of the child, which were addressed at [40], effectively were to have her best interests protected by her mother and family, and owing to the limited contact with the appellant would not make the effect of deportation *on the child* unduly harsh. The judge unarguably considered the individual circumstances of the child in accordance with the Supreme Court authority of **HA (Iraq).** The approach to the private social worker report was reasoned, not just because of the absence of the CV but also because of the approach the social worker took to the compilation of the report (based on the papers alone) and because of the absence of the mother from the hearing to speak in relation to the child and the lack of contact. Those findings were open to the judge and we are mindful of **Volpi v Volpi** [2022] EWCA Civ 464 which confirms at 2(i) that '*An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong*'. On the evidence that was before the judge, it is difficult to see that any other conclusion could have been reached as regards the child.

45. The judge was fully aware when concluding 'on a holistic view' at [63] of the test he needed to apply when balancing the public interest and as discussed in **HA Iraq** and **NA Pakistan** 2016 EWCA Civ 662 not least s117C(2) which states that "the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal."

46. We find none of the ground is made out.

Notice of decision.

The decision of the First-tier Tribunal contains no material error of law and stands; the appellant's appeal remains dismissed.

Helen Rimington

Judge of the Upper Tribunal Rimington
Immigration and Asylum Chamber

19th February 2024