IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004733

First-tier Tribunal No: HU/01174/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 13th of September 2024

Before

UPPER TRIBUNAL JUDGE CANAVAN
UPPER TRIBUNAL JUDGE HOFFMAN

Between

Secretary of State for the Home Department

Appellant

and

HS
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr A McVeety, Senior Home Office Presenting Officer
For the Respondent: Mr A Azmi, Counsel

Heard remotely at Field House on 21 August 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and any member of his family are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant and/or any member of his family. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. While we attach significant weight to the principle of open justice, especially in cases involving the deportation of foreign criminals, and while the appellant's representatives have not made an application for anonymity, we have made such an order in this appeal in accordance with s.97(2) of the Children Act 1989 on the

basis that the appellant's children are subject to proceedings in the Family Court. While, as we discuss later in our decision, the documents relating to those proceedings were not before us or the First-tier Tribunal, the parties agree that an order was made by the Family Court preventing the appellant from having direct unsupervised access to his children. In the circumstances, we are satisfied that the interests of the appellant's children outweigh the principle of open justice.

2. We will refer to the parties as they were before the First-tier Tribunal even though it is the Secretary of State who is the appellant before the Upper Tribunal. Therefore, HS will be referred to as the appellant and the Secretary of State as the respondent.

3. The appellant is a citizen of India. He first arrived in the UK on 4 December 2002. He was refused leave to enter and granted temporary admission but subsequently absconded and remained in the UK illegally. In 2010 he married his wife in the UK and at some point in 2011 he returned to India where he applied for entry clearance as a spouse. That application was refused and a subsequent appeal dismissed. The appellant reapplied again in 2013 but that application was also refused. The appellant submitted a third application in 2014: this time he was successful. He returned to the UK on or around 16 December 2014. In 2017, the appellant made an application for leave to remain as a spouse which was granted until 30 April 2020. On 28 April 2020, the appellant applied for further leave to remain. The appellant and his wife have two children.

4. In 2021, the appellant was convicted of three counts of distributing indecent photographs/pseudo-photograph of a child and he was sentenced to 14 months' imprisonment on the first count, eight months' imprisonment for the second count and two months' imprisonment for the third count, to run concurrently. The appellant was also given a sexual harm prevention order and was required to sign the sex offenders register for 10 years.

5. As a consequence of his convictions, on 31 January 2022 the respondent made a decision under section 32(5) of the UK Borders Act 2007 to deport the appellant to India. The appellant's outstanding application for leave to remain as a spouse made on 28 April 2020 was also refused.

The appellant's appeal to the First-tier Tribunal

6. The appellant exercised his right of appeal to the First-tier Tribunal on the basis that his removal from the UK would breach his right to a family and private life under Article 8 of the European Convention on Human Rights ("ECHR").

7. The appeal was heard by First-tier Tribunal Judge Lebasci ("the judge") on 14 August 2023. In a decision promulgated on 29 August 2023, the judge allowed the appellant's appeal on human rights grounds. In summary, the judge found that notwithstanding the lack of direct contact between the appellant and his two children at that time, the appellant had a genuine and subsisting relationship with them and it would be unduly harsh for the children to be separated from their father. The judge therefore found that the appellant met the exception set out at s.117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") and there was no public interest in the appellant's deportation for the purposes of Article 8 ECHR.

8. The respondent subsequently applied for permission to appeal the judge's decision. The respondent relied on a single ground: that the judge failed to give

any, or adequate, reasons or apply the relevant caselaw when finding that (a) the appellant met exception under s.117C(5) and (b) there are very compelling circumstances to the appellant's case.

9. Permission to appeal was refused by the First-tier Tribunal but granted by Upper Tribunal Judge Kebede on 7 December 2023.

Findings – Error of Law

10. The judge records at [6] of her decision that it had been agreed by the respondent at the hearing that it would not be reasonable for the appellant's children to return with the appellant to live in India. The appellant's representative had also confirmed that the appellant did not seek to rely on the exception to deportation under s.117C(4) of the 2002 Act. Consequently, as explained at [8], the issues for determination by the First-tier Tribunal in the appeal were:

    a. whether it would be unduly harsh, under s.117C(5), to expect the appellant to return to India, given the effect this would have on his two children; or

    b. whether the appellant can demonstrate very compelling circumstances, over and above those described in s.117C(4) and (5).

11. As Mr McVeety accepted, contrary to what is claimed at para (a) of the grounds of appeal, the judge did not find that there were very compelling circumstances to the appellant's case: she had only allowed his appeal on the basis that he met the exception under s.117C(5) of the 2002 Act. As a result, the points raised at paras (c) and (d) of the grounds of appeal are irrelevant to the challenge to the judge's findings in relation to the unduly harsh test. Para (b) of the grounds argues that the judge attached undue weight to the evidence of the independent social worker ("ISW"), Mr Laurence Chester, when concluding that the appellant's removal would have unduly harsh consequences for his two children and that her reasons for relying on the contents of the report was insufficiently reasoned.

12. Subsections (1), (3) and (5) of s.117C of the 2002 Act have the effect that where a foreign criminal 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 the foreign criminal's deportation on the partner or child would be unduly harsh, the public interest does not require the person's deportation.

13. The meaning of "unduly harsh" was considered by the Supreme Court in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53. At [23], Lord Carnworth said:

> "23. On the other hand the expression 'unduly harsh' seems clearly intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word 'unduly' implies an element of comparison. It assumes that there is a 'due' level of 'harshness', that is a level which may be acceptable or justifiable in the relevant context. 'Unduly' implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels

> of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2017] 1 WLR 240, paras 55 and 64) can it be equated with a requirement to show 'very compelling reasons'. That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

14. The Supreme Court returned to the unduly harsh test in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 where it approved the self-direction given by the Upper Tribunal at [46] of the decision in MK (Section 55: Tribunal Options: Sierra Leone) [2015] UKUT 223:

> "...By way of self-direction, we are mindful that "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher..."

15. We take into account that the judge does refer to KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 and HA (Iraq) at [18] and [19] although we note that she does not refer to the paragraphs in HA (Iraq) regarding the MK self-direction or to MK itself.

16. As Mr McVeety, on behalf of the respondent, submitted, the judge attached significant weight to the report dated 2 May 2023 prepared by the ISW in reaching her finding that it would be unduly harsh on the appellant's children for the appellant to be deported to India. The judge quotes from two passages of the ISW's report at [22] and [23] and returns to it in her findings on unduly harsh consequences at [27].

17. The respondent criticises that report on the basis the ISW failed to detail how the appellant's separation from his children "has had a negative effect on the children that differs from those caused by his offending"; failed to explain the role the appellant currently plays in his children's lives; and failed to explain what specific detrimental impact the separation has had on the children, for example in relation to their education or physical or mental health.

18. We have several concerns about the ISW's report. The first is that it was written without the ISW having had sight of any Family Court documents relating to the measures put in place by social services and the Probation Service following the appellant's conviction for child pornography offences preventing the appellant from having direct unsupervised contact with his children. It is plain that the contents of those documents would be a very important consideration in any social worker's report. (We also note that the Family Court documents were not before the First-tier Tribunal either, which appears to be a significant failure of case management.)

19. The second is that when completing the Welfare Checklist in accordance with the Children Act 1989 at page 13 of the report, the ISW states that he is "highly concerned about the offence the appellant has been convicted of" under section (f) ("how capable each of [the child's] parents and any other person in relation to whom the court considers the question to be relevant, is of meeting [the child's] needs"), yet he fails to factor this into the consideration at (e) ("any harm which [the child] has suffered or is at risk of suffering"). In assessing "any harm which he has suffered or is at risk of suffering" the ISW simply states, "On balance, it is my view that the children would suffer significant emotional harm if their father

were deported and even more physically removed from their lives". We find the ISW's failure to consider the nature of the appellant's offending at section (e) as a safeguarding issue that needed to be evaluated was an astonishing oversight.

20. Our third concern is the nature of the ISW's findings. Under the heading "Analysis" on page 7 of his report, the ISW writes that he is "concerned that the children may suffer emotional distress if they lose the hope of having regular on-ongoing contact with their father. Albeit subject to being professionally supervised and time restricted". The appellant's removal, it is said, "would represent further trauma for the children and their mother who is already emotionally struggling with the current situation". Later, at page 12, the ISW says that the children's separation from their father "may cause further lasting emotional harm for them" and that separation from parents should only be done in their best interests. On page 13, the ISW says that his concern is that "the children are already experiencing concerning levels of stress and anxiety due to the lack of contact they have with their father, and this may lead to worrying developments in their emotional wellbeing" and that they may suffer "significant emotional developmental harm if their father were deported". As the respondent points out, no specific examples are given as to how the children's mental health or wellbeing has been affected by their separation from their father. Neither is the nature or extent of the trauma they have suffered made clear. Furthermore, the ISW does not explain the basis for his finding that the children are "experiencing concerning levels of stress and anxiety".

21. We also note that when considering the children's best interests, no regard appears to have been given to the fact that the Family Court must have assessed it in the children's best interests not to have direct unsupervised contact with their father. Little regard is given to the fact that the children and their mother now live in a different part of the country to the appellant. Only passing references are made to the nature of the appellant's offending. Moreover, we find the ISW's conclusions on the impact on the children caused by their separation from their father to be overly general in nature and unsupported by any corroborating material, for example medical records, information from the children's schools or social services reports. We find that it is difficult to ascertain from the report how the degree of harshness caused by the appellant's removal would go beyond something uncomfortable, inconvenient, undesirable or merely difficult. We also find it difficult to discern anything that denotes something severe, or bleak for the children, not least in circumstances where the ISW records at section (f) of the Welfare Checklist that "In fact, from observations, the family [which in this context appears to be the appellant's wife and the children] is coping well given the challenging situation they find themselves in" and that when asked by the ISW whether they had any worries, both children answered "No".

22. These obvious weaknesses in the ISW's report are not acknowledged by the judge.

23. At [24] of her decision, the judge moves on from the report and considers the evidence of the appellant and his estranged wife (who, while she provided a letter of support, did not give oral evidence at the hearing). The judge acknowledges that since his conviction, the appellant's wife and children had moved away to another part of the country and would not visit the appellant in India. The appellant's wife is also recorded as saying that the appellant remained close with his children and that "she is concerned about the impact on them if he is required to leave the UK". We note that what the appellant's wife actually says in her

letter is, ”I do not wish my differences with [HS] to have an impact on my children’s relationship with their father as they both adore their father”. Apart from having to move to a new area, the letter says little about any hardship the children have faced as a result of their separation from their father. Much of the letter is focussed on the reasons why the appellant’s wife would not want to move to India with her children. The judge does explain to what extent, if any, the evidence from the appellant’s estranged wife has factored into her assessment of the unduly harsh test.

24. At [25], the judge accepts the evidence that, prior to his conviction, the appellant was close to his children and played an active role in their lives, and that he had now weekly video contact with them. At [26], the judge agreed with the parties that the best interests of the children were to remain in the UK and found that if the appellant was deported, “there is limited prospect the children would see their father in person for a number of years, if at all”.

25. The judge then reaches her conclusion on the unduly harsh test at [27]:

> “Despite the fact the Appellant no longer lives with his children they remain significantly emotionally dependent on him. Maintaining this relationship, if the Appellant returns to India would be challenging and the children are unlikely to feel there is any realistic prospect of there being a change to that relationship in the medium term. I accept Mr Chester’s evidence that the Appellant’s removal to India would:
>
> 27.1 represent a further trauma for the children who have already experienced a
> significant amount of emotional distress.
> 27.2 be extremely harsh on the children.
> 27.3 represent a very significant challenge for the children's emotional wellbeing.
>
> I find that the best interests of the children would be to live in the UK with both parents also in the UK, even if they are not living together. Given the available evidence, and in particular the report of Mr Chester, I find the Appellant has a genuine and subsisting relationship with his children and the effect of his deportation on both children would be unduly harsh. It follows that I conclude Exception 2 in s.117C of the 2002 Act applies and therefore, the public interest does not require the Appellant’s deportation. In case I am wrong about this, I will now address the issue of whether there are compelling circumstances.”
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> [Underlining added]

26. We are satisfied that, as Mr McVeety submitted, the judge did indeed rely heavily and it would seem, primarily, on the ISW’s report when reaching her findings at [27]. Mr Anzi submitted that the question of how much weight to attach to the report was a matter for the judge and we remind ourselves that we can only interfere with the findings of the First-tier Tribunal if it is clear that the judge has misdirected themselves in law. We should not rush to find that they have done so simply because we might have reached a different conclusion: see AH (Sudan) v Secretary of State for the Home Department [2007] UKHL 49, [30]. This is a borderline decision but, in the present case, we are satisfied that the judge did misdirect herself in law.

27. By primarily relying on the evidence of the ISW, the judge failed to engage with the evident shortcomings within his report. As explained above, the ISW’s report

includes some startling omissions and overly generalised conclusions unsupported by clear examples on the effect on the children of their separation from their father. It is difficult to discern from that report any degree of harshness that would lead to severe or bleak consequences for the children.

28. As a consequence of that, we are satisfied that the judge failed to provide sufficient reasoning to explain (a) why it would be challenging for the appellant and his children to maintain their relationship if the appellant was deported given that, at the date of the hearing, they only enjoyed weekly video calls; (b) what trauma the appellant's children have already experienced that could be expected to worsen; (c) what the extremely harsh consequences would be for the appellant's children that would be severe or bleak; or (d) what the very significant challenges were for the children's emotional wellbeing were their father to be deported. Furthermore, we also find that the judge failed to take into account the nature of the applicant's offending, which involved child pornography, and how this factored into the issue of contact with his children given that the Family Court had already deemed it to be in the best interests of the children not to have direct unsupervised contact with their father.

29. In summary, we are satisfied that the judge failed to properly explain her reasons as to why the high threshold for establishing unduly harsh consequences had been met based on the evidence before her.

Conclusion – Error of Law

30. For the reasons given above, we find that the decision of the First-tier Tribunal is infected by a material error of law. We cannot say that the judge's conclusions would have been the same had she not made those errors and we therefore set aside the decision of the First-tier Tribunal.

31. We are of the view that none of the findings of fact can be preserved. At the hearing, the parties were in agreement that, if we were to find there to be a material error of law, the appeal should be remitted to the First-tier Tribunal for a hearing de novo. In our view, it would be important for any judge rehearing the appeal to have access to the Family Court documents and, therefore, before that hearing takes place, steps should be taken in compliance with the Family Court protocol. It is also likely to be important to understand what licence conditions might have been in place, if any, at the date when the ISW decided that he could supervise and enable direct contact between the appellant and his children. We also remind the parties that they have a continuing duty to the court and should disclose relevant documents of this kind (if permission is given by the Family Court) so that the welfare of the children can be assessed properly by the First-tier Tribunal on the next occasion.

32. With that in mind, and taking into account the nature and extent of the findings of fact required to remake the decision, applying paragraph 7.2 of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal* we are satisfied that remittal is the appropriate course of action.

Notice of Decision

The decision of the First-tier Tribunal involves the making of a material error of law.

The decision of the First-tier Tribunal is set aside with no findings preserved.

The remaking of the decision in the appeal is remitted to the First-tier Tribunal at Newport, to be remade afresh and heard by any judge other than Judge Lebasci.

Prior to the remitted hearing, steps should be taken in accordance with the protocol on communications between judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal to obtain disclosure of Family Court documents relating to the contact between the appellant and his children

M R Hoffman

Judge of the Upper Tribunal
Immigration and Asylum Chamber

4th September 2024