Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20559/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 9 November 2021	**On 22 November 2021**

Before

THE HONOURABLE MR JUSTICE C G BOURNE
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMED MUSTAFA RASUL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Home Office Presenting Officer
For the Respondent: Ms E Harris, Counsel instructed by David Benson Solicitors

DECISION AND REASONS

The appellant in this matter will be referred to as the Secretary of State and the respondent will be referred to as the claimant.

This is an appeal by the Secretary of State against the decision of Judge of the First-tier Tribunal Lawrence ("the judge") to allow the claimant's appeal on human rights Article 8 grounds. Permission to appeal to this Tribunal was

granted by Judge of the First-tier Tribunal Chohan by a decision dated 29 June 2021.

Background

The claimant, born on 18 May 1989, is a citizen of Iran. He was married to Nora Laurena on 23 May 2011. They have two children who are British citizens, a daughter born on 10 June 2013 and a son born on 29 March 2016. The claimant entered the UK on 27 May 2005 clandestinely and subsequently made an asylum claim. His asylum claim was refused but he was given discretionary leave until 17 May 2007. On 11 May 2007 he applied for further discretionary leave and on 29 June 2010 he was granted indefinite leave to remain.

On 4 November 2008 the claimant was convicted of battery for which he received a community order of twelve months with an unpaid work requirement of 60 hours. On 7 December 2018 he was convicted on two counts of doing an act to facilitate the commission of a breach of UK immigration law by a non-EU person. These involved conspiring to smuggle his brother and another individual into the UK. He was sentenced to a total of three years in prison, being consecutive sentences of two years and one year.

On 16 January 2019 the claimant was served with a deportation notice. He claimed that deportation would breach his Article 8 rights. The Secretary of State refused that claim. The claimant's appeal against that decision was allowed by the First-tier Tribunal by a decision promulgated on 4 June 2021.

The Decision of the First-tier Tribunal

The judge noted that where the public interest in deportation of a foreign criminal was at stake and where that individual relied on rights under ECHR Article 8 it was necessary to apply Sections 117A to 117D of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). Section 117C of the 2002 Act states that the deportation of foreign criminals is in the public interest and, the more serious the offence committed, the greater is the public interest in deportation. The Section further provides that in the case of a foreign criminal who has received a sentence of less than four years, the public interest requires his deportation unless Exception 1 or Exception 2 applies.

Exception 1, which is not material in this appeal, is where the person has been lawfully resident in the UK for most of his life, he is socially and culturally integrated in the UK and there would be very significant obstacles to his integration in the country to which he will be deported.

This appeal concerns Exception 2, which applies where the person "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".

The judge considered the scenario in which the family as a whole relocated to Iran and reviewed the various difficulties which the claimant's wife and children would face. This appeal does not concern that scenario.

The judge then turned to the alternative scenario of separation in which the wife and children remained in the UK. As to this, he said:

> "136. The Appellant and Ms Rasule enjoy a genuine and subsisting relationship involving cohabitation as a household with their children.
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> 137. With the exception of the Appellant's imprisonment, the children have been accustomed to living with and being cared for by both of their parents. Since June 2020 when the Appellant was released, the family has spent more time together at home than would normally be the case, because the children have been intermittently home-schooled due to the COVID-19 pandemic and the Appellant has not been able to work as much as he would otherwise have done. The Appellant's children visited their father in prison most weeks.
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> 138. The report by independent social worker Diana Harris that has been provided by the Appellant addresses the relocation scenario in some detail. The qualifications and expertise of the independent social worker have not been impugned and I accept that it is appropriate to treat her assessment as an expert assessment of the likely impact on the Appellant's children of their separation from the Appellant in the separation scenario. I also consider that Ms D Harris's assessment is consistent with the other evidence that I have been provided with, including the oral evidence of the Appellant and Ms Rasule. Ms D Harris's assessment included that it was evident that the children suffered emotionally because of being separated from their father during his incarceration, and that had had an impact on their attachment behaviours. The children feared being separated from their father again. Ms D Harris found no potential benefits to the separation scenario, and she considered that the impact of that scenario on the children's material, psychological and emotional wellbeing would reduce their short- and long-term life choices and life chances, thus preventing them from achieving their full potential. Ms D Harris's opinion was that the unwanted separation and loss of their father would impact every aspect of the children's lives, bringing disadvantages and barriers to their health, development and attainment levels which would not be present when their father and mother were both physically available to co-parent them.
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> 139. I consider that maintaining contact with the Appellant using modern means of communication and visits would be an extremely poor substitute for the relationship with the present and actively involved father that the children presently enjoy, regardless of whether such modern means of communication and visits would be reliable or practical.

140. I do not doubt that a close bond exists between the Appellant's children and the Appellant's brother who resides nearby in the UK. Nor do I doubt that the brother would provide such assistance to the family as he is able to provide, as he did when the Appellant was in prison, which would go some way towards mitigating the children's effective loss of their father. However, the affection and support of an uncle is of a different character to, and no substitute for, a relationship with a present and actively involved father.

141. The Appellant's children is, I consider, such a case as that was envisaged by Lord Justice Peter Jackson in HA (Iraq) v Secretary of State for the Home Department (Rev 1) (*supra*) in where the deportation of a close caregiver parent where face to face contact cannot continue may be akin to a bereavement.

142. For all those reasons, I consider that the Appellant meets the criteria for Exception 2 in section 117C of the 2002 Act, on the basis that the Appellant has a genuine and subsisting relationship with two qualifying children, and the effect of the Appellant's deportation on those children would be unduly harsh.

143. I therefore conclude that the public interest does not require the Appellant's deportation."

The Appeal before the Upper Tribunal

In her notice of appeal the Secretary of State challenged the judge's conclusion on the separation scenario. In particular, she submitted that the judge did not give adequate reasons why the threshold set by Parliament of unduly harsh had been met. She relied on the decision of the Supreme Court in **KO (Nigeria) [2018] UKSC 53** stating that the test goes beyond what would necessarily be involved for any child faced with the deportation of a parent. The Secretary of State further relied on **MK (Sierra Leone) [2015] UKUT 223 (IAC)** where this Tribunal said:

> "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."

The Secretary of State further relied on passages from **HA (Iraq) [2020] EWCA Civ 1176**. We shall make further reference to **HA (Iraq)** below.

In summary, the Secretary of State points out that there is no finding that the claimant's mother would be unable to cope in his absence and submits that the report of an independent social worker in the case did not identify any unduly harsh element. There was no evidence of the impact on the children from their

father's incarceration, and many children are successfully raised in one-parent homes. The reasons given by the judge did not justify the ultimate conclusion.

The claimant, by his Counsel Ms Harris, contends that the judge referred to the correct legal test and the appropriate authorities and that the Secretary of State therefore must show that the decision was one which no reasonable judge could have made, in order to establish an error of law. Ms Harris notes that in the First-tier Tribunal there was no challenge to the expertise of the independent social worker and the judge therefore was entitled to treat her as an expert. Her assessment was that the children had suffered emotionally because of being separated from their father during his incarceration and that this had an impact on their attachment behaviours. The social worker considered that the impact of a further separation on their material, psychological and emotional wellbeing would reduce their short-term and long-term life chances, preventing them from achieving their full potential and bringing disadvantages and barriers to their health, development and attainment levels.

Whilst the appeal refers to "a need to identify a level of harshness above that which would ordinarily be experienced by a child if a parent were deported", Ms Harris points out that in **HA (Iraq)** Lord Justice Underhill analyses the meaning of the judgment of Lord Carnwath in **KO (Nigeria)** and explains at paragraph 44:

> "It is true that he refers to a degree of harshness 'going beyond what would necessarily be involved for any child faced with the deportation of a parent', but that cannot be read entirely literally: it is hard to see how one would define the level of harshness that would 'necessarily' be suffered by 'any' child (indeed one can imagine unusual cases where the deportation of a parent would not be 'harsh' for the child at all, even where there was a genuine and subsisting relationship). The underlying concept is clearly of an enhanced degree of harshness sufficient to outweigh the public interest in the deportation of foreign criminals in the medium offender category."

Ms Harris similarly relies on Lord Justice Underhill's conclusion:

> "52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context (I have already made this point – see para. 34 above). The statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set

somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."

Ms Harris also relies on paragraph 157 of the judgment of Lord Justice Peter Jackson in the same case:

> "In order to maintain focus on the individual child, it will be helpful for the decision-maker to apply the words of the statutory tests themselves. By their nature, commentaries on the tests may be illuminating, but they are not, as Underhill LJ has shown at [56], a substitute for the statutory wording. For example, Lord Carnwath's reference in paragraph 23 of *KO (Nigeria)* to undue harshness to 'any child' cannot have been intended to set up a notional comparator, if only because it is not possible to know what the circumstances of such a child might be. For some children the deportation of a largely absent parent may be a matter of little or no real significance. For others, the deportation of a close caregiver parent where face to face contact cannot continue may be akin to a bereavement. A decision that gives primary consideration to the best interests of the child will instead focus on the reality of that child's actual situation and the decision-maker will be more assisted by addressing relevant factors of the kind identified by Underhill LJ at the end of [56] than by making generalised comparisons. Likewise, as explained in the footnote to [48], the aphorism 'That is what deportation does' is an important truth, but it is not a substitute for a proper consideration of the individual case. The full citation from Sedley LJ in *Lee* makes this clear:
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> > 'The tragic consequence is that this family, short-lived as it has been, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does. Sometimes the balance between its justification and its consequences falls the other way, but whether it does so is a question for an immigration judge.'"

That passage, Ms Harris observes, was relied on by the judge at paragraph 141 of his determination where he concluded that this was the type of case where

deportation "may be akin to a bereavement". She submits that that conclusion was open to the judge on the evidence as summarised by him at paragraph 138 of his determination, and therefore there was no error of law.

Discussion

The only question in this case is whether the First-tier Tribunal erred in law when applying Section 117C of the 2002 Act and when deciding that the exception provided for by that Section was applicable because the effect on the children of their father's deportation would be unduly harsh.

The meaning of unduly harsh has been elucidated by the decisions in **KO (Nigeria)** and **HA (Iraq)**. It refers to a level of harshness which is such as to outweigh the public interest in deportation of a foreign criminal. It will go beyond what would necessarily be involved for any child faced with the deportation of a parent but that does not mean that there is an identifiable baseline impact which is acceptable. Rather, it necessitates a fact-sensitive assessment in every case, taking into account all the circumstances.

In this appeal it is not suggested that the judge did not correctly direct himself in law. The judge referred to the relevant legislation and the relevant case law clearly was identified in argument before him. Nor does Mr Tufan for the Secretary of State frame the appeal primarily on the basis of perversity, i.e. that in applying the law to the facts the judge reached a conclusion which no reasonable judge could have reached.

However, a secondary ground is that if the judge did set out reasons with sufficient clarity, then those reasons were not sufficient to meet the unduly harsh test.

Nevertheless, the main thrust of the appeal is that the decision was inadequately reasoned. In our judgment, that ground of appeal is not made out. The judge noted that the claimant and his wife had enjoyed a genuine and subsisting relationship living as a household with their children. He found that the children visited their father in prison most weeks and that since his release in June 2020 he had spent more time at home with them because of the COVID pandemic. The judge identified the report of the independent social worker as evidence of an emotional impact of separation on the children during the claimant's imprisonment affecting their attachment behaviours and of their fear of a further separation. He referred to her opinion that a further separation would impact every aspect of their lives. Finally, the judge noted that maintaining contact using electronic means of communication would be an extremely poor substitute for the face-to-face relationship with their father.

It is a matter of record that the contents of the independent social worker's report were not challenged in the Tribunal hearing. We note also that the judge at paragraph 141 said that he followed the Court of Appeal's decision in **HA (Iraq)** in regarding the effect as "unduly harsh" because this was one of

those cases where separation could be akin to bereavement. We therefore conclude that the judge applied the test as identified in legislation and as interpreted in the case law. He also identified a factual and evidential basis for his conclusion that the test was satisfied. The reasons challenge therefore must fail.

We have carefully considered whether the facts as found by the judge were sufficient to satisfy the unduly harsh test. There is no doubt that the impacts on the children identified by the independent social worker are of a kind which are generally likely to occur when a parent is deported. In this case, the conclusion that the case passed the elevated test depended on the fact that this is a functioning family unit in which the father plays a full part and that that part has been intensified during the COVID pandemic, plus the fact that the impact of separation during his imprisonment has made these children more vulnerable to the effects of a future separation.

This is a case in which some Tribunals might have allowed the appeal and some might not, without either conclusion being vulnerable to a further appeal as a matter of principle. The fact that different Tribunals might have reached different conclusions on the facts is not a reason for allowing an appeal. In the end, the judge did give clear reasons and we cannot say that those reasons were not capable of supporting a decision in the claimant's favour.

In those circumstances, the Secretary of State's appeal cannot succeed. Our decision is therefore that the appeal is dismissed.

Notice of Decision

The Secretary of State's appeal is dismissed.

No anonymity direction is made.

C.G. Bourne — 11 November 2021

Signed — Date

Mr Justice C G Bourne
Sitting as a Judge of the Upper Tribunal