IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003809

First-tier Tribunal No: HU/50472/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 9 May 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MUHAMMAD ILAYAS
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr F. Gazge, Home Office Presenting Officer
For the Respondent: Mr. P. Saini, counsel instructed by UK Law solicitors

Heard at Birmingham Civil Justice Centre on 23 March 2023

DECISION AND REASONS

1. The SSHD appeals against a decision of First tier Tribunal Judge Chamberlain who, in a decision promulgated on 13 July 2022, allowed the Claimant's appeal on human rights grounds against a decision to deport him from the United Kingdom.

2. The Respondent to this appeal, to whom I shall refer as the Claimant to avoid confusion, is a national of Pakistan, born on 1.1.83. He was granted entry clearance as the spouse of a person settled in the United Kingdom on 17 November 2010 valid until 17 February 2013 and arrived in the United Kingdom on 11 December 2010 aged 27. He was granted indefinite leave to remain in the UK on 23 April 2013. On 31 August 2016 he was convicted of burglary, having pleaded guilty and was sentenced to 20 months imprisonment. On 20 September 2016 he was served with a deportation notice. On 16 October 2016 a submission was made in which he stated that he wished to remain on Article 8 grounds. On 12 May 2017 a deportation order was signed against him, and on 19 May 2017 a decision was made to refuse his human rights claim. This was certified and

then subsequently withdrawn and an in-country right of appeal afforded to the Claimant.

3. The Claimant also raised an asylum claim as the victim of slavery as his wife and her family took all the money he had earned. He said that he had a fear of return due to a serious threat to his life in Pakistan as well as a risk of harm by his former wife's family and due to risk of harm or unlawful killing by his family as he was considered to have dishonoured the family by his conviction and his family's resentment of his marriage. On 18 April 2018 he married a British citizen, in an Islamic marriage. Their daughter was born on 30 January 2019.

4. In the refusal decision dated 27 January 2021, the SSHD considered Article 8 and the exceptions to deportation set out in the immigration rules, which are mirrored by sections 117A to 117D of the 2002 Act. The Claimant claimed to have family life in the United Kingdom with three daughters, but it was not accepted that he had a genuine and subsisting parental relationship with his two older daughters. No evidence of his subsisting relationship with them or of his significant and meaningful positive involvement in their lives had been provided. The Claimant had divorced the mother of his two older daughters and they had been in her sole care and he had only recently been granted contact with them on a fortnightly basis only, but he had not provided evidence of this. He had not provided any photographs of family occasions, correspondence, or exchanges between him and his children.

5. It was accepted that the Claimant had a relationship with his younger daughter as he was living with her mother in the same household. It was accepted that it would be unduly harsh for his older children to live in Pakistan because they had not had much contact with him due to being divorced from their mother and the fact that the Claimant had been in prison. The Claimant's younger daughter who was only two years old would follow him and his partner to Pakistan if he and his partner chose to do so and it was not accepted that it would be unduly harsh for all of his children to remain in the United Kingdom even though he was to be deported. They were British citizens and would have access to education, health and other social services and be able to lead a normal life with their mother's support and care. Contact could be maintained by modern means of communication and visits. It was not accepted that he met the requirements of the exception to deportation on the basis of family life with a child.

6. In her decision the First tier Tribunal Judge at [23] found the Claimant to be a honest witness and found the core of his evidence to be consistent and reliable and that his partner was also an honest and credible witness [25]. The Judge noted at [44] that no application had been made to use the Family Court protocol, although permission had been sought from the Family Court seeking permission to use an Order as to contact between the Claimant and his two older daughters. She allowed the appeal on the basis that if the Claimant were to be deported then his two older daughters would lose contact with him altogether and this would be unduly harsh. Therefore, the Claimant met the exception set out in s117C(5) of the NIAA 2002.

7. The SSHD sought permission to appeal to the Upper Tribunal on the basis that the Judge failed to provide adequate reasons/follow binding caselaw/failed to apply the appropriate evidential burden in allowing the appeal. The SSHD asserted that, in the total absence of any evidence from the children and any independent evidence regarding their wishes or best interests, the Judge's findings were wholly speculative and did not meet the evidential burden of the balance of probabilities. Following *HA Iraq* [2020] EWCA Civ 1176 at [57] it was submitted that it was impossible to see how the Judge could have made any reliable assessment of the child's best interests or the impact of the decision upon a child without supporting evidence, or evidence from the children themselves and therefore the FtTJ failed to undertake any careful evaluation of the case. The Judge's speculative approach was further demonstrated at [47] where the FtTJ appeared to find, despite having no evidence from the court, that the reason why the Claimant had not increased his contact with his children was due to the actions of his ex-partner. The SSHD asserted that, other than a physical separation from their father, which already occurred when their father was in prison, the Judge failed to provide any reasons as to why separation would be unduly harsh. It was further submitted that, in the absence of any evidence from the Family Court, it was not open to the FtTJ to simply accept the word of the Claimant that contact with his children had been interrupted solely due to the actions of his ex-wife, especially where no application had been made to invoke the Family Court protocol. It was further submitted that whilst at [23] the Judge found the Appellant to be an honest witness, this was clearly contradicted by the FtTJ's own findings at [27] that the Claimant had not addressed the discrepancies or inconsistencies in his asylum claim, which self-evidently did not indicate that he is an honest witness.

8. In a decision dated 18 August 2022, permission to appeal was granted by FtTJ Oxlade in the following terms:

"This in-time application relies on three grounds, which can be summarised as a criticism of the Judge's finding that the Appellant's deportation would be unduly harsh on the two children (aged 8 and 10) from his former marriage.

2. The Respondent says (ground 1) that the Judge made findings of fact as to the effect on the children of deportation, but without receiving independent evidence (i.e. from a source other than the Appellant) as to the likely effect on them, (ground 2) concluded that there was limited contact because of the control of his ex-wife on quantum, which assertion was not reliable, and (ground 3) says that the Judge failed – when assessing the Appellant's credibility – to take into account inconsistencies in the Appellant's asylum claim, which were unresolved.

3. It was incumbent on the Judge to identify in what way the Appellant's deportation would impact these children and whether this was unduly harsh; to do so, the Judge had available no independent evidence, and it is arguable that the Judge's credibility assessment is defective in light of the unresolved inconsistencies in his asylum claim which impact the reliability of this evidence as to the children. It is arguable that the failure to comply with the family protocol and so failure to disclose to the Tribunal any

independent evidence as to the level of contact and history of proceedings, should be lead to adverse findings.

4. Permission is granted on all grounds, arguably there is an error of law."

9. On 6 September 2022, the Claimant's solicitors wrote to the Upper Tribunal asking for an order for the Family Court to disclose the Family Court proceedings, as they had written to the Family Courts but to no avail. There is no record of a response but on 29 September 2022, the Claimant's solicitors wrote to the Upper Tribunal again, attaching the Family Court Order. The Family Court agreed that the final order could be disclosed on 14 September 2022. The Order is dated 23 March 2022 and makes provision for the Claimant to spend time with his two elder daughters on alternate Sundays from 9am to 7pm commencing Sunday 27 March 2022.

Hearing

10. Mr Gazge submitted that the Judge made findings of fact as to the impact on the children without receiving independent evidence from a source other than the Claimant. He submitted that the SSHD relies on the decision of Court of Appeal in *HA (Iraq)* [2020] EWCA Civ 1176 at [57] and the Court concluded there was no error: see [50]-[53] of *KO (Nigeria)* [2018] UKSC 53. He submitted that the Judge could not make an assessment of the child's best interests without the evidence of the children or their care giver. The Judge did not undertake a careful evaluation of the case. Mr Gazge said that [47] was given as an example, in that, despite having no evidence, the Judge found that any child faced with deportation involved physical separation from their father and she failed to provide any reason as to why it would be unduly harsh. He submitted that there was no evidence to support the undue harshness finding. Mr Gazge submitted that given the standard of proof of a balance of probabilities, in the absence of any evidence from the Family Court, the Judge was not in a position to make a finding that it would be unduly harsh.

11. Mr Gazge submitted that the appeal should have been adjourned for the Family Protocol to be exercised and the Claimant should have made an application for an adjournment for the documents to be obtained. He submitted that at [23] the Judge finds the Claimant to be an honest witness, which contradicts her own finding at [27] that he had not addressed inconsistencies in asylum claim.

12. In his submissions, Mr Saini submitted that *HA Iraq* (op cit) did not state it was mandatory to have evidence from a child or otherwise, but rather just to consider the effect on the child of the parent's deportation, to see whether it would be unduly harsh. The Claimant could not afford a report from an independent social worker and the children were 8 and 10 years old and could not say much in terms of the assessment of undue harshness. Therefore, there is not much more one could have obtained from the children themselves. The evidence, therefore, comprised photographs and indirect evidence of the Family Court Order; the CAFCASS safeguarding letter and the Child Arrangements Order. Whilst the CAFCASS letter was not before Judge Chamberlain as it was not possible to submit

that either, without the permission of the Family Court, she knew the documents existed as reference was made to evidence upon which the Family Court Order was based and the CAFCASS letter was referred to at [3] of the Claimant's second witness statement.

13. Mr Saini submitted that if there was any error of law in not having the Family Court Order it was not material. On 13 March 2023 a formal rule 15(2)(a) application was made to adduce new evidence i.e. the Family Court Order. Mr Saini sought to rely upon the judgment in *KO (Nigeria)* (op cit) and submitted that the SSHD was attempting to re-argue the appeal. At [51]-[60] of the decision of the First tier Tribunal the Judge has performed the very assessment she was accused of not performing and there is a very careful piecemeal assessment of all the relevant factors: at [52] the Judge cites [56] of *HA (Iraq)* (op cit). She has then gone on at [54] onwards to consider all those factors. Mr Saini submitted that [57] of *HA (Iraq)* was met and does not bite in this appeal.

14. As to the standard of proof, there has only been permission to rely on the Family Court Order since September 2022 and in light of the decision by the former President in *Ahmed* [rule 17; PTA; Family Court materials] Pakistan [2019] UKUT 357 (IAC) any disclosure prior to this time would have been in contempt of Court. Mr Saini submitted that the Judge did not direct an adjournment of her own motion and he was instructed to proceed with the hearing. The Claimant was represented in family proceedings by the same solicitors, who obtained the order from the Family Court i.e. no Family Protocol application was made by the Tribunal as far as is known.

15. With regard to the alleged inconsistency in findings, Mr Saini submitted that it was slightly misleading to say that the Judge has not looked at asylum claim at [24] when she explicitly considered that the Claimant had failed to deal with issues arising from the refusal decision. The asylum claim was not formally conceded but it was not pursued at the hearing and the Claimant's statement did not address those aspects of the refusal decision.

16. In line with *HA (Iraq)* [2022] UKSC 22 in the Supreme Court albeit not much detail as to evidence was required, Mr Saini submitted that Lord Hamblen at [98] exemplifies the points he was seeking to make and that it was open to the Judge to reach the conclusions that she did.

17. In his reply, Mr Gazge noted that at [47] it was accepted by the Judge that contact had been reinstated but this clearly shows speculation in that it is not recorded that the Claimant is relying on the documents referred to by Mr Saini and she does not mention them. At [44] Mr Gazge reiterated the point that no adjournment request was made and it was not recorded that the affordability argument in relation to a report by an independent social worker was not made at that time.

Decision and reasons

18. At the heart of the SSHD's challenge to the findings of the First tier Tribunal Judge is her assessment of whether the impact of their father's deportation would be unduly harsh in its effect on his two eldest daughters. Underlying this was the issue as to the Claimant's relationship

and contact with his daughters at [42], which the Judge resolved in the Claimant's favour by accepting his evidence that he saw them fortnightly until 1 May 2021 when his ex-wife unilaterally stopped contact, but that contact was reinstated by the Family Court in March 2022 every other Sunday from 9am to 7pm unsupervised. The Judge accepted that the Claimant has a genuine and subsisting relationship with his two eldest daughters.

19. Whilst the SSHD asserted that, in the absence of any evidence from the Family Court, it was not open to the Judge to simply accept the word of the Claimant that contact with his children had been interrupted solely due to the actions of his ex-wife, especially where no application had been made to invoke the Family Court protocol, I do not accept this as correct. I find it was open to her to accept the Claimant's evidence and to reach the findings she did, for the reasons she gave at [44]-[49]. I note that the evidence now available from the Family Court is consistent with the Claimant's evidence to the First tier Tribunal Judge.

20. As to the Family Protocol, it was not within the remit of the Claimant's solicitor to exercise the Family Protocol of their own volition. Whilst they could have sought a direction from the First tier Tribunal after the Family Court Order was made in March 2022, prior to the hearing in July 2022, they instead sought disclosure of that Order direct from the Family Court, which was a reasonable course of action: see MI Exhibit 4 which contains email correspondence from the Claimant's solicitors to the Family Court seeking disclosure of the Order, on 13 April, 25 April and 19 May 2022. Similarly, whilst the First tier Tribunal Judge could have adjourned the Claimant's appeal so that the Family Protocol could have been invoked, Mr Saini said that he was not instructed to seek an adjournment for this to be done. In any event, the overriding objective favoured continuation of the hearing, given that the deportation order had been outstanding since 20 September 2016. In these circumstances, given that there had already been substantial delay and the Claimant's solicitors had made concerted efforts to obtain a copy of the Family Court Order, I find no error of law in the fact that the Judge proceeded to reach her own view as to the credibility of the Claimant's evidence, absent corroboration from the Family Court.

21. As to the Judge's assessment of whether the impact upon his two eldest daughters would by unduly harsh, I set out her findings in full at [50]-[60] of her decision and reasons:

"*50. It is acknowledged by the Respondent that it would be unduly harsh for the Appellant's older daughters to move to Pakistan with him. I have considered whether it would be unduly harsh for them to remain in the United Kingdom while the Appellant returns to Pakistan. I have taken into account their best interests, which must be a primary concern, following the case of ZH (Tanzania) [2011] UKSC 4.*

51.I have also considered the case of KO (Pakistan) UKSC 53. This provides : "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."

52.I have considered the factors set out at [56] of HA (Iraq) & RA (Iraq) [2020] EWCA Civ 1176, while recognising that this is not an exclusive list.

“Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.”

53.I was referred to the case of MI (Pakistan) [2021] EWCA Civ 1711. This states at [48] in relation to the test at 117C(5)

“The test to be applied in section 117C (5) is not hard-edged, but is an evaluative exercise focussed on the reality of the affected child's particular situation. An inevitably important part of the evaluative exercise is to look at the importance of the deportee parent to the child in question, and at the degree of emotional dependence the child has on that parent.”

54.I find that the Appellant’s older daughters are 10 and 8 years old. They live with their mother. I have found above that the Appellant has a genuine and subsisting parental relationship with them. I find that the Appellant supports his older daughters financially and that the amount is calculated by the Child Maintenance Service. I find that this support would cease were the Appellant to be deported, although I find on the balance of probabilities that he would try to support them financially from Pakistan. I do not have evidence of the Appellant’s ex-wife’s ability to provide financial support.

55.Turning to the nature of their relationship with their father and their emotional dependence on him, I do not have any evidence from the children, but I would not expect to do so, given their ages. It was submitted by Mr. Saini that cost had prevented the Appellant from obtaining an independent social work report. I find on the balance of probabilities that emotional support is provided for the older daughters by their mother. They live with her. However, this does not replace or negate the emotional support that they receive from the Appellant.

56.In relation to maintenance of the relationship between the Appellant and his older daughters, given the Appellant’s ex-wife’s conduct and behaviour, I find that she is very unlikely to facilitate a visit to Pakistan for them to see the Appellant. I find it is likely that she would prevent any such visit. It would in any event involve an application to the Family Court given that contact is currently allowed only to the extent permitted by the Family Court. I find that it is exceedingly unlikely that the Appellant’s ex-wife would agree to any visits to Pakistan, and I find it exceedingly unlikely that she would take her daughters to Pakistan to visit the Appellant.

57.I therefore find that contact will only be able to be maintained through modern methods of communication. Given the ages of his daughters, I find that even contact using modern methods of communication such as phone and video calls would have to be facilitated by his ex-wife and given her conduct and the fact that contact now is under a Court Order, I find on the balance of probabilities that this contact would be minimal.

58.I have considered the impact of this lack of contact, physical or otherwise, on the Appellant's older daughters. I find that their relationship with the Appellant would effectively cease just at the point when they are starting to rebuild it. They lived with the Appellant until he went to prison. They had contact with him by mutual consent, and then by Order of the Family Court. This was then interrupted through no fault of the Appellant or his daughters by the Appellant's ex-wife in 2021. The Appellant then returned to the Family Court to get this contact reinstated. They have been seeing their father since March 2022. I find that the likely impact of this contact now ceasing would cause another significant degree of upheaval in the lives of the Appellant's daughters. The impact of severing this contact, which has only recently restarted, would be detrimental to their emotional wellbeing and not in their best interests.

59.I find that, if the Appellant were to be deported, his two older daughters would be deprived of their father. I find that there would be no meaningful contact between them. Given the upheaval that his two older daughters have been through with his absence due to his offence, the divorce, and subsequently their mother's conduct in stopping contact between them and the Appellant, I find that it would be unduly harsh on them now to lose contact with their father altogether, which would be the result of the Appellant's deportation. I find that the Appellant meets the exception to deportation in section 117C(5).

60.Taking all of the above into account, I find that the effect of the Appellant's deportation on his older daughters would be unduly harsh, and that this outweighs the public interest in his deportation. I have focused on these two older children as they are in a more vulnerable position as regards their relationship with their father due to the situation between their parents and the conduct and behaviour of their mother in preventing the Appellant from having contact with them."

22. It is clear from her decision that the Judge's conclusion that the effect of the Claimant's deportation on his two older daughters would be unduly harsh was because he has a genuine and subsisting relationship with them; this would end if he were to be deported because, due to their ages (8 and 10 years respectively) their mother would have to facilitate contact by way of modern means of communication and she found as a fact that such contact would be minimal, given that contact was currently pursuant to a Court Order and that it was exceedingly unlikely that the children's mother would agree to allow the children to visit the Claimant in Pakistan nor to take them there to visit him. She found that their relationship with him would effectively cease just at the time when they are starting to rebuild it; ceasing contact would cause another significant degree of upheaval in their lives, would be detrimental to their wellbeing and not in their best interests and it would be unduly harsh for them to lose contact with him altogether.

23. The SSHD's grounds assert, in essence, that the Judge's decision was based on speculation, in the absence of evidence from the children or on their behalf and that, following *HA Iraq* [2020] EWCA Civ 1176 at [57] it is impossible for the Judge to make any reliable assessment of the child's best interests or the impact of the decision upon a child without supporting evidence and therefore the Judge failed to undertake any careful evaluation of the case and failed to provide any reasons as to why separation would be unduly harsh, other than physical separation from their father which already happened when he was in prison.

24. Mr Saini submitted and I accept, that the judgment of the Court of Appeal in *HA (Iraq) (op cit)* does not mandate that it is necessary to have evidence from a child or otherwise. The First tier Tribunal Judge set out an extract from [56] of the judgment of Lord Justice Underhill at [52] above. The judgment was subject to an appeal by the SSHD to the Supreme Court, who on 20 July 2022, 7 days after the decision in this case, again considered the question of whether the Court of Appeal erred in its approach by failing to follow the guidance given by the Supreme Court in *KO (Nigeria)* (op cit) and, in particular, by rejecting the approach of assessing the degree of harshness by reference to a comparison with that which would necessarily be involved for any child faced with the deportation of a parent. Lord Hamblen held at [41]:

"41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in KO (Nigeria), namely the MK self-direction:

> *"… '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."*

25. That is the current position in law and I find that the manner in which the First tier Tribunal Judge considered the question of undue harshness is in accordance with the *MK* self-direction as set out in the Supreme Court judgment in *HA (Iraq)* and is sufficiently reasoned.

26. I find no substance in the third ground of appeal ie that the Judge's credibility findings were inconsistent. The Judge heard evidence relating to the Claimant's contact with his daughters and his human rights claim and concluded in light of his oral evidence and that of his partner that he was an honest and credible witness, at [23] as was his partner, at [25]. It is clear that the protection claim, which was based on threats the Claimant said he had received from his ex-wife's family, was not pursued in practice: it was not referred to in the skeleton argument and no detail about it was included in the Claimant's witness statement, which did not engage with the refusal decision and inconsistencies and discrepancies referred to therein.

27. The Claimant also confirmed that there had been no threats since 2017. In these circumstances, the Judge reasonably did not make detailed findings except to find that there would be sufficiency of protection in Pakistan, the Claimant would be able to internally relocate and did not have a well-founded fear of persecution there. Given that the Judge was well aware of the fact that the Claimant did not address inconsistencies and discrepancies identified in the refusal decision because she set that out at [27] it was open to her to find that this did not impact negatively upon his evidence relating to contact with his two older daughters.

Notice of Decision

28. For the reasons set out above, I find no error of law in the decision of First tier Tribunal Chamberlain. I dismiss the appeal by the SSHD and uphold the decision of the First tier Tribunal, allowing the Claimant's appeal.

Rebecca Chapman

Deputy Upper Tribunal Judge Chapman

18 April 2023