IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002336

First-tier Tribunal No:
PA/00037/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 13 June 2023

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

KJ
(ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr G Brown, counsel instructed by BKP Solicitors
For the Respondent: Mr P Lawson, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 1 June 2023

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant (*and any member of his family)* is 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 any member of his family*). Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The appellant is a national of Pakistan. He arrived in the UK in May 2007 as the spouse of a person present and settled in the UK. He was granted indefinite leave to remain on 31 August 2010.

2. On 31 May 2018 the appellant was convicted at Sheffield Crown Court of sexual assault on a female and sentenced to 2 years imprisonment. Having considered the representations made in response to a Notice of Decision to Deport, the respondent refused a human rights claim made by the appellant. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Moxon for reasons set out in a decision promulgated on 19 August 2019. Permission to appeal to the Upper Tribunal was refused and the appellant had exhausted his rights of appeal on 18 October 2019.

3. Removal directions were subsequently issued for removal of the appellant to Pakistan on 24 December 2019. A week before the appellant was to be removed, further representations were made on his behalf. On 21 December 2019 the appellant made a claim for asylum. On 16 June 2020 the respondent made a decision to refuse the appellant's protection and human rights claims. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Saffer for reasons set out in a decision promulgated on 4 March 2022.

4. The appellant claims Judge Saffer made demonstrable errors of law in his decision and reasons. The appellant does not challenge Judge Saffer's decision to uphold the respondent's decision made in accordance with section 72(9)(b) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") to certify that the presumptions under subsection 72(2) apply to the appellant. Judge Saffer was satisfied the appellant presents a danger to the community in the United Kingdom. The appellant was therefore excluded from the protection afforded by the 1951 Refugee Convention, but in any event, Judge Saffer rejected the appellant's claim that he would be at risk upon return to Pakistan. The conclusions reached by Judge Saffer upon the international protection claim and the Article 3 claim are not challenged.

5. The focus of the grounds of appeal is upon the determination of the appellant's Article 8 claim. The appellant advances three grounds of appeal. First the appellant claims Judge Saffer failed to conduct a careful evaluation of the likely effect of the appellant's deportation on the two qualifying children and failed to give proper reasons as to why it would not be unduly harsh. Second, the decision is vitiated by a procedural irregularity, leading to unfairness. The appellant claims Judge Saffer strayed into an area that was not put in issue by the respondent. The Judge considered and made findings of fact in relation to previous allegations of domestic violence that were not properly tested. Third, the

appellant claims Judge Saffer failed to give proper reasons for rejecting the evidence of the independent social worker, Sarah Edwards.

6. Permission to appeal was granted by Upper Tribunal Judge Perkins on 31 August 2022. He said:

> "I am particularly concerned that the Judge may have lost sight of his obligation to decide if the effects of removal on the appellant's daughters would be "unduly harsh". I am aware that Judge decided unequivocally that it was positively in the best interests of the appellant's daughters that he be removed from the United Kingdom but that finding was, arguably, informed by findings that the Appellant had abused his wife physically and had abused his wife and daughters emotionally that were not supported by the evidence and/or not reached fairly because that was not how the trial was run."

The hearing before me

7. At the outset of the hearing before me, I established that the focus of the criticisms made by the appellant are Judge Saffer's consideration of:

   a. Whether it would be unduly harsh for the appellant's partner and children to stay in the UK without the appellant; and

   b. Whether there are very compelling circumstances which would make a decision not to revoke the deportation order a breach of Article 8 of the Human Rights Convention.

8. Mr Brown adopted the grounds of appeal and submits Judge Saffer failed to adequately address whether the effect of the appellant's deportation on his partner or children would be unduly harsh. He refers in particular to the judge's consideration of the evidence at paragraph [103] of the decision. Mr Brown refers to the absence of the words "unduly harsh" or the identification of the correct test in that paragraph. Mr Brown submits one cannot infer from the decision that Judge Saffer had the correct test in mind. As far as the appellant's partner is concerned, Mr Brown quite properly acknowledges that in paragraph [104] of the decision Judge Saffer expressly states he was not satisfied that the effect of the appellant's deportation on his partner would be unduly harsh.

9. In reply, Mr Lawson submits the failure of Judge Saffer to set out at paragraph [103] of his decision that he was considering whether the effect of the appellant's deportation on the children would be unduly harsh, does not amount to a material error of law. A Judge is not required cite the relevant test being applied and it is obvious without any express reference to the "unduly harsh" test, that that is what Judge Saffer was addressing. Mr Lawson submits that in paragraph [56] of his judgment in HA (Iraq) v SSHD [2020] EWCA Civ 1176, Underhill LJ confirmed that how a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances. He said by way of example that the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them; 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. He submits that at paragraph [103], they are precisely the factors Judge Saffer refers to.

10. In response, Mr Brown submits that in the closing sentence of paragraph [103], Judge Saffer states the view of Ms Edwards that the girls emotional problems are due to the possible separation is undermined by the failure to consider that the problems may be due to the girls being victims of emotional abuse. He submits Judge Saffer fails to provide adequate reasons for placing little weight upon the opinion expressed by the independent social worker.

Decision

11. I am grateful to the parties for their focused and succinct submissions. The relevant legal framework is set out at paragraphs [65] to [70] of the decision of Judge Saffer. At paragraph [70] he states:

> "…Regarding the 'unduly harsh test' and the 'very compelling circumstances test' in sections 117C(5) and 117C(6) NIAA 2002 I have applied AA (Nigeria) v SSHD [2020] EWCA Civ 1296, KO (Nigeria) [2018] 14 UKSC 53; R (on the application of Byndloss) [2017] UKSC 42; NA (Pakistan) [2016] EWCA Civ 662 and HA (Iraq) [2020] EWCA Civ 117…."

12. As Judge Saffer noted at paragraphs [95] and [96] of his decision, s117C the 2002 Act confirms the deportation of foreign criminals is in the public interest and that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal. In accordance with s117C(3), as the appellant has received a two-year sentence of imprisonment, the public interest requires his deportation unless Exception 1 or Exception 2 applies. By operation of s117C(4), Exception 1 applies where (a) the appellant has been lawfully resident in the United Kingdom for most of his life, (b) the appellant is socially and culturally integrated in the United Kingdom, and (c) there would be very significant obstacles to the appellant's integration into Pakistan. By operation of s117C(5), Exception 2 applies where the appellant 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 his deportation on the partner or child would be unduly harsh.

13. Judge Saffer found the appellant has not been lawfully resident in the UK for most his life, and that he is not socially and culturally integrated in the United Kingdom. He was also not satisfied that that there would be very significant obstacles to the appellant's integration into Pakistan. Those findings are not challenged and it is clear that Exception 1 does not apply.

14. Judge Saffer was satisfied the appellant has a genuine and subsisting parental relationship with his two daughters and that he sees them regularly each week, albeit the contact is supervised. He was also satisfied it is in the childrens' best interests to remain in the UK. In a decision of the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22, that

post-dates the decision of Judge Saffer, Lord Hamblen (with whom Lord Reed, Lord Leggatt, Lord Stephens and Lord Lloyd- Jones agreed) said:

> “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:
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> "… '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. It was for Judge Saffer to make an informed assessment of the effect of deportation on the appellant’s daughters and to make an evaluative judgment as to whether that elevated standard has been met. Although I accept there is no reference to the ‘unduly harsh test’ in paragraph [103] of the decision, it is clear that Judge Saffer was aware of and addressing the ‘unduly harsh test’ in that paragraph. As Mr Lawson submits, Judge Saffer noted the relevant circumstances; the appellant has been physically abusive towards NA and emotionally abusive to them all; the children can get professional and family support to help them understand the reason for the separation and initial upset, and with their mental health needs; the children survived for well over a year while the appellant was in jail; The pleasure the children have in seeing the appellant could be for many reasons, and do not detract from the harm he may cause. Their mental well-being, has to be balanced against their physical well-being and the mental illness they may suffer should the appellant choose to abuse them in the same way he did to his victim in the criminal proceedings and if he continues to perpetuate domestic abuse against NA; The children can maintain such contact as is appropriate by modern means of communication; The children will not be able to visit the appellant while they are minors as the local authority will be likely to seek injunctions or for them to be made Wards of Court to protect them; If IA wants to see the appellant she can go to Pakistan when she turns 18 in 2 ¾ years’ time. The focus throughout is upon the impact that the appellant’s deportation, whether positive or negative, will have upon his daughters. The matters referred to by Judge Saffer are in my judgment all relevant factors and reasons to support the conclusion that the effect of the appellant’s deportation on the children would not be unduly harsh. The failure to refer to the ‘unduly harsh’ test is therefore immaterial to the outcome of the appeal.

16. At the hearing before me, Mr Brown did not elaborate any further upon the second and third grounds of appeal, and I can deal with them briefly.

17. I reject the claim that Judge Saffer impermissibly made findings as to the allegations of historic domestic violence. Judge Saffer did so in the context of his consideration as to whether the appellant has rebutted the presumption that he presents a danger to the Community of the United

Kingdom. The issue arose not because it had been raised by the respondent, but by reference to the evidence the appellant himself relied upon. At paragraphs [40] to [42] of his decision, Judge Saffer refers to the information set out by Stephanie Hine, Team Manager at Rotherham CYPS that the appellant's daughters have been known to Rotherham social care since 2010 and the referrals to children's social care over the years in relation to domestic abuse in the parents' relationship and the emotional harm caused to the girls as a result. Judge Saffer had regard to the evidence of NA in particular as recorded in paragraph [37] of his decision. The Judge weighed the evidence and reached findings that were open to him on the evidence. Having considered the evidence before the Tribunal it was open to Judge Saffer to concluded as he did at paragraphs [79] and [80]:

> "79. There is no evidence either girl saw the domestic abuse. I accept NA's evidence that they may have heard something, as I have no reason to doubt they would have heard arguments. They were therefore present in 2016, and IA was present in 2010 and 2011. I am satisfied that the child protection plans in 2016 were due to the pattern of domestic abuse, the arrest that had been made in 2014 for the sexual assault that was subsequently prosecuted in 2018, and the emotional abuse the girls suffered in hearing the argument and seeing the effect of the domestic violence in 2016. The suggestions by KJ in his 2019 statement that apart from the conviction he is of impeccable character, and the letter from his solicitor of 17 December 2019 that he is not a violent criminal are simply nonsense.
>
> 80. His domestic violence behaviour was not a one-off incident, but a course of conduct over a period of time, and part of a pattern of abuse to women as evidenced by the sexual assault offence which occurred during the same period. I note the allegation of sexually assaulting a 13-year-old girl KJ referred to, but place little weight on this as I have no details. His minimisation of the domestic violence, and his denial of the sexual assault on the 16-year-old girl until while he was in jail for it indicate that he will deliberately lie to conceal the truth about his behaviour, and that he has no idea what constitutes acceptable behaviour towards females of any age."

18. I also reject the appellant's claim that Judge Saffer fails to give proper reasons for rejecting the evidence of the independent social worker, Sarah Edwards. There is specific reference to the evidence of Sarah Edwards, with relevant extracts from her report at paragraphs [47] to [55] of the decision. It is clear that in reaching his decision, Judge Saffer had regard to that evidence. In her report Sarah Edwards was asked, *inter alia,* to address the impact upon the children if their father is removed from the UK. I have read her report and the opinions she expresses in that regard. She noted that whilst the appellant does not live within the family home, he is an important figure within the family. She sates that a "reasonable conclusion suggests both girls have a vulnerability in terms of their emotional wellbeing which is likely to be compounded if the appellant is deported". It was in my judgment open to Judge Saffer to attach little weight to the opinion expressed by Ms Edwards because as he states, Ms Edwards did not take into account the emotional impact upon the children of the emotional harm caused to the girls arising from the domestic abuse in the parental relationship as reported by Stephanie Hine.

19. For the sake of completeness, as far as s117C(6) of the 2002 Act is concerned, I invited Mr Brown to draw my attention to the evidence that was before the First-tier Tribunal that supported the appellant's claim that if Exceptions 1 and 2 do not apply, there are in any event very compelling circumstances, over and above those described in Exceptions 1 and 2. Initially Mr Brown drew my attention to the evidence set out in paragraph [15] of the appellant's statement regarding the assault that he himself was subjected to when he was in prison. However Mr Brown quite properly accepted that at paragraph [109] of his decision Judge Saffer had rejected the appellant's claim that he was sexually assaulted in prison. Mr Brown was unable to direct me to any other evidence that was relied upon by the appellant that had not already been considered by the Judge when he was considering whether Exceptions 1 and 2 apply. It was therefore plainly open to Judge Saffer to conclude as he did at paragraph [105] that there are no very compelling circumstances, either individually or cumulatively, for the appellant to be able to remain in the UK.

20. It is now well established that 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. It is in my judgement clear that in reaching his decision, Judge Saffer considered all the evidence before the Tribunal in the round and reached findings and conclusions that were open to him on the evidence. A fact-sensitive analysis was required. In my judgement, the conclusions reached by Judge Saffer were rooted in the evidence before the Tribunal. The findings and conclusions reached cannot be said to be perverse, irrational or findings that were not supported by the evidence.

21. Although the decision could have been better expressed, it is not a counsel of perfection. In the final analysis, Judge Saffer concluded, after considering a wide range of factors including matters that weigh in favour of, and against the appellant, that there are no compelling circumstances which might warrant revocation of the deportation order on Article 8 grounds, when weighed against the public interest. It was in my judgement open to Judge Saffer to dismiss the appeal for the reasons he gave.

22. It follows that I dismiss the appeal.

Notice of Decision

23. The appeal is dismissed.

V. Mandalia

Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal

Immigration and Asylum Chamber

1 June 2023