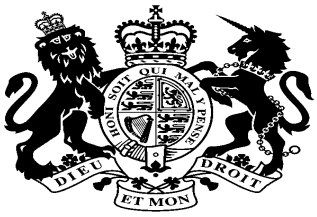


Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02462/2019**

THE IMMIGRATION ACTS

Heard at Field House, London	**Decision & Reasons Promulgated**
On Thursday 16 January 2020	**On Wednesday 29 January 2020**

Before

UPPER TRIBUNAL JUDGE SMITH

Between

H K
[Anonymity Direction Made]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Joseph, Counsel instructed by Chambers Solicitors (Slough)
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a protection claim and minor children. Accordingly, it is appropriate to make an anonymity direction. Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

DECISION AND REASONS

BACKGROUND

1. By a decision promulgated on 20 November 2018 ("the Decision"), the Tribunal found there to be an error of law in the decision of First-tier Tribunal Judge M A Khan, itself promulgated on 11 July 2019 allowing the Appellant's appeal against the Respondent's decision of 20th June 2018 under section 32(5) of the UK Boarders Act 2007 seeking to deport the Appellant from the UK as a foreign criminal. The Decision is annexed hereto for ease of reference.

2. The Appellant's immigration history is set out at [2] and [3] of the Decision and I do not need to repeat that. The Appellant does not challenge the dismissal of his appeal by Judge Khan on protection grounds. That claim is therefore no longer in issue.

3. The human rights claim made by the Appellant rests in large part on his relationship with Ms N, his partner, who is a Polish national, and his children who are British citizens. As such, the legal framework is relatively straightforward. Section 117 of the Nationality, Immigration and Asylum Act 2002 ("Section 117") applies, in particular Section 117C. As Section 117C is already set out at [54] of the First-tier Tribunal's decision as recorded at [6] of the Decision, I do not need to repeat that reference. Nor do I need to repeat the references to case-law as set out at [8] and [9] of the Decision.

THE ISSUES AND LEGAL FRAMEWORK

4. The approach to be adopted by the Tribunal and relevant issues were not in dispute between the parties. It was agreed that the issues to be decided in the context of the relevant legal framework are as follows.

5. Does the Appellant meet Exception 1 set out at Section 117C (4)? This issue can be dealt with very shortly as it is accepted on his behalf that he cannot. His residence in the UK has not been lawful in order to meet the half of life provision in Section 117C(4)(a) (there is an error in the citation at [54] of the First-tier Tribunal decision set out in the Decision as the words "most of" are omitted). Since he is unable to meet that provision, it has not been argued either that the Appellant is socially and culturally integrated in the UK or that there are very significant obstacles to integration in Iraq but I can deal with the extent to which those provisions are met when assessing the case outside the two exceptions.

6. Does the Appellant meet Exception 2 set out at Section 117C (5) based on what is accepted to be his genuine and subsisting relationship with Ms N and their two children? In other words, is the impact of the deportation of the Appellant on Ms N and their children unduly harsh? That encompasses both the scenario of Ms N and the children going to Iraq with the Appellant and remaining in the UK without him. The Respondent accepts however that Ms N and the children could not be expected to go to Iraq with him (in other words that it would be unduly harsh for them to do so). This issue is therefore confined to the impact

of deportation of the Appellant with Ms N and their children remaining in the UK.

7. Are there very compelling circumstances over and above the two exceptions which apply to render the decision to deport disproportionate? Although Section 117C(6) refers to that provision applying only to those sentenced to at least four years (which does not apply here), it was accepted by the Court of Appeal in NA (Pakistan) and others v Secretary of State for the Home Department [2016] EWCA Civ 662 that this is a drafting oversight and that this provision applies also to those sentenced to under four years if they are unable to meet the two exceptions (see [24] to [27] of that judgment). As such, if I conclude that the exceptions (in practice Exception 2) is not met in this case, I must nevertheless go on to consider whether there are very compelling circumstances over and above the two exceptions.

8. When conducting this assessment, I bear in mind also the guidance of the Supreme Court concerning the "balance sheet approach": [83] and [84] in the speech of Lord Thomas in Hesham Ali v Secretary of State for the Home Department [2016] UKSC 60 ("Hesham Ali") (although that judgment pre-dates the introduction of Section 117, the approach still has validity).

9. Turning then to what those circumstances might be in this case, the Supreme Court in KO (Nigeria) and others v Secretary of State for the Home Department [2018] UKSC 53 held that the nature and seriousness of the offence (and therefore the public interest more generally) was not to be weighed in the balance when considering Exception 2 (in other words, whether the impact is unduly harsh is a threshold test only). However, as the Tribunal concluded in MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 122 (IAC) ("MS (Philippines)"), "[i]n determining pursuant to section 117C (6) … whether there are very compelling circumstances, over and above those described in Exceptions 1 and 2 … , such as to outweigh the public interest in the deportation of a foreign criminal, a court or tribunal must take into account, together with any other relevant public interest considerations, the seriousness of the particular offence of which the foreign criminal was convicted…Nothing in KO (Nigeria) .. demands a contrary conclusion". Section 117C (2) is therefore relevant – "The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal".

10. As the Tribunal makes clear in MS (Philippines), "[t]here is nothing in Hesham Ali … that requires a court or tribunal to eschew the principle of public deterrence, as an element of the public interest, in determining a deportation appeal by reference to section 117C (6)". In relation to the public interest more widely, the Tribunal, in RA (s.117C: "unduly harsh"; offence; seriousness) Iraq [2019] UKUT 123 (IAC) ("RA (Iraq)") gave guidance that "[r]ehabilitation will not ordinarily bear material weight in favour of a foreign criminal"

11. When conducting the assessment under Section 117C (6), the additional issue on which the Appellant places most emphasis is the delay of the Respondent in

considering the Appellant's human rights representations and the passage of time since the offence. The Appellant relies on the Court of Appeal's judgment in MN-T (Columbia) v Secretary of State for the Home Department [2013] EWCA Civ 893 ("MN-T (Columbia)") for what it has to say about delay in deportation.

12. In that case, the appellant satisfied Exception 1 "by a wide margin" but could not benefit from the exception as she was sentenced to a term of imprisonment of more than four years. The Court observed at [29] of the judgment that "[i]f the claimant were a person who only just satisfied the conditions of Exception 1, there would be much force" in the point that the development of private and family life during the period of delay was part of the exceptions within Section 117C (6) and could not therefore be taken into account as circumstances over and above those exceptions. However, the Court went on to say at [30] of the judgment that when evaluating the circumstances in an assessment under Section 117C (6), the Tribunal was required to consider all the circumstances collectively both those within Exceptions 1 and 2 and those over and above those exceptions. In carrying out that assessment, the Tribunal "must have regard to the high public importance of deporting foreign criminals".

13. Importantly for the Appellant's case, the Court went on to say the following about the delay itself:

> "35. I agree that rehabilitation alone would not suffice to justify the Upper Tribunal's decision in this case. If it had not been for the long delay by the Secretary of State for the Home Department in taking action to deport, in my view there would be no question of saying that 'very compelling circumstances over and above those described in Exceptions 1 and 2' outweighed the high public interest in deportation. But that lengthy delay makes a critical difference. That lengthy delay is an exceptional circumstance. It has led to the claimant substantially strengthening her family and private life here. Also, it has led to her rehabilitation and to her demonstrating the fact of her rehabilitation by her industrious life over the last 13 years. This is one of those cases which is on the borderline. The Upper Tribunal might have decided either way. The Court of Appeal would not have reversed the Upper Tribunal's decision if the Upper Tribunal had decided that because of the high public importance the claimant must be deported. In the event the Upper Tribunal decided this matter in favour of the claimant. This was, in my view, an evaluative decision within the range which the Upper Tribunal was entitled to hold that there were in this case very compelling circumstances over and above those described in Exceptions 1 and 2, which outweighed the high public interest in deportation…"

14. In relation to the effect of delay in the context of the assessment of circumstances within Section 117C (6), the Appellant relies on the House of Lords judgment in EB Kosovo v Secretary of State for the Home Department [2008] UKHL 41 ("EB (Kosovo)"). At [14] to [16] in the speech of Lord Brown, it was said that delay may be relevant in any one of three ways as follows:

> "14. First, the applicant may during the period of any delay develop closer personal and social ties and establish deeper roots in the community than he could have shown earlier. The longer the period of the delay, the likelier this is to be true. To the extent that it is true, the applicant's claim under article 8 will necessarily be strengthened….
>
> 15. Delay may be relevant in a second, less obvious, way. An immigrant without leave to enter or remain is in a very precarious situation, liable to be removed at any time. Any relationship into which such an applicant enters is likely to be, initially, tentative, being entered into under the shadow of severance by administrative order. This is the more true where the other party to the relationship is aware of the applicant's precarious position. This has been treated as relevant to the quality of the relationship…. A relationship so entered into may well be imbued with a sense of impermanence. But if months pass without a decision to remove being made, and months become years, and year succeeds year, it is to be excepted that this sense of impermanence will fade and the expectation will grow that if the authorities had intended to remove the applicant they would have taken steps to do so. This result depends on no legal doctrine but on an understanding of how, in some cases, minds may work and it may affect the proportionality of removal.
>
> 16. Delay may be relevant, thirdly, in reducing the weight otherwise to be accorded to the requirements of firm and fair immigration control, if the delay is shown to be the result of a dysfunctional system which yields unpredictable, inconsistent and unfair outcomes…"

As is evident from what is said about the last category, EB (Kosovo) was a removal and not a deportation case. To that extent, it can be distinguished, particularly in relation to what is said about the diminution of the public interest. However, the Appellant relies on the case predominantly in relation to the first and second categories which he says apply here.

15. In the course of submissions, Mr Joseph confirmed that no issue arises under EU law. The Appellant has never made an application for a residence card under the Immigration (European Economic Area) Regulations 2016. The Appellant is not legally married to Ms N (although they have undergone a religious marriage) and cannot therefore qualify as a family member. For whatever reason, he has not made an application for a residence card as an extended family member.

EVIDENCE AND SUBMISSIONS

16. I now turn to the evidence and submissions. I heard oral submissions from both representatives, and I received a helpful skeleton argument from Mr Joseph. I do not record the submissions separately as the matters canvassed are covered either above or in the Discussion section below in relation to the law as it applies to this case or within the context of the evidence recorded below.

17. I have before me a bundle of evidence adduced by the Appellant before the First-tier Tribunal to which I refer as necessary as [AB/xx]. I also have a

supplementary bundle filed by the Appellant on 7 January 2020 in accordance with my earlier directions to which I refer as [ABS/xx]. In addition, I have a Respondent's bundle to which I refer as [RB/xx] as well as the PNC report relating to the Appellant printed on 2 April 2019 ("the PNC report"). I have read and have regard to all the documents even if I do not specifically mention them.

18. I also heard oral evidence from the Appellant and Ms N. Ms N is currently suffering mental health problems. Mr Joseph did not seek any particular arrangements in relation to the giving of her evidence, but I made clear to her that if, at any time, she wished to have a break, she should ask. As it was, few questions were asked of her and that was not necessary. I observe that she was nonetheless visibly distressed during her evidence but was comforted by having the Appellant sit alongside her and was on that basis able to complete her evidence.

The Appellant's Evidence

19. The Appellant has made two written statements, one which appears unsigned and undated at [AB/A1-8], a copy of which was signed on 21 June 2019 ("the Appellant's First Statement") and the second which appears at [ABS/A1-8] which was signed at the hearing before me ("the Appellant's Second Statement"). He adopted both statements in his oral evidence and confirmed the truth of both.

20. The circumstances of the Appellant's offence are described at [5] and [6] of the Appellant's First Statement. Having had his asylum appeal rejected in 2003, the Appellant says that he was "wrongly advised by someone" to pay for a document showing that he had indefinite leave to remain. He did so, obtaining a letter dated 12 May 2004 with a different surname and date of birth. He used those details to obtain a replacement document and then a travel document on which he travelled to Iran, Poland and Germany. He used the false identity over a number of years from 2004 to 2009 when his true identity was discovered. He was then prosecuted for possessing a false document (the travel document) and for seeking to obtain leave to remain by deception and sentenced to twelve months in prison. The Appellant pleaded guilty to the offences. I observe that the PNC report shows that this was the Appellant's only offence. The Respondent does not dispute that this is the position.

21. The Appellant says in his first statement that he accepts that he "did wrong" and that he is "very remorseful". He says that he "was young and foolish and made a mistake" but that he is not a risk to public safety and has "never posed a threat to the public good or public safety".

22. The Appellant was then notified that he was to be deported. His appeal was heard on 1 July 2011. By a decision promulgated on 6 July 2011 (at [RB/J1-11]), the First-tier Tribunal allowed his appeal. The Appellant was at that stage already in a relationship with Ms N. The Tribunal found that the relationship

was a durable one which "may serve to qualify the Appellant as an extended family member" ([21]). The Tribunal concluded that the Respondent's failure to consider the issue meant that the decision to issue the deportation order was "not in accordance with the law" and, based on a concession made by the Respondent's representative to that effect, allowed the appeal to the extent of remitting the matter back to the Respondent to consider it. As I have already noted, the Appellant does not suggest that he has any entitlement to remain under EU law and therefore I do not need to take the 2011 decision as a starting point. The Tribunal expressly declined to deal with Article 8 ECHR in that decision, having reached the conclusion that it did applying EU law.

23. Following the allowing of that appeal, the Appellant records that his solicitors submitted further representations on 12 August 2011. It was not until 3 August 2016 that those were considered, leading to a further decision to deport him on that date. However, by then, the Appellant's circumstances had changed as his two children had been born. Accordingly, a statement of additional grounds was submitted in August 2016. Thereafter, there was yet more delay, culminating in a judicial review challenge to the delay which was settled when the Respondent agreed to make a decision within three months. The further decision which is that under appeal was served on 28 February 2019.

24. The Appellant's case is mainly founded on his relationship with Ms N and with his two children, [D] born in April 2012 and [L] born in 2015. He says that his children and partner are "all emotionally and physically dependent" on him. He points out that he has been unable to work due to his status and therefore Ms N works full-time. He would like to be able to work to support his family financially but, at present, he plays "a big part" in bringing up the children and takes care of the home.

25. [D] attends primary school. [L] now attends reception following nursery school. In the Appellant's First Statement, he describes the children as "both doing really well" and being "very happy". He speaks about what he does for them – taking them and picking them up from school, feeding them, helping them with homework, telling them stories, taking them to and from football and swimming and taking them to football matches. In the Appellant's Second Statement, he sets out in some detail the family's normal daily routine. I have regard to what is there said about the extent of the Appellant's involvement with the children's upbringing.

26. The Appellant points out that, due to his unsettled status, the family has been unable to holiday together other than within the UK. Ms N took the children to Poland in 2016 and 2017 but he describes her as being "very scared" to travel without him and being "very anxious and nervous".

27. This is not a case where the Appellant was separated from his children by imprisonment for his criminal offence. The offence and imprisonment pre-dated their birth. Accordingly, the children have grown up with two parents at all times. I was told that the children were not made aware of these

proceedings at the outset (although they would have been aware that there was some problem which resulted in their father being unable to go on holiday abroad with them). However, when the appeal was allowed by the First-tier Tribunal decision which has now been set aside, they were told that the situation was resolved. In the Appellant's Second Statement, he describes how they then had to explain that the First-tier Tribunal's decision had been overturned. He says that "they are really sad to say the least" and that "[t]hey can't comprehend what is happening and are now even more stressed about me being taken away from them". He says that the children "have become very clingy and even more attached to [him]". They worry where he is even when he goes to the shops.

28. In his oral evidence, the Appellant said that the children were still doing very well at school. There is apparently currently no impact on their education from the threat of the Appellant's deportation. There are no long-lasting health concerns. [L] has tonsillitis and is awaiting an operation which can be expected to deal with that concern. He also has a problem with his speech for which he is awaiting therapy.

29. That the children are apparently doing well is confirmed by other evidence. At [AB/G2-4] is [L]'s school report for 2019. That reports a difficulty making friends and being a quiet member of the class who enjoys school. There are not however said to be any concerns about him or his behaviour. It is expected that he will gain confidence over time. The teacher comments as follows:

> "It has been a pleasure to teach [L] this year. He made so much progress in many areas of his development. [L] is a quiet natured boy but he is always willing to learn something new. He takes on board all learning and applies this on a daily basis. I wish [L] all the best for the future and I know he will enjoy the challenge of Reception."

30. At [AB/G5-28] appear various documents relating to [D]'s education recording his achievements both academically and in extra-curricular activities, particularly sport. His 2017-18 report shows that he is either meeting expectations or exceeding them in core subjects. His teacher comments as follows:

> "I have really enjoyed having [D] in my class this year; he has been a joy to teach. [D] is a bright boy who has made lots of progress in all areas, particularly his English where his writing is now beautifully joined. Occasionally, [D] can lack confidence in himself and gets worried when talking in front of the class. Hopefully in Year 2 he will grow in confidence as I am sure he has even more to give. [D] has built solid friendships this year and is a popular member of the class. Good luck in Year 2 [D] we will miss you in Year 1!"

31. I was told that the Appellant had intended to obtain a report concerning the impact on the children of his deportation but the cost of such a report from an adult and child psychologist approached by his solicitors had been prohibitive.

32. Ms N has suffered from depression, anxiety and panic attacks, particularly following the birth of their youngest child. I deal with the evidence about that in more detail when recording her evidence below. The Appellant says that he has been "her backbone". He says that her issues stem from her father who was "an abusive alcoholic" but that he has supported her "emotionally and physically for her to move forward and become a happier person".

33. In the Appellant's Second Statement, he says however that Ms N "is not dealing with this on-going issue very well at all. It is affecting her health and the way she functions on a daily basis". He describes her not being able to sleep and therefore having little energy to deal with the children. The Appellant records that Ms N was prescribed Sertraline recently to help deal with her mental health problems. However, this had an adverse effect and she suffered a further panic attack leading to her being rushed into a walk-in centre on 4 January 2020. Her medication was subsequently changed.

34. In terms of the effect of separation, the Appellant says that they "would be broken as a family if [he] was removed". He fears that the lack of his support and help with the children would have "a massive impact" on Ms N's mental health and that the deterioration which would be caused would affect her ability to work as she would have to look after the children full-time. He says that his children would be "devastated" and that "it would be further detrimental to their development".

35. The Appellant also describes a very close relationship with family and friends in the UK. His family now is Ms N and their children. He has cousins in the UK.

36. The Appellant is an Iraqi born in Baghdad in 1982. The Appellant gave oral evidence that he has no family remaining in Iraq. His father was killed prior to his departure from Iraq and his brother had been kidnapped (although his evidence at the time of his representations in 2009 was that his brother was arrested by the authorities). A document at [RB/G9] appears to confirm his father's death in October 1999. It is said that the Appellant's father was killed by a group in Baghdad and his body dumped in the street. Although the appeal decision relating to the Appellant's asylum appeal is not in evidence, some paragraphs are cited in the Respondent's earlier deportation decision in 2011 which appears at [RB/H1-10] and some of the relevant paragraphs are contained in First-tier Tribunal Judge M A Khan's decision in this appeal. Those paragraphs indicate that the Appellant's asylum claim was found not to be credible in terms of the risk to him on return. The Tribunal concluded that the Appellant could return to live in the Kurdish area of Iraq. It does not appear from the extracts cited however that the Tribunal took issue with the Appellant's claim that his father was dead and that his brother was abducted or arrested.

37. The Appellant did not challenge the First-tier Tribunal's dismissal of his protection appeal. He did not argue before me that he is at risk on return to

Iraq; nor indeed did he seek to persuade Judge Khan to depart from the 2003 findings. However, in terms of his position on return to Iraq, the Appellant says that he no longer speaks Arabic and cannot read or write Kurdish and so would "struggle to reintegrate" in Iraq. He came to the UK in 1999, aged seventeen and has spent over twenty years in the UK and "this is the only place [he considers] as home". Ms N and his children could not be expected to go to Iraq due to the difficulties in adjusting to life there. They are also practising Christians and have not converted to Islam (although I note that I was told that the Appellant and Ms N had entered into a religious marriage). The Appellant remains a Muslim but is not religious and is not practising.

Ms N's Evidence

38. Ms N has made two written statements, one which appears unsigned and undated at [AB/B1-5], a copy of which was signed on 21 June 2019 ("Ms N's First Statement") and the second which appears at [ABS/B1-5] which was signed at the hearing before me ("Ms N's Second Statement"). She adopted both statements in her oral evidence and confirmed the truth of both.

39. Much of what is said in Ms N's statements replicates what is said in the Appellant's statements and I do not therefore repeat that evidence.

40. Ms N was born in Poland in 1978. She came to the UK in 2004 and has been working here since. She was granted permanent residency in November 2018. She is working as an accounts' administrator on a full-time basis. She earns £21,000 pa (letter at [AB/I1]). However, I was told that as a result of her health concerns which have recently worsened, she was signed off sick at the beginning of January 2020, currently until the end of the month.

41. The Appellant has produced at [ABS/C1-2] the most recent medical notes for Ms N which concern the attendance at the walk-in centre on 4 January 2020. Those read as follows:

> "Feels has stress and anxiety – worrying too much about life – undergoing court case as home office want to deport partner to his country in Iraq. Under Chapel surgery – came yesterday and given Sertraline – told by GP to come back if worsens. Panic attack last night and scared if occurs again – occurred after using Sertraline has two kids – 4 and 7. Partner has taken the kids to families house to give pt some time and space alone. Does not feel suicidal – as kids would stop her from doing this and also very religious no thoughts of harming her kids or doing anything to them. Started on Sertraline 50mg – only taken one tablet (given 14 tablets in total). Has diarrhoea since taking the tablet – feels panic attack since taking the tablet. Feeling down about the court case. Reduced sleep and anxiety. No self harm.
>
> 1. Stop the sertraline – pt to give medication to the pharmacist
> 2. URGENT GP apt with Chapel surgery on Monday

3. Pt will stay with her family member this weekend for a break
4. If gets suicidal, anxiety, self harm, any feelings of severe depression or harming kids or any concerns to contact CRISIS, 111 (checked has contact numbers) or come back/go to A&E
5. Pt wants anxiety tablets – explained propranolol – prefers daily does than PRN – so trial 40mg – aware SE
6. Letter printed for GP on Monday and for pt."

42. At [AB/F1-2], there is a letter dated 11 June 2019 from Ms N's GP surgery (Dr Dhamu) who summarises Ms N's previous mental health problems as follows:

> "22-Jul-14: the initial concern for the patient's mental health has been detailed in a letter to the Adult Mental Health Services Berkshire, outlining 'panic attacks in the past' with current feelings of 'anxious/panicky/depressed'. Around this time, it was found she was pregnant and wasn't keen on medical therapy to treat her symptoms. There were no thoughts of suicide or self-harm, though she was experiencing 'negative thoughts towards her baby'. She was offered diazepam 5mg and sertraline 50mg though it is not clear if these were taken at the time.
>
> 24-Jul-14. She was reviewed by the mental health services. Please find attached report.
>
> Over the following week, she was reviewed twice, and further guidance was sought from the psychiatric services with regard to optimizing her medication in light of her pregnancy. It was decided that Promethazine should be started.
>
> 01-Aug-14. She was reviewed again by mental health services. They comment on a history of panic attacks, which 'first started in adolescence' and she contributes their onset to 'severe domestic abuse her family experienced from her alcoholic father'. It describes on finding out she was pregnant, these attacks have come back in 'severe form' and 'of equally severe degree'. She is afraid to leave the house. She has also developed 'secondary depressive symptoms'.
>
> She was referred to talking therapies, given written material, given crisis information, and it was stated that no safeguarding concerns for her child were raised at the time – equally, it was denied that any domestic violence was taking place. The patient was referred to the high risk pregnancy team in light of the above situation.
>
> In early pregnancy, she was progressing with pregnancy well, taking sertraline 100mg OD. She was attending talking therapies – 'finding it helpful'.
>
> 18-Dec-14. 'Mood stable'. Still taking sertraline.
>
> 31-Dec-14. 'Less anxious better sleep good support'.

03-Jun-15. Post-partum review. Still taking sertraline – 'helps with anxiety sleep'.

05-Nov-15. 'doing very well no insomnia no panic attacks', 'came with supportive partner who agrees she is doing very well'.

31-Aug-16. Letter written stating 'her partner [HK] has been supporting her at appointments for her and her children [L] and [D]'

After this date, there is no further mention of her mental health status, nor mention of panic attacks or similar, in her notes for me to comment on.

Specifically, she was under the support of talking therapies, as well as the surveillance of the adult mental health services (Berkshire) during her period of time with depressive symptoms and panic attacks".

43. Annexed to that letter, at [AB/F3-6] are progress notes from Berkshire Healthcare NHS Foundation Trust. The following extracts from the notes are relevant:

"**28 Jul 2014…**

[S]'s short assessment of [Ms N] and her symptomology discussed. It appears that [Ms N] is having anxiety symptoms than depression [sic] associated with the pregnancy. In view of her early pregnancy I discussed suitable medication regime with the Pharmacist …suggested sertraline 50mg daily to start with and to help with agitation and panic attacks, promethazine 25mg prn up to tds was recommended and this dose can be increased if necessary to 50mg mg prn tds.

…

28 Jul 2014…

…

T/c to [Ms N] to inform her of h/v opportunity on 01/08/14 at 1300pm.

Brief triage of current needs and risks involved.

Perinatal case – approx. 2-4 weeks, no formal confirmation yet – planned pregnancy

She has one 2 year old son – [D] …

Throughout our conversation [Ms N] remained tearful …

She reported having some history of anxiety and panic attacks in her adolescence (19-20s) – which was related to domestic violence from her alcoholic father.

Was never formally diagnosed, at that time treated with diazepam PRN – her mental state stabilised after moving out from family home.

Current episode started last week with strong panic attack – [Ms N] felt unable to find any explanation or triggers to it. Today she reported

having further panic attack. These appears to severely affecting her functioning.

At the time of her attack [Ms N] reports struggling with palpitations, hyperventilation, dizziness, numbness in her limbs, hot flashes.

In the last couple of days her general anxiety increased, complains of agitation and impulsivity, feeling guilty of looking after her little son without irritability, tearful ++ at the time of call.

Denied current suicidal or self-harming thoughts. Risk to child requires further assessment – currently supported by her husband, has one sister in Woking, who would be able to support [Ms N] with childcare if required.

…

28 Jul 2014…

…

She states that she is feeling very unwell and has not taken her antidepressant or diazepam as her GP has advised her to think about the effects on the baby.

…"

44. Ms N has a sister living in the UK (Woking), but her sister has her own child who suffers from autism. Her sister cares for the child while her sister's partner works full-time and therefore Ms N says in her second statement that her sister would be unable to assist with childcare if the Appellant were deported. The Appellant's cousins live in the UK. However, they too have their own young children and Ms N says would be unable to assist.

45. Ms N has been in a relationship with the Appellant since 2007. They moved in together in 2012. They are engaged to be legally married. They have been engaged since 2008 but she would like to get married in Poland where her family all live. It is important to her to marry in a Christian church. They have been unable to travel to Poland to marry due to the uncertainties concerning the Appellant's immigration position.

46. In Ms N's Second Statement, she says that her "life would fall apart" if the Appellant were deported. She would not be able to work and support her family. She would not be able to afford childcare and would not have support of extended family. The Appellant's absence would "have a huge impact on all of us mentally and physically". She fears that she would have a breakdown if the Appellant were not there as she "won't be mentally able to cope". She says that the children "will be besides themselves". She reiterates that they have become worried even when the Appellant is only going to the shops. In relation to [L]'s speech problems, she confirmed that he has so far undergone three therapy sessions and additional lessons arranged by the school and they have completed a form for further referral/assessment. [L]'s difficulties are confirmed by documents from Berkshire Healthcare NHS Foundation Trust at

[AB/C29-31]. I note from those documents that [L] is being exposed to both the English and Polish language but there is no suggestion that he is being taught to speak his father's language(s).

Other Evidence

47. At [AB/C1-2], there is a statement from [NA] who is one of the Appellant's cousins. He confirms the contact between the two families and says that "[w]e are there for each other for everything". He says that the Appellant is "an outstanding husband and father" and "the backbone of that family". As to the impact of deportation, he says that he is "very close to his family and I know they will not be able to manage a day without him." [NA] did not attend to give evidence.

48. In relation to the Appellant's offence, the Judge's sentencing remarks dated 15 September 2009 appear at [RB/D2-3] as follows:

> "You have pleaded guilty to having a false identity document, a travel document, which you were using to travel on and also you have pleaded guilty to seeking leave to enter this country by deception. The circumstances are that that travel document was obtained with your photograph in it, but in a false identity, somebody else's identity, and you have been using that document since.
>
> The Courts have made it very clear that use of forged documents in this way is regarded very seriously and that is because the intention behind such offences and the effect of them is to undermine checks on people's identity and on their right to be in this country and to travel and that is why the Courts have indicated custodial sentences will follow.
>
> Some time has been taken up in this case to establish properly what your status is in this country and it is quite apparent to me, in the light of what has been put before me, that the position is that you have at no stage been granted leave to remain in this country, but whatever the outcome of any current application might be, that is the situation and was the situation at the time of your arrest in June.
>
> I give you credit for your plea of guilty. I take into account what is said about you and the fact that you have been here some time without coming to the attention of the authorities.
>
> In all of the circumstances, the sentence will be one of 12 months' imprisonment.
>
> …
>
> It is an automatic consequence of the sentence that I pass that you will be subject to the automatic deportation provisions of Section 32 of the Borders Act.
>
> In view of the nature of this offence, I recommend that when you have served the sentence you be deported, but ultimately that is a decision not for me, but for the immigration authorities.
>
> That sentence is concurrent on each count.

…"

DISCUSSION AND CONCLUSIONS

49. I follow the approach to the issues as set out at [5] to [14] above. I therefore begin with Exception 1. It is accepted on the Appellant's behalf that he cannot satisfy that exception. However, it may be relevant to consider the reasons why he cannot meet that exception and the extent to which he can, when assessing the case outside the exceptions. Although I accept that the Appellant has been in the UK for more than half his life, he has been here unlawfully and therefore cannot satisfy the first part of the exception.

50. There is limited evidence as to the degree of the Appellant's social and cultural integration in the UK which is perhaps to be expected given that he has been unable to work for at least the past ten years. It is not clear whether he was working unlawfully prior to that date using the false document confirming that he had indefinite leave to remain. There is a document at [RB/I24] which suggests that the Appellant was working in 2001, 2002 and 2005 and prior to that undertook college courses in the UK in IT, English, Mathematics and Geography. As a minor when he arrived, he would have been entitled to education. He may also have been entitled to work as an asylum seeker before his claim was determined but certainly his work in 2005 would appear to have been carried out unlawfully (presumably using the false status document). Whatever the position, I have little if any evidence as to the Appellant's integration in that context. I also accept that the Appellant has been here unlawfully throughout his stay and to that extent cannot be said to be compliant with the law. That undermines to some extent a claim to be integrated.

51. I note however that the Appellant speaks excellent English and there is evidence which was not challenged that he has family and friends in the UK as well as his own family. He also describes the UK as "his home". Although, he committed an offence over a period of time, that was his only offence (other than remaining in the UK without leave) and came to an end over ten years' ago. I am prepared to accept on the evidence I have and in the limited context in which this issue can be considered, that the Appellant is socially and culturally integrated.

52. I also accept that the Appellant's return to Iraq will be very difficult for him. I accept (since the evidence was not challenged) that he has no family members in Iraq. He has not lived there for over twenty years. He says that he no longer speaks Arabic and cannot read or write in Kurdish. I accept his evidence in that regard. I have noted that the children are being taught to speak Polish but not their father's language(s). He also speaks excellent English and I infer that this is the way in which he and Ms N communicate. There is no suggestion that she speaks his language(s) nor he her language. However, he grew up speaking Arabic and/or Kurdish and to the extent that he was educated in Iraq, he would have learnt to read and write in those languages. I have no reason to

think that he could not pick up the language(s) again were he to return. After all, he has learnt to speak English to a very high standard notwithstanding that he did not arrive here until he was aged seventeen and did not apparently receive much education in this country.

53. There is no doubt that the situation in Iraq is volatile and the Appellant may face difficulties in settling back there (whether in Baghdad or the Kurdish areas). Perhaps surprisingly, the Appellant's evidence about that situation was very limited and I can only base my findings on the evidence before me. Although I find that the Appellant will face significant obstacles on return based on his absence from that country, the general situation and lack of family members there, I cannot find on the evidence that those are very significant based on the high threshold which applies.

54. I turn then to the crux of the Appellant's case regarding the impact on Ms N and the two children of the Appellant's deportation (Exception 2).

55. I can deal very shortly with whether it would be unduly harsh for them to travel to Iraq with the Appellant. The Respondent concedes at [92] of her decision letter under appeal that it would be unduly harsh for the two children to go to Iraq. Accordingly, for that reason, it is accepted that Ms N could not return with the Appellant.

56. I therefore have to consider only whether it is unduly harsh for Ms N and the two children to remain in the UK without the Appellant. I have regard to the case-law and to the high threshold which "unduly harsh" entails. I also accept that what is required is something which goes beyond the normal consequence of deportation for a family.

57. If I am considering the position of the two children taken alone, I find that it would not be unduly harsh for them to remain in the UK and for the Appellant to return to Iraq. I accept the evidence that they are upset by the prospect of the Appellant leaving them. I accept also that I cannot be guided in this regard by the effects of separation in the past as there has been none (save when Ms N took the two children to Poland for two short holidays on her own). I accept that the children, now aware of the prospect, are anxious and have become "clingy" to the Appellant as a result. However, none of that is more than would be expected for a child faced with the possibility of being separated from a parent.

58. I anticipate that [D] would be more greatly affected than [L] by the separation as he is older, but both are of a young age and would adapt in due course. There is nothing in the evidence which suggests that their education and development thus far has been affected by the prospect of separation from their father. Whilst I understand the reason for the lack of any independent evidence about the impact on the children, I reiterate that I can only decide the case on the evidence before me.

59. The position in relation to Ms N and of the impact on the family as a whole is however more nuanced. I begin by noting that the medical evidence in relation to Ms N is not disputed. As such, I accept that she suffers from long-standing depression, anxiety and panic attacks which conditions are treated with medication. There is no formal diagnosis. She has suffered such problems from her late teens as a result of domestic violence from an alcoholic father. They emerged again acutely when she fell pregnant with her youngest son. She also suffered a further attack in early January which she has connected with these proceedings. I see no reason to disbelieve her as to the causes of her problems or indeed the impacts of her condition.

60. Although there is no formal medical report dealing with the reasons for her mental health issues, it appears from the evidence that she suffers acutely at times of stress and I can readily accept that the prospect of the Appellant's deportation and the connected appeal proceedings would generate sufficient stress to spark an attack (although I do note that the GP's letter does not say that she has suffered any such attacks previously, for example at the time of the 2016 or 2019 decisions to deport). Based on the totality of the evidence, however, I accept that the deportation of the Appellant would likely exacerbate her condition.

61. Ms N does however have her sister in the UK as well as members of the Appellant's family with whom she has close contact and who could be expected to help her through any such episodes. She has also sought medical help at times of crisis and could be expected to do that again. I realise that this is no substitute for the support of the Appellant, but she would have other avenues of support to help her cope.

62. There is however the additional question of the impact which any exacerbation of her symptoms would have on the children. On that point, I have little evidence. However, I have evidence that the Appellant is the children's main carer and that the recent exacerbation of Ms N's symptoms has meant that she has been unable to sleep and has therefore lacked energy to deal with the children. It can readily be inferred that, were she to be left to care for the children alone, a deterioration in her mental health would impact on her ability to look after the children which is, in turn, likely to affect their wellbeing.

63. Again, though, Ms N has her sister and the Appellant's cousins to help her through any such periods. I recognise that they are no substitute for the Appellant. I accept the evidence of the Appellant and Ms N that she depends on him for support. I was able to observe for myself the effect it had on her ability to cope with the hearing that he was able to sit next to her and comfort her. However, although I take account of what she says about her sister's circumstances and those of the Appellant's cousins, the GP notes that, when she became ill recently, she went to stay with her sister. [NA] says in his statement that he and the Appellant (and therefore their respective families) are there for each other for everything. The fact that the Appellant's cousins have their own

families and young children does not on the evidence prevent them from helping Ms N and the children were the Appellant to be deported.

64. I have carefully considered the evidence about the impact of deportation of the Appellant on Ms N and the children and whether it can be said that the impact is more than the commonplace effect of separation of a family. I accept that, particularly based on Ms N's mental health, the likely adverse effect of deportation in that regard and the potential effect of such deterioration on her ability to care for the children, the impact is likely to be very harsh. Taken alone, however, and particularly given the limited independent evidence as to impact on her medical condition, I cannot accept that the impact is shown to be unduly harsh.

65. However, I take into account my assessment in relation to Exceptions 1 and 2 alongside other relevant factors when considering whether there are very compelling circumstances over and above those exceptions (applying Section 117C (6)). In carrying out that assessment, I follow the "balance sheet" approach advocated in Hesham Ali.

66. I begin that assessment by considering the best interests of the two children. As I have already observed, the children have been brought up with both parents. This is not a case where they have been separated from their father before due to imprisonment following offending. Furthermore, their father is their main carer as their mother works full-time. Although they are at a young age and adaptable to change, they are likely to be the more affected by a loss of their father. I have no difficulty in accepting that it is in their best interests to continue to be brought up by both parents. Since it is accepted that it would be unduly harsh for them to go to live in Iraq, it is clearly in their best interests that family life with both parents continue in the UK.

67. Dealing first with the Appellant's family life and the impact of deportation and separation on Ms N and the two children, I have already found that this impact would be very harsh but not of a sufficient intensity to be unduly harsh. I incorporate what I have already said about the evidence when reaching that conclusion.

68. Ordinarily, where family life is formed whilst a person is in the UK unlawfully, it could be given little weight in the Article 8 balancing exercise. However, in this case, I take into account the delay of the Respondent in re-considering the Appellant's case. I appreciate that the case of EB (Kosovo) was not a case involving deportation. As such, the relevance of delay as a reason to reduce the public interest in removal does not apply. It was relevant in EB (Kosovo) because of the effect of systemic failings on the public interest of maintaining the immigration control system. There is not the same connection between delay and the public interest in deportation of foreign criminals.

69. However, the first and second categories are of relevance. I emphasise that the circumstances of the delay in this case are unusual. This is not a case of delay in

physically removing a person following an earlier dismissed appeal. In this case, the Appellant's appeal was allowed on the first occasion in 2011. I accept that this was only in order that the Respondent could reconsider the Appellant's case, taking into account Ms N's status as an EEA national. It may be questionable whether that was a legally correct approach given that no application had been made on that basis (as the Respondent pointed out in later decisions). However, the appeal decision was not challenged by the Respondent; indeed, the appeal was allowed on a concession by the Respondent's representative. From a lay person's point of view, the fact of the appeal being allowed is likely to have given the Appellant and Ms N cause to expect a positive outcome when the Appellant's case was re-considered. During the five years which it took for that reconsideration and thirty months for the subsequent reconsideration (for which Mr Tufan could offer no explanation), the Appellant and Ms N strengthened their family life significantly with the birth of their two children who are now aged seven/eight and four/five years.

70. The case of MN-T (Columbia) on which the Appellant also relies may be distinguishable on its facts. In that case the appellant was someone who had indefinite leave to remain prior to the offence and would have satisfied Exception 1 if her offence had led to a term of imprisonment of under four years. Neither of those factors applies here. However, in general terms, what is said at [35] of the judgment as set out at [13] above still largely applies and is consistent with the first and second categories of delay in EB (Kosovo). For those reasons, although ordinarily, I could give little weight to family life formed whilst the Appellant was here unlawfully (particularly in light of Section 117B (4)), I give more weight to it based on the Respondent's significant delay over a period of nearly eight years for which no explanation has been given. During that period, the family life which the Appellant had formed with Ms N previously was substantially strengthened as they now have two children who have been allowed to grow up to date with two parents.

71. Turning then to the Appellant's private life, although he has been here unlawfully throughout the period, he has been in the UK for over twenty years. For nearly eight years of that period, he was awaiting the outcome of reconsideration of his case following his successful appeal in 2011. I repeat what I say about the likely effect of that allowed appeal on the Appellant's expectation of being able to remain. As such, I can give greater weight to the private life formed in the UK, in particular in the period after 2011. As it is, though, most of the Appellant's private life is concerned with his family relationships, in the main with Ms N and his children. As such, this aspect adds little if anything to the weight to be given to family life.

72. What is relevant however in this regard is the impact on the Appellant of return to Iraq. Although the Appellant did not pursue his protection claim and his evidence did not focus on the problems created by the general situation there (such as travel within Iraq, registration etc), there is no doubt that the situation

in Iraq will render it difficult for the Appellant to re-integrate there, particularly since he no longer has any family members in Iraq. He has not lived there since 1999, before the fall of Saddam Hussein. It is therefore likely that he would find the country much changed from that which he left. He was aged only seventeen when he left and would therefore have little if any employment history there. I have no evidence as to what education he undertook nor whether he has qualifications which would enable him to find work but given his period of absence, he is likely to find it very difficult to re-integrate. Although I have not accepted that the evidence shows that there are very significant obstacles to integration, given the high threshold which that implies, the obstacles are nonetheless significant.

73. On the other side of the balance sheet, I have to consider the Appellant's offence. I accept that this was not an offence involving violence and that the Appellant is not a risk to public safety. However, it is still a serious offence and one affecting the public interest. This was not simply a one-off use of a false document such as the use of a false passport in order to gain entry and seek asylum. It involved the deliberate obtaining of a document to which the Appellant knew he was not entitled in an identity which was sufficiently different to prevent the authorities realising that he was not entitled to it. Moreover, he used that document to obtain other documents to which he also knew he was not entitled which led eventually to his prosecution. I have no doubt that, had he not been caught and prosecuted at that time, he would have continued to use the documents.

74. The offending therefore amounts to a deliberate and continued practice of dishonesty. The fact that the documents suggested that the Appellant had an immigration status to which he was not entitled which enabled him to remain in the UK (and possibly also to work illegally) involves the undermining of effective immigration control. That is also to be weighed in favour of the public interest (Section 117B (1)).

75. As noted at [9] above, when assessing the case applying Section 117C (6), it is appropriate to take into account the seriousness of the offence within this assessment, not simply on the basis of the sentence passed but also the nature of the offence. I accept that this offence, whilst undermining of the immigration system and one of dishonesty, is not at the most serious end of the spectrum. It is not one involving violence or of a sexual nature. It is not one involving drugs which has serious and long-term effects on the wider society and on those who are vulnerable. Although I accept that the undermining of the immigration system and dishonesty does affect society at large, its impact is less than some other such offences. This is not a case where the Appellant was supplying false documents to others.

76. I also accept that the Appellant deeply regrets the offence. I accept that he is not a risk to the public. However, the continuation of risk is not the only factor in favour of the deportation of foreign criminals. As the Tribunal held in RA (Iraq), "[r]ehabilitation will not ordinarily bear material weight in favour of a

foreign criminal". That is because, as the Tribunal there explains, an individual is expected to comply with the law. In that regard, although I also accept that the Appellant has remained in the UK unlawfully (which is obviously not compliance with the law), I give less weight to that factor, particularly in the period following the offence because he has been waiting for the Respondent to reconsider his case. I also weigh in the balance in favour of the public interest, the deterrence of others. The deportation of foreign offenders may deter others from committing similar crimes.

77. However, the passage of time since the offence is something to which I attach importance. I have set out at [69] and [70] above, the impact which the Respondent's delay has had in this case of allowing the Appellant to strengthen his family life. I give more weight to that family life as a result. I have accepted that, although the impact of deportation would not be unduly harsh on Ms N and the children, it would still have very harsh consequences, particularly if Ms N's health deteriorates to the extent that she is unable or less able to care for the children. I emphasise that I do not view the passage of time as diminishing the public interest in deportation. That the Appellant has not committed further offences for over ten years is not of itself a reason why he should not be deported in the public interest for the reasons I have given. The impact is on the level of interference on the other side of the scales.

78. Balancing the impact of deportation on the Appellant, Ms N and their children against the public interest to which I give due weight, this is a borderline case. However, I have concluded that the balance comes down in the Appellant's favour. The interference in this case outweighs the public interest. Deportation would therefore be disproportionate.

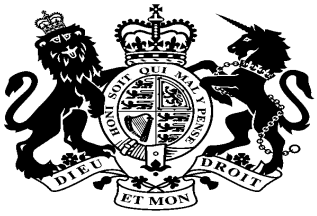
79. For those reasons, I allow the appeal.

DECISION

I allow the appeal on human rights grounds (Article 8 ECHR). For the avoidance of doubt, the dismissal of the appeal on protection grounds contained in the decision of First-tier Tribunal Judge M A Khan is preserved.

Signed: Dated: 24 January 2020
Upper Tribunal Judge Smith

APPENDIX: ERROR OF LAW DECISION



Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/02462/2019**

THE IMMIGRATION ACTS

Heard at Field House
On Tuesday 29 October 2019

Determination Promulgated
20 November 2019

Before

MR JUSTICE DOVE
(SITTING AS AN UPPER TRIBUNAL JUDGE)
UPPER TRIBUNAL JUDGE SMITH

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

H K
[Anonymity Direction Made]

Respondent

Representation:
For the Appellant: Ms S Jones, Senior Home Office Presenting Officer
For the Respondent: Mr A Joseph, Counsel instructed by Chambers Solicitors (Slough)

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
An anonymity direction was made by the First-tier Tribunal Judge. The appeal involves a protection claim and a minor child. Accordingly, it is appropriate to make an anonymity direction. Unless and until a tribunal or court directs otherwise, the Appellant (as he was before the First-tier Tribunal) is granted anonymity. No report of these proceedings shall

directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent.

DECISION AND REASONS

BACKGROUND

1. On the 11th July 2019 First-tier Tribunal Judge M.A. Khan allowed the Appellant's appeal against the Respondent's decision of the 20th June 2018 under section 32(5) of the UK Boarders Act 2007 seeking to deport the Appellant from the UK as a foreign criminal. This is the appeal by the Respondent against the decision of the First-tier Tribunal and for ease of reference we shall refer to the parties as they were known before the First-tier Tribunal.

2. The essence of the Appellant's immigration history is as follows. Having left Iraq on the 8th July 1999 the Appellant travelled via Iran and Turkey to the UK where he claimed asylum on the 27th September 1999. His claim to asylum was refused on the 23rd August 2001 and an appeal against that decision was dismissed on the 10th March 2003. Permission to appeal against that decision was refused on the 8th May 2003. On the 7th June 2009 the Appellant was detected attempting to enter the UK using a false travel document which led to his conviction at Isleworth Crown Court on the 25th August 2009 for "possessing a false/ improperly obtained/ another's identity document" for which he was sentenced to one year's imprisonment and recommended for deportation.

3. During the course of his determination in relation to the appeal against the decision to deport the Appellant, the First-tier Tribunal Judge noted the findings which have been set out above in respect of the relationship between the Appellant and [Ms N] and the conclusion that had been earlier reached that this was a durable relationship. Indeed the relationship continued up to the time of the appeal decision in the present case, and the First-tier Tribunal Judge heard evidence from both the Appellant and [Ms N] testifying to their continuing relationship, and to the fact that they have now have two children (aged 7 and 4) for whom the Appellant assumes day to day caring responsibilities whilst [Ms N] works in order to enable the household to be financially supported. There was evidence that the younger child required speech therapy and further evidence that [Ms N] suffered from depression, anxiety and panic attacks which meant that on occasions she has had to work part time, albeit she was working full time when the hearing occurred.

4. Against the background of the Appellant's immigration history, the findings reached in earlier appeals, and the evidence which was heard at the hearing, the First-tier Tribunal Judge reached the following conclusions. Firstly, he dismissed the Appellant's claim to protection and under Article 3 reliant on the previous determination in 2003 when the Appellant's claim in respect of those

matters had been dismissed. He went on to assess the claim made by the Appellant under Article 8 and reached the following conclusions:

> "52. I find that the Tribunal were further correct in their findings that the appellant had established family and private life under Article 8 of the ECHR but they did [not] come to any conclusion on this point. However, great deal of water has passed under the bridge since 2011. Further changes were made to the Nationality, Immigration and Asylum Act 2002 by the 2014 Act. The 2014 Act inserted into article 8 assessment section 117A to 117D.
>
> 53. Section 117C inserted Article 8 assessment as additional considerations in cases involving foreign criminals.
>
> 54. Section 117C states:
>
> '(1) The deportation of a foreign criminal is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in the deportation of the criminal.
>
> (3) In the case of foreign criminal ('C') who has not been sentenced to a period of imprisonment for four years or more, the public interest requires C's deportation unless Exception 1 of Exception 2 applies.
>
> (4) Exception [1] applies where –
>
> (a) C has been lawfully resident in the United Kingdom for C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with the qualified 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.
>
> (6) 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.
>
> (7) The consideration in subsections (1) to (6) are to be taken into account where a court of tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.'
>
> 55. I heard oral evidence from the appellant, his partner and his cousin [Mr A]. I find the evidence all three witnesses generally credible and consistent. I find that since the last hearing in 2011, the appellant's partner has given birth to two children, the eldest is now 7 and the youngest 4

> years old. This shows that the appellant's and his partner's relationship has grown great deal stronger and has been consolidated by the presence of two children in their lives. Both children are British citizens and therefore qualifying under legislation. The appellant's partner is an EEA national exercising her treaty rights in the UK, and therefore she is a qualified person.
>
> 56. The appellant has been present in the life of his partner since late 2007 and from day one in the lives of their two sons. I accept that the appellant has had a great deal of input into the lives of his two children and indeed his partner. I accept the evidence that his partner suffers from depression, anxiety and panic attacks.
>
> 57. I find that the appellant's deportation would have an extremely grave effect on the lives of his partner and his two children and his deportation would be unduly harsh on them. The appellant has lived in the UK since July 1999. He entered this country at the age of 17 and he has spent nearly 20 years of his life in the UK, this is more than half his life."

In the light of these conclusions the First Tier Tribunal Judge allowed the appeal.

5. Sections 117A-117D of the Nationality, Immigration and Asylum Act 2002 make specific provision in relation to the consideration of Article 8 in immigration cases. In particular section 117C makes specific provision for cases involving foreign criminals as set out in paragraph 54 of the determination above.

6. The question of the correct approach to examining whether or not in any particular case the effect of a foreign criminal's deportation on a partner or child would be unduly harsh was recently considered by the Court of Appeal in the case of Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213 in which the Court of Appeal noted the approach taken to the consideration of this question in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53; [2018] 1 WLR 5273. Giving the leading judgment in the Court of Appeal Holroyde LJ concluded that in order to apply the observations of Lord Carnwarth in KO (Nigeria) at paragraph 22 that the approach taken to the question should be as follows:

> "34. It is therefore now clear that a tribunal or court considering section 117C(5) of the 2002 Act must focus, not on the comparative seriousness of the offence or offences committed by the foreign criminal who faces deportation, but rather, on whether the effects of his deportation on a child or partner would go beyond the degree of harshness which would necessarily be involved for any child or partner of a foreign criminal faced with deportation. Pursuant to Rule 399, the tribunal or court must consider both whether it would be unduly harsh for the child and/or partner to live in the country to which the foreign criminal is to be deported and whether it would be unduly harsh for the child and/or partner to remain in the UK without him."

7. The application of this approach was distilled by Holroyde LJ in the following conclusions:

"38. The decision in *KO (Nigeria)* requires this court to adopt an approach which differs from that taken by Judge Griffith and Judge Finch. In the circumstances of this appeal, I do not think it necessary to refer to decisions predating *KO (Nigeria)*, because it is no longer appropriate, when considering section 117C(5) of the 2002 Act, to balance the severity of the `consequences for SAT and the children of PG's deportation against the seriousness of his offending. The issue is whether there was evidence on which it was properly open to Judge Griffith to find that deportation of PG would result for SAT and/or the children in a degree of harshness going beyond what would necessarily be involved for any partner or child of a foreign criminal facing deportation.

39. Formulating the issue in that way, there is in my view only one answer to the question. I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature.

40. So far as PG's offending history is concerned, I accept Mr Lewis's submission that neither the nature of the offences committed after PG had served his prison sentence, nor the overall passage of time, can assist SAT or the children now that *KO (Nigeria)* has made it clear that the seriousness of the offending is not a relevant consideration when determining pursuant

> to section 117C(5) of the 2002 Act whether undue harshness would be suffered."

8. In support of the Respondent's appeal Ms Jones submitted that the First-tier Tribunal Judge had failed to consider or apply the unduly harsh test. The matters which were set out in paragraphs 55-57 of the decision which the First-tier Tribunal Judge alluded to are common place effects of a foreign criminal's deportation upon his or her immediate family and were not capable of demonstrating of how the unduly harsh test had been passed. In particular, Ms Jones submitted that the reasons provided by the First-tier Tribunal Judge for concluding that deportation of the Appellant would be unduly harsh were inadequate and failed to provide the necessary degree of particularity to justify his substantive conclusion that the unduly harsh test had been met.

9. In response Mr Joseph alluded to the fact that no oral submissions had been made on behalf of the Respondent in respect of the unduly harsh test, and indeed the representative of the Respondent had conceded that "the Respondent's case is not the strongest" ([39] of the First-tier Tribunal's decision). Mr Joseph submitted that there were particular reasons in the present case which were well capable of establishing the unduly harsh test had been passed. Each of these types of cases were fact sensitive and there was a need to carefully scrutinise the different relationship which would be affected by the deportation. He submitted, therefore, that there was no error of law in the First-tier Tribunal Judge's conclusions.

10. We are satisfied that the Secretary of State's appeal must be allowed for the following reasons. Having scrutinised the determination (including in particular paragraphs 55-57) in our view there are no adequate reasons provided for the Judge's conclusion that the deportation of the Appellant would have an unduly harsh impact on his partner and children. In particular, the reasons provided do not begin to engage with the question of why, applying the correct approach set out by the Court of Appeal in the decision in PG (Jamaica), the circumstances in the present case demonstrate a degree of harshness which goes beyond that which would normally be involved for any partner or child of a foreign criminal facing deportation. It is insufficient that in paragraph 57 of the determination the conclusion that the Appellant's deportation would be unduly harsh on his immediate family is simply asserted. It is necessary when applying the unduly harsh test for reasons to be provided which demonstrate that the decision maker has engaged with the question of which elements of the circumstances of the case being considered reach beyond the inevitable (and no doubt in many cases harsh) repercussions of the deportation for an immediate family member, and go further so as to justify the conclusion that deportation would have unduly harsh consequences for the immediate family member or members affected. That reasoning is required to address not only the consequences of the Appellant's partner and children accompanying him to Iraq but also the consequences of them remaining in the UK whilst he returns, alone, to his home country. That is an exercise which is

simply not evidenced by the reasons contained in the determination which we are considering, and this amounts in our view to a clear error of law on the part of the First-tier Judge in this case.

11. We received submissions from the parties as to their views in relation to the form of any relief, were we to be satisfied that there were errors of law in the determination. There was a consensus that if the Respondent's appeal was to be successful then the appropriate relief would be to set aside the decision of First-tier Tribunal Judge Khan and for the matter to be retained within the Upper Tribunal and for directions to be given for a hearing to occur in order to enable the decision to be remade.

DECISION

We are satisfied that the decision of First-tier Tribunal Judge M A Khan discloses an error of law. We set aside that decision. We make the following directions for a resumed hearing:

1. **Within 6 weeks from the date when this decision is promulgated, the Appellant shall file with the Tribunal and serve on the Respondent any further evidence on which he seeks to rely.**

2. **The resumed hearing will take place before UTJ Lesley Smith on the first available date after 8 weeks from the date when this decision is promulgated, with a time estimate of ½ day. If an interpreter is required for that hearing, the Appellant's representatives are to inform the Tribunal within 14 days from the date when this decision is promulgated, indicating the language spoken.**

Signed: Dated: 19 November 2019
Pp Mr Justice Dove