IAC-AH-KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07756/2019**

THE IMMIGRATION ACTS

Heard at Field House, Breams Buildings	**Decision & Reasons Promulgated**
On the 27th January 2022	**On the 13th April 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AK
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, SPO
For the Respondent: Mr L Youssefian, Counsel

DETERMINATION AND REASONS

1. This is an appeal against the determination of First-tier Tribunal Judge Roots, promulgated on 4th August 2021, following a hearing at Taylor House on 9th July 2021. In the determination, the judge allowed the appeal of the Appellant before the First-tier Tribunal against a decision of the Secretary of State dated 29th July 2019 to refuse his asylum and human rights claim, and to make a deportation order against him. The Secretary

of State subsequently applied for, and was granted, permission to appeal to the Upper Tribunal, and thus the matter comes before us.

The Respondent

2. The Respondent in this appeal, (who was previously the Appellant) is a male, a citizen of Sri Lanka of Tamil ethnicity, and was born on 29th October 1978. He appealed against the decision of the Secretary of State (then the Respondent but now the Appellant) refusing his application for asylum and the refusal of his Article 8 right to family and private life, consequent upon the Respondent's 29th July 2019 decision of automatic deportation, where the Section 33 exceptions did not apply, with respect to the Appellant at the time having been convicted on 8th January 2019 of conspiracy to dishonestly make false representations to make gain for himself and another or to expose others to risk, together with five counts of fraud. On 29th October 2009 the then Appellant had been convicted of sale of alcohol to a person under 18 and fined £300 at New Forest Magistrates' Court, and sentenced to eight months' imprisonment. On 28th February 2017 he had been convicted on three counts of making false representations at West and Central Hertfordshire Magistrates' Court and sentenced to a suspended imprisonment of two months. On 8th January 2019 at Harrow Crown Court he had again been convicted of conspiracy to dishonestly make false representations and sentenced to a total of fourteen months' imprisonment.

The Respondent's Claim

3. The Respondent's protection claim for asylum is based upon the fact that there had previously been two determinations by an Immigration Judge. The first was in the year 2000. The second was in 2010. With respect to the determination of 2000, the judge had accepted his account that he had two brothers in the LTTE, one of whom was a commander of high rank. The judge had also accepted that the then Appellant had been detained on three occasions even though he had not faced any risk on return at that point. The Respondent maintains that these findings remain highly relevant because his brother was detained, released in 2016, and then died in suspicious circumstances in Sri Lanka. He relies on news articles about the death which he says relates to his brother.

4. With respect to the Article 8 claim, the Respondent states that he is married, and has two children. Both of his children were born in the UK in 2004 and in 2009 respectively. Both are British citizens. There is no dispute about this. It is also accepted that the Respondent has a genuine and subsisting relationship with his two children. The older child is 16 years of age and the younger one is 12 years of age. They have lived their whole lives in the UK. When the Respondent was in prison from December

2018 to August 2020 they had experienced separation from their father. However, the Respondent now states that there is evidence of significant negative effect of the separation on his children.

5. The Secretary of State's decision was to reject the claims of the then Appellant for the following reasons: (i) he had not been a former activist of the LTTE or performed a combat or a civilian role for them and so would be of no interest to the Sri Lankan authorities; (ii) although there had been an Easter Sunday attack on 21st April 2019 this was undertaken by a little known Islamist group in the eastern part of Sri Lanka this was unconnected with the then Appellant; and (iii) although he had provided some web-site prints and pictures purporting to be himself protesting against the Sri-Lankan government in the UK, these could not be verified.

The Judge's Findings

6. At the hearing before Judge Roots on 9th July 2021, evidence was heard by the Tribunal about the then Appellant being married and having two children, and the negative impact of his removal upon his family. There was also evidence of the ISW report and the GP evidence in relation to the children. A letter from the Harrow Senior Social Worker was the most recent evidence. The skeleton argument on the then Appellant's behalf made the point that it would be unduly harsh for the Appellant's children to either stay in the UK without their father or to go to Sri Lanka with their father (paragraph 58 of the skeleton argument). The independent social worker's report (ISW) had recorded that "the children have a close relationship with their father" and that both the children are "showing physical signs of the impact of the absence of their father" with the elder one, particularly worried about his deportation (determination at paragraph 97). The latest letter from the Harrow senior social worker had referred to the detrimental impact of deportation "on the family dynamic" because the family relied upon the then Appellant quite considerably and the eldest son "speaks highly of his father and the role his father plays within the household", with the Appellant cooking the food and providing food for the children, as well as dropping them off at school and picking them up again. The senior social worker concludes that, "I believe that it is imperative that [the Appellant] is able to stay within the family unit as he has already been apart from the children for a significant period of time" (determination, paragraph 99).

7. Against this background, the judge concluded (at paragraph 118) that the evidence of the ISW, and of the eldest child "is of particular significance, along with the evidence of the GP and the local authority social worker," such that the then Respondent Secretary of State's criticisms of the ISW reports were not accepted. Added to this was the fact of "the crucial stage of the children's development, the role of the Appellant in their lives, [the eldest child's] views about separation from his father, and the effect on the children of the separation during the Appellant's time in prison". As a

result, the judge held that, "based on all my findings I find that the effect on the two children of the Appellant being deported would be unduly harsh", such that the appeal should be allowed on Article 8 grounds (at paragraph 118).

8. The judge rejected the then Appellant's claim on asylum grounds because "the previous determinations have found the Appellant not to be at risk on return" (paragraph 85) and also because in the UK "he has engaged in very limited sur place activities" (paragraph 87).

Grounds of Application

9. The grounds of application of the Secretary of State began by highlighting the fact that on 8th January 2019 the then Appellant was convicted of conspiracy to dishonestly make false representations to make gain for himself or another or cause loss, or expose another to risk, and five counts of fraud. On 21st February 2019 he was sentenced to fourteen months' imprisonment. The Appellant at the time had therefore been subjected to a term of three and a half years' imprisonment. The judge had rejected the claim on protection grounds. Thereafter, however, the application for permission was based on the fact that the judge had materially misdirected himself or had failed to give adequate reasons for his findings.

10. First, reliance was placed upon **PG (Jamaica) [2019] EWCA Civ 1213** at paragraph 46 under which it was said that no conclusion of removal being "unduly harsh" could have reasonably been reached. This is because when a parent is deported, one can only have great sympathy for the entirely innocent children involved who will inevitably be distressed. However, in Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") Parliament has made clear its will that for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. This was not the case here.

11. Secondly, in **KO (Nigeria) [2018] UKSC 53** it was emphasised how the seriousness and the nature of offending should not be taken into account in assessing whether deportation would be "unduly harsh", but whilst this was the case, the Supreme Court also emphasised the fact that the "unduly harsh" test is a high one, and one which goes beyond what would necessarily be involved for any child faced with the deportation of a parent. In the instant case there was no evidence that the circumstances would go beyond the established threshold in the given case law.

12. Third, the "unduly harsh" test is an extremely demanding one as made clear by **MK (Sierra Leone) [2015] UKUT 223**, where it was said (at paragraph 27), "that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult" but that it is a "more elevated threshold", given that the word "harsh" is one which "denotes

something severe, or bleak". It is therefore "the antithesis of pleasant or comfortable", but one where "the addition of the adverb 'unduly' raises an already elevated standard still higher". The Supreme Court in **KO (Nigeria)** endorsed the approach of **MK (Sierra Leone)**. The approach of the Upper Tribunal in **MK (Sierra Leone)** was also endorsed by the Supreme Court in **KO (Nigeria)**, when the court held (at paragraph 44) that "the children, who have enjoyed a close and loving relationship with their father, will find his absence distressing and difficult to accept". However, "it is hard to see how that would be any different from any disruption of a genuine and subsisting parental relationship arising from deportation".

13. Fourth, the latest case of **HA (Iraq) [2020] EWCA Civ 1176** does not lower the threshold of "unduly harsh" when Underhill LJ (in reminding himself of what was said at paragraph 23 of **KO (Nigeria)**) stated that, "one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" (at paragraph 42).

14. The Grounds of Appeal end with the observation that it has not been found in this case that the then Appellant's wife was unable to cope with caring for the children while the Appellant was in prison and there is no reason why the mother's involvement cannot continue in the future.

15. On 27th August 2021, permission to appeal was granted by the First-tier Tribunal.

Submissions

16. At the hearing before us on 27th January 2022, Mr E Tufan (SPO) drew our attention to the manner in which the eventual conclusions on Article 8 were reached by the judge. In particular, the concluding paragraph of the judge's determination (at paragraph 118) had wrongly given undue importance to the children remaining in the UK with the then Appellant, especially when in the preceding paragraph the judge had taken account of the possibility of the children accompanying the then Appellant to Sri Lanka, before rejecting that possibility (at paragraph 117). Thereafter, he relied on the detailed grounds of application. The Supreme Court in **KO (Nigeria)** had in 2018 endorsed the Tribunal's approach in **MK (Sierra Leone)** in 2015 which had referred to "a considerably more elevated threshold" in the satisfaction of the test of "unduly harsh" scenario. The latest decision in **HA (Iraq) [2020]** had seen the court describe "a degree of harshness going beyond what would necessarily be involved" in a case of this sort. In the light of this, the question was whether these two children of the Appellant stood to suffer in this respect. Mr Tufan submitted that this was not the case here. The evidence, such as the ISW report does not reach that high threshold in this case. Whereas the judge in this case had cited the case law there was little evidence of the case law

being properly applied. The judge below had misdirected himself and reached wrong conclusions as to fact.

17. For his part, Mr Youssefian relied upon his skeleton argument. He submitted, first, that there was no merit to the Secretary of State's contention that the judge failed to take into account the "unduly harsh test". The judge correctly directed himself concerning the relevant authorities, and was not required gratuitously to repeat those self-directions throughout the decision in the manner contended by the Secretary of State. Secondly, he submitted that, properly understood, the Secretary of State's grounds of appeal amounted to a rationality-based challenge, and that, in his submission, Mr Tufan "understandably shied away" from pursuing that line of argument. It could not be said that the judge's findings of fact amounted to an error of law.

18. Mr Youseffian submitted in his skeleton argument (at paragraph 13) that in **MI (Pakistan) [2021] EWCA Civ 1711**, Simler LJ stated (at paragraph 3) that **HA (Iraq)** was binding at the Court of Appeal level and so it would make little sense for the FtTJ in this case to refer to **PG (Jamaica)** when he had already considered **HA (Iraq)** in detail. After all, the court in **HA (Iraq)** had been referred to **PG (Jamaica)** and other line of cases. However, Underhill LJ (at paragraph 61) found that these "mostly turned on issues peculiar to the particular case and none has called for the kind of analysis required by the Grounds of Appeal argued before us. I have found nothing in any of them inconsistent with what I have said above". Therefore, the failure of the FtTJ to refer to **PG (Jamaica)** could not form a basis for an error of law.

19. If the law had been properly applied, that left the question of the facts. These too, submitted Mr Youssefian had been properly considered in detail from paragraphs 94 onto paragraph 118. The challenge in this case was simply a disagreement with the determination. There was no error of law.

No Error of Law

20. We have found that there is no material error of law in the judge's determination. Although there is a cross-appeal by the Appellant in relation to the asylum appeal we did not consider it in the circumstances. Suffice it to say that with respect to the basis upon which the appeal was allowed by the judge below, the judge had considered to an extensive degree the applicable case law. This was done under the heading "guidance from the senior courts on 'unduly harsh'" (at paragraph 45). It is significant that in this consideration the judge not only recognises (at paragraph 50) that there is a more elevated threshold with respect to the satisfaction of the "unduly harsh" test, but proceeds to highlight in bold lettering what the court had said specifically in this regard in **KO (Nigeria)** when considering the degree of harshness required (at paragraph 51(2) and paragraph 51(3)). With respect to the facts, the judge not only gives

detailed consideration to the ISW report but cites extracts from it (at paragraph 97 and paragraph 99), noting also how the senior social worker from Harrow Council had said that "it is imperative that [the then Appellant] is able to stay within the family unit". Attention was drawn to the fact that the mother's application for further leave was outstanding (paragraph 102). The then Respondent's disagreement with the expert reports is properly set out (at paragraphs 101 to 104). Ultimately, the judge is satisfied that "the Appellant plays a full part in his children's lives and in their education as set out in the ISW report and in particular the evidence from (the eldest son)" (at paragraph 110). The findings are in the end all properly brought together by way of reasons at paragraph 118.

21. Drawing this analysis together, we consider that the Secretary of State's challenge to the judge's decision is one of fact and weight and does not disclose an error of law. We accept Mr Youseffian's submission that the judge correctly directed himself concerning what amounts to "unduly harsh" and, having done so, proceeded to reach findings of fact that were open to him concerning whether, on the facts of this case, that threshold was met in relation to the appellant's two British children. We remind ourselves that this appellate tribunal will only interfere with findings of fact reached by a first instance judge if it may be said, in the words of Lady Hale PSC in **Perry v Raleys Solicitors** [2019] UKSC 5 at [52] that, "there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached." As Mr Youseffian observed at the hearing, Mr Tufan for the Secretary of State "shied away" from making a rationality-based challenge. In our judgment, Mr Tufan was right to do so; his submissions in this case were simply an attempt by the Secretary of State to relitigate the case, rather than a realistic attempt to demonstrate an arguable error of law. The First-tier Tribunal is an expert tribunal; as the House of Lords held in **AH (Sudan)** [2007] UKHL 49 at [30]:

> "it is probable that in understanding and applying the law in their specialised field the tribunal will have got it right."

And later in the same paragraph:

> "Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

Postscript

22. As we conclude, we make an observation about the grant of permission to appeal by the First-tier Tribunal by First-tier Tribunal Judge Grant. It was in brief terms, and made in response to a series of disagreements of fact and weight set out in the grounds of appeal. We are surprised that permission to appeal was granted in those terms. One of the bases for the grant of permission to appeal was that the judge failed to take into account "any of the guidance by the Supreme Court on the unduly harsh test". We are

puzzled by that observation; the decision of the First-tier Tribunal was replete with accurate references to the appropriate authorities. Secondly, in relation to the sufficiency of reasons limb of the Secretary of State's grounds of appeal, the grant of permission to appeal failed to take into account the guidance given by this tribunal in **Durueke (PTA: AZ applied, proper approach)** [2019] UKUT 00197 (IAC) at paragraph (iii) of the Headnote:

> "Particular care should be taken before granting permission on the ground that the judge who decided the appeal did not 'sufficiently consider' or 'sufficiently analyse' certain evidence or certain aspects of a case. Such complaints often turn out to be mere disagreements with the reasoning of the judge who decided the appeal because the implication is that the evidence or point in question was considered by the judge who decided the appeal but not to the extent desired by the author of the grounds or the judge considering the application for permission. Permission should usually only be granted on such grounds if it is possible to state precisely how the assessment of the judge who decided the appeal is arguably lacking and why this is arguably material."

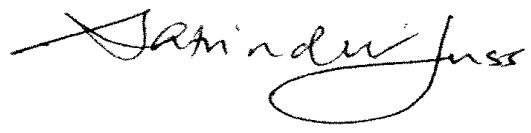
Decision

23. There is no material error of law in the First Tier Tribunal's decision. The determination shall stand.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date

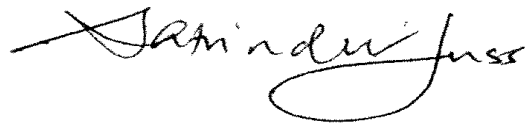


Deputy Upper Tribunal Judge Juss 27th March 2022

TO THE RESPONDENT
FEE AWARD

We have dismissed the appeal and therefore there can be no fee award.

Signed Date



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