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Case Nos: CA-2022-000342 + C + D

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
The Upper Tribunal (Immigration and Asylum) Chamber
Upper Tribunal Judges Allen and Kebede
Lower Court case number: HU/03479/2017

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 18 January 2023

Before:

LORD JUSTICE ARNOLD
LORD JUSTICE LEWIS
and
LADY JUSTICE ELISABETH LAING

Between:

QASIM ALI RAZA	<u>Appellant</u>
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	<u>Respondent</u>

Manjit Singh Gill KC and Ramby De Mello (instructed by **Thompson & Co. Solicitors**) for
the **Appellant**
Steven Kovats KC and Jack Holborn (instructed by **The Treasury Solicitor**) for the
Respondent

Hearing dates: 6 and 7 December 2022

Approved Judgment

This judgment was handed down remotely at 11am on 18 January 2023 by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Elisabeth Laing:

Introduction

1. The Appellant ('A') appeals against a determination of the Upper Tribunal (Immigration and Asylum) Chamber ('the UT') which dismissed his appeal from two determinations of the First-tier Tribunal (Immigration and Asylum Chamber) ('the FtT').
2. In determination 1, the FtT, sitting at Taylor House, considered, at A's request, and separately from its decision on the merits of the appeal, whether A could have a fair appeal if he took part in the hearing remotely. He was in Pakistan. It held that he could, and explained why. The FtT then heard A's appeal. He took part by means of a video link from Pakistan. His wife attended the hearing in person and gave evidence. His counsel, and counsel for the Secretary of State, also attended the hearing. In determination 2, the FtT dismissed A's appeal from the Secretary of State's refusal of A's human rights claim ('the decision').
3. The UT held that the FtT did not err in law in determination 1 or in determination 2. The question on this appeal, therefore, is whether the FtT erred in law.
4. There are two grounds of appeal on which Lewis LJ gave permission on the papers. They reflect, in part only, the issues which were the subject of determinations 1 and 2. The first ground of appeal is that the FtT's hearing was unlawful and that there was no adequate evidence that the authorities in Pakistan had permitted a hearing by video link. The second is that the FtT misdirected itself in law about the 'unduly harsh' test in section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act').
5. On this appeal, A was represented by Mr Manjit Singh Gill KC and Mr Ramby De Mello. The Secretary of State was represented by Mr Steven Kovats KC and by Mr Jack Holborn. I thank counsel for their written and oral submissions. Mr Gill and Mr Kovats have, respectively, represented A and the Secretary of State at all the hearings of A's appeal. Junior counsel made their first appearance in this case in this Court.
6. At the start of the hearing, the Court decided to allow both parties to rely on evidence which was not before the FtT or the UT. This had come to light after the relevant decisions. It concerned the scope of the Secretary of State's inquiries about the attitude of the Pakistan authorities to the taking, from their territory, of evidence by video link for the purposes of an appeal in the United Kingdom. I will summarise that evidence briefly, but as will become clear, it does not affect my reasoning.
7. For the reasons which I will give in this judgment, I have decided that A's appeal to the FtT was lawfully held and that the FtT correctly understood and applied section 117C(5) of the 2002 Act.

The facts

8. I have taken this summary of the facts from determinations 1 and 2. A entered the United Kingdom on 24 December 2009 with leave to enter as a Tier 4 migrant. That leave expired on 25 June 2011. A overstayed. He was encountered by police on 8 August 2014. He was given temporary admission. He failed to report in accordance

with the terms of that temporary admission. On 29 October 2014, he applied for leave to remain on human rights grounds.

9. A married a British citizen on 2 May 2015. They have now three children who are also British citizens.
10. On 15 October 2015, at Wood Green Crown Court, A was convicted of one count of blackmail. He was sentenced to 16 months' imprisonment and ordered to pay costs. On 17 November 2015, he was served with a notice of liability to deportation. On 15 April 2016, the decision, which refused A's human rights claim, was served on A. The Secretary of State certified the decision under section 94B of the 2002 Act. On 18 April 2016, the Secretary of State made a deportation order against A. A applied, unsuccessfully, for judicial review of the decision (paragraph 5).
11. A made a further human rights application. The Secretary of State refused and certified that application on 10 February 2017 ('decision 2'). A's representatives served a pre-action protocol letter on the Secretary of State and applied for a stay of A's removal. The application for a stay was refused. A was removed to Pakistan on 28 February 2017. A lodged an out-of-country appeal.
12. On 31 July 2017, A's representatives served a further pre-action protocol letter on the Secretary of State. A then applied for judicial review. In due course, on 21 June 2018, this Court gave A permission to apply for judicial review of the decision to certify A's human rights claim under section 94B. That application was then stayed, on 5 September 2018, pending A's appeal to the FtT. In December 2019, A applied for an interim injunction requiring the Secretary of State to bring him to the United Kingdom from Pakistan. The High Court refused that application on 17 January 2020. A's hearing was listed in the FtT for 10 and 11 March 2020.
13. At that hearing, and at the insistence of Mr Gill, the FtT agreed to decide, first, whether A could have a fair effective appeal by video link. The parties invited the FtT to decide that question by reference to *AJ (s.94B; Kiarie and Byndloss questions) Nigeria* [2018] UKUT 115. The FtT recorded the submission of the Secretary of State that the FtT could not properly decide the first issue without having heard the appeal (determination 2, paragraphs 16 and 37). The FtT heard some evidence about the physical arrangements for the hearing, which it summarised in paragraphs 22-28 of determination 2.
14. At that stage, as is clear from the submissions of Mr Gill and of Mr Kovats, which the FtT recorded, the evidence was that the Secretary of State for the Home Department had notified the Pakistani High Commission about the use of video link evidence and the Pakistan authorities had not responded/objected (determination 2, paragraphs 32 and 41). The FtT also agreed to reserve its decision on that question (determination 2, paragraph 45).

The determinations of the FtT

Determination 1

15. The FtT said that it had to consider whether A could have a fair and effective appeal via video link (paragraph 4). It recorded A's submissions in paragraph 5. It decided that

it had no power to quash the section 94B certificate (paragraph 6). The FtT rejected A's argument about data protection (paragraph 7). It referred in paragraph 7 to the evidence that 'the Pakistani government did not object to video evidence being given from Pakistan and evidence that it was not in contravention of their laws' (paragraph 7). I say more about that evidence below (see paragraph 44). The FtT rejected A's argument that the delay meant that he could not have a fair and effective hearing by video link. The FtT had not been referred to any evidence which showed that (whoever was responsible for the delay) it had adversely affected A's ability to present his appeal and to have a fair and effective hearing. The overriding objective meant that further delay was not in A's interests or in those of his family (paragraph 8).

16. Even though A was outside the United Kingdom, he had spent 'considerable periods of time with his wife and children as a friend has kindly lent them an apartment in Dubai enabling them to live together as a family unit' (paragraph 9). The FtT noted A's submission that his absence from the United Kingdom had stopped him giving full instructions and getting full legal advice. A number of witness statements had, nevertheless, been produced for A and for his witnesses. He had been assessed by an independent social worker who had travelled to Dubai to assess the family as a unit. The evidence did not show that A had been 'significantly prejudiced in the preparation of the appeal by being outside the United Kingdom' (paragraph 10).
17. The FtT's conclusion was that A could have a fair and effective appeal by video link and did not need to be brought back to the United Kingdom. The FtT made clear that this was not its decision on a preliminary issue. The FtT, rather, was giving directions about how the appeal should proceed. It would keep the *AJ* questions under review during the appeal (paragraph 11). In paragraph 85 of determination 2, the FtT explained that it had done this during the hearing. Its conclusion was that it was satisfied that A had been fully able to participate in the appeal.

Determination 2

18. I will only summarise the reasoning in determination 2 which is relevant to ground 2. In paragraph 48, the FtT recorded that Mr Kovats had wanted to ask questions of A's parents in law, but they had not attended the hearing. Counsel had agreed that Mr Gill would not submit that the Secretary of State had not challenged their evidence and that the Secretary of State had agreed not to ask for an adjournment. Mr Gill indicated that A objected to giving evidence by video link but that he would do so if the FtT directed him to (*ibid*).
19. The FtT summarised A's evidence in paragraphs 49-59. It referred to three occasions on which Mr Gill had suggested that the quality of the video link was not good enough. On each occasion, the FtT disagreed (paragraphs 51, 54 and 56). A said he was ashamed of his offence. He had been visiting his family in Dubai. It was very expensive. Luckily, his father in law and a friend were helping him out. His children would start school soon and they would have to separate. They could not see their grandparents with him. They missed him when they were not with him. They were constantly asking where he was and it was not good for them.
20. In cross-examination he said he was living with his parents and two younger brothers. The electricity supply was intermittent and there was not much financial support. His

parents did not have much to offer. He could not get his qualifications in the United Kingdom and he needed them to get a job. The jobs offered could not support him and his family. He was in and out of the country to see his wife and so could not apply for jobs. No-one would offer him a job given his travel arrangements (paragraph 57). A friend owned the flat in Dubai. His father had asked a friend's father for use of the flat. Normally they rent it out. They could not do it indefinitely. He would then have to go to Pakistan and his wife to the United Kingdom. The children should be allowed to stay with him. He could go to Dubai in the school holidays but it would depend on his wife's income. He would not be able to earn enough in Pakistan to support his family and to travel to Dubai. Wages in Pakistan are 'not anywhere near the wages in the UK'. If he worked six to seven days a week he would only be paid £120 per month, and would have travel and living expenses (paragraph 58).

21. The FtT summarised the evidence of A's wife in paragraphs 60-74.
22. She had been born in the United Kingdom, as had both her parents. She had visited Pakistan twice but had been ill each time. She did not speak Urdu. She was scared of living in Pakistan as she had heard that children were kidnapped there. There was much sexual violence against women and there were no job opportunities. The education system was worse than in the United Kingdom. She could not imagine living in Pakistan. Visiting Dubai was 'financially draining' as she had to pay for flights and accommodation. She had borrowed money which would have to be paid back. They would have to pay for medical care and education if they moved to Dubai.
23. Her mental health had 'got quite bad' in Dubai. She was very anxious. A doctor had prescribed medication and had wanted to assess her, but she could not afford to go back.
24. In cross-examination she said that her children had been with her mother on both days of the hearing. She had never been prescribed medication in the United Kingdom as she had never been back for mental health check-ups. Her parents refused to look after her children so she did not give check-ups priority.
25. Her parents had had a 'messy' divorce when she was 11 and she had not realised at the time the extent of its effect on her. She had had counselling in her teens. She was quite depressed when she was 17. She was not close to her mother. She did not feel a connection with her parents and went back and forth between them. Her mother would bicker with her and send her back to her father. A made her feel better. She had a job as an events manager. A had met her parents. Her mother became close to A. She was shocked at A's arrest. She had had to leave her job when A was deported. She was living in a fourth-floor flat. She had a baby and was pregnant. Her parents paid the rent.
26. She was supposed to have her gall bladder removed but had no-one to look after her in the six to eight weeks it would take for her to recover. She was very uncomfortable. She had emailed a doctor's letter to her previous solicitors. A did not have immigration status when she and A started dating in 2014. She did not think about it at the time and knew nothing about immigration law. It was very difficult when A was in prison. She had no emotional support. A took responsibility for caring for their baby and was there for her emotionally. Their second baby was not planned and was born after A was removed to Pakistan. They first had access to the flat in Dubai in about April 2018. She had also met A in Dubai in November 2017 when her grandmother had paid for

accommodation and travel for a month there. They meet in Dubai because she does not want to go to Pakistan. She has no family connections in Pakistan. The flat is owned by a friend of A's. She goes there for a month and then comes back to the United Kingdom. She spends about half the year in Dubai.

27. In answer to questions from the FtT she said that she could not take the children with her when she went for check-ups. Her parents have their own lives and will not look after her children. She was not receiving any medication in the United Kingdom. Her parents would not look after her children even if she had to go to the GP, or for anything else (paragraph 73).
28. She repeated that in re-examination (paragraph 74). Her mother had only helped on the day of the hearing with great difficulty. Her mother had a part-time job and her boss was not happy with her. Even on the day of the hearing, her mother had asked her to get back as soon as possible. 'She said that her mother gets on well with the children but not in a manner that she can look after them all the time' (ibid).
29. The FtT summarised the parties' submissions in paragraphs 75-85. The Secretary of State accepted that A had a genuine and subsisting relationship with his wife and with their children. It was not suggested that they should move to Pakistan.
30. In paragraph 86, the FtT quoted sections 117A(2)(b), 117B and 117C of the 2002 Act. The FtT was bound by law to give effect to Parliament's assessment of the public interest (*NE-A (Nigeria) v Secretary of State for the Home Department* [2017] EWCA Civ 239. It was unnecessary to refer to any provisions of the Immigration Rules (HC 395 as amended).
31. The FtT quoted paragraph 53 of the judgment of Lord Carnwath SCJ in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; [2018] 1 WLR 5273, *RA (s. 117C; "unduly harsh"; offence seriousness) Iraq* [2019] UKUT 1 (IAC), paragraph 30 of *Secretary of State for the Home Department v KF (Nigeria)* [2019] EWCA Civ 1225, and paragraph 27 of *Imran (Section 117C(5); children, unduly harsh)* [2020] UKUT 83.
32. The FtT's analysis, findings and reasons are in paragraphs 93-131. The FtT had considered the evidence of the witnesses, and the documents (paragraph 93). A fell within the automatic deportation provisions. He had not lived lawfully in the United Kingdom for most of his life and could not rely on section 117C(4) of the 2002 Act. In the light of the Secretary of State's concessions (see paragraph 28, above), the issue was whether the effects of deportation would be unduly harsh on A's partner and/or children if they remained in the United Kingdom without him. The FtT had not taken into account the seriousness of A's offence in its considering whether the effect of deportation was unduly harsh (paragraph 96).
33. The family could use the flat in Dubai for about half of the year and live together there. The FtT summarised the evidence of A and of his wife about the extent to which that would be a long-term arrangement, and their evidence about the effect separation had on them (paragraph 97). In paragraph 98, the FtT referred to two reports from Mr Horrocks, an independent social worker. The second report was the result of a joint instruction by the parties. In his first report he said that A's wife's father was a business

man and her mother was unemployed. His view was that A should be seen, before his removal, as having played a major role in the lives of both children. The family's current pattern of life was very stressful and emotionally challenging for the children because of the frequent separations, which contributed to the 'mental health problems' of the mother, for which she had not sought appropriate treatment.

34. For his second report, Mr Horrocks had visited Dubai and assessed the family as a unit. A's wife reported having anxiety attacks. She was worried about the cost of medical care if one of the children got ill. The FtT recorded that he had 'particular concerns' about her long-term mental health (paragraph 101, quoting paragraph 4.16 of the second report). In paragraph 102, the FtT quoted paragraph 4.19 of the second report. This said that she had the support of her extended family in the United Kingdom. She would normally stay with her mother when visiting the United Kingdom and was supported financially by her father and grandmother. Her current position was not sustainable without that support. She thought that her mother would not be able to cope with the children during the 'one to two weeks' which 'in all likelihood' it would take her to recover from the gall bladder operation. Extended family members from the United Kingdom had visited Dubai with them. If A's appeal failed, A's wife would continue to have emotional and practical support from the extended family and/or friends, but there was no long-term replacement for A.
35. The second report concluded by saying that A's wife was vulnerable, and even if A were returned to the United Kingdom, she would need time to address the mental health issues which have arisen 'over the past three years or so' (paragraph 103). If the appeal failed, the children would 'in all likelihood' be permanently separated from A. That would cause them 'great distress and trauma and they will suffer harm in their emotional development'. It was also likely that they would be exposed to 'a deterioration in their mother's mental health'. Those two factors would 'cast a major shadow over all aspects of family life, which will change from being a happy and functioning family unit, to one which has been traumatised'. A's wife's distress would make it difficult for her to be 'emotionally available' for the children (paragraph 104). His opinion was that the children would suffer great distress and harm and harm to their emotional development if they were permanently separated from A (paragraph 105).
36. In paragraph 106, the FtT directed itself, by reference to *Zoumbas v Secretary of State for the Home Department* [2013] UKSC 74; [2013] 1 WLR 3690, that the best interests of the children were a primary but not the paramount consideration. No other consideration was intrinsically more significant, although the cumulative effect of other considerations could outweigh it. British citizenship was a significant factor, but not a trump card. The FtT had 'no hesitation' in finding that it was in the best interests of the children to be living in the United Kingdom with A, which was likely to be more stable than Dubai. The family was a strong and loving unit (paragraph 107).
37. In paragraph 108, the FtT recorded its concerns about the evidence of A's wife. She had tried to distance herself from both her parents, saying that neither would support her or help with the children. That evidence was inconsistent with the comments of Mr Horrocks in his second report. Neither parent attended the hearing, despite the fact that their witness statements suggested that they had given a lot of support to A's wife in the past. There was no cogent explanation for their absence. The FtT found that that absence was because they and A's wife did not want to disclose the level of support

which they currently gave A and his wife and the support which they would be willing to give in the future.

38. The FtT also had concerns about A's wife's evidence about her mental health. There was no psychological or psychiatric report. There was one medical letter from Dubai which said that she had been treated for anxiety there but the FtT had not been provided with her medical records (other than those relating to her pregnancies). She had lived all her life in the United Kingdom. It was surprising that she had no friends who could look after her children while she went to see a GP. Nor did the FtT find it credible that A's wife would not be supported by family and friends in the United Kingdom (paragraph 109). Unlike A's wife, Mr Horrocks did not refer to long-standing mental health difficulties. Her parents did not refer to them in their witness statements. She did not refer to any mental health difficulties until her most recent witness statement. This was not explained. The FtT found that it was more likely than not that she had 'sought to exaggerate her mental health difficulties and to minimise her support from family and friends (paragraph 110).
39. The FtT noted concerns expressed by Mr Horrocks about the particular vulnerability of A's wife and her ability to cope without him. The FtT observed that he was not a mental health professional, and that there was no medical assessment of the likely effect of separation on A's wife. There was no assessment of the help available to her from her family and friends and from professional agencies. There was no explanation for this gap in the evidence, or of the fact that Mr Horrocks had not been provided with relevant information. The FtT found that it was more likely than not that A's wife was exaggerating her mental health difficulties and minimising 'her support from family and friends' (paragraph 110).
40. The FtT then summarised the parties' submissions. In paragraph 111, the FtT reminded itself that A relied on *MK (section 55 – Tribunal options) Sierra Leone* [2015] UKUT 223 (IAC); [2005] INLR 563, which had been confirmed 'as the correct test' in *KO (Nigeria)*. Mr Gill submitted that the facts of *MK (Sierra Leone)* were similar to this case, and that the children would suffer 'a gaping chasm' as a result of A's absence (paragraph 111).
41. In paragraph 112, the FtT referred to later cases, which made clear that 'what is required is something which distinguishes the case from the ordinary upset caused by the separation of a family and the consequent effects on children which can be long running in many cases'. Mr Horrocks had raised the particular vulnerability of A's wife. He was not a mental health professional and there was no medical assessment of the likely effect on A's wife if she were separated from A permanently. Nor was there any assessment of the support which would be available to her. 'The children will undoubtedly be emotionally effected [sic] by the absence of [A], but the evidence did not show that the consequences would be "severe or bleak", as was confirmed to be the test in both *MK* and *KO*' (paragraph 112).
42. In paragraph 113, the FtT considered the evidence that A would be likely to be able to use the flat in Dubai during school holidays. The separation, therefore, would not be permanent. A and his wife did not wish to live in that way, and that was 'completely understandable'. It was not ideal, but 'those circumstances do not reach the threshold of "unduly harsh". The case law is clear that the phrase "unduly harsh" implies

something beyond a due level of harshness. The evidence before us does not show that [A's] children are likely to face severe or bleak difficulties as a result of the absence of [A]. They are, of course, bound to be upset that they will not see their father on a day to day basis as frequently as they would like and this would be likely to have an emotional effect on them but this, in itself, does not meet the level of unduly harsh. It is, sadly, often an inevitable consequence of offending behaviour and deportation that a child will face a level of emotional distress at their separation from a parent'.

Permission to appeal to the UT

43. The FtT refused permission to appeal to the UT on 1 June 2020. On 29 July 2020, the UT gave permission to appeal. The UT considered three 'amplified grounds' which were 27 pages long, and a witness statement from A's solicitor.

The determination of the UT

44. There was a hearing in the UT on 28 and 29 July 2021. In a determination promulgated on 2 November 2021, the UT held that there was no error of law in the determination of the FtT. On what is now ground 1, the UT rejected A's argument that there was no lawful basis for taking A's evidence by video link from Pakistan. The UT described the evidence on this issue (paragraphs 54-55). This Court was shown that evidence. It consisted of a document from the Deputy High Commissioner in Islamabad. He said that checks had been made and he had received legal advice that there is no legal barrier to the provision of evidence by video link from Pakistan. He enclosed a letter from an Islamabad law firm and said that colleagues in London had validated that position. The Pakistan High Commission in London had been notified of the plan to take evidence by video link and no objections had been raised. The letter from the law firm said that there are no barriers under Pakistan law to prevent Pakistani nationals from giving evidence to a United Kingdom court over a video link from Pakistan.
45. The UT recorded A's argument that this evidence was inadequate (paragraph 56). The Secretary of State accepted that taking evidence in the territory of a foreign state potentially infringed its sovereignty, with potential diplomatic and legal consequences. The Secretary of State submitted that most of those potential difficulties were considered in the evidence. Pakistan was not a party to the Hague Convention on the Taking of Evidence Abroad in Civil and Commercial Matters (18 March 1970) ('the Hague Convention'). There was no breach of Pakistani law or any diplomatic comeback (paragraph 57). The UT accepted the Secretary of State's submission. The evidence satisfied the potential diplomatic and legal concerns (paragraph 58).
46. In paragraph 92, the UT accepted, on what is now ground 2, that the FtT had applied the right legal tests in assessing undue harshness. It had properly applied the guidance in *KO*. It had fully taken into account the individual circumstances and had adopted a 'properly nuanced approach' to the evidence of A's wife. There was no error of law.

Ground 1

Video links abroad: the relevant law

47. Section 82(1) of the 2002 Act gives a person a right of appeal to the FtT where the Secretary of State has refused a human rights or protection claim made by him. That right of appeal is subject to the exceptions and limitations specified in Part V of the

2002 Act (section 82(3)). Section 84 provides for the grounds of appeal, and section 85 for the matters which the tribunal must consider on such an appeal.

48. Section 92(3)(a) provides that a human rights appeal must be brought from outside the United Kingdom if the relevant human rights claim was made inside the United Kingdom and the claim has been certified under section 94B of the 2002 Act. Otherwise, it must be brought from inside the United Kingdom. Other appeals must also be brought from outside the United Kingdom: see sections 92(2)(a) and (b), section 92(3)(a) in so far as it applies to appeals certified under section 94(1), section 92(3)(b), section 92(4) and section 92(5)(b). In some circumstances, appeals which have been brought from inside the United Kingdom must be continued from outside the United Kingdom (section 92(6)).
49. Rule 1 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ('the Rules') defines a 'hearing' as 'an oral hearing' and as including 'a hearing conducted in whole or in part by video link, telephone or other means of instantaneous two-way electronic communication'.
50. In *Nare (evidence by electronic means) Zimbabwe* [2011] UKUT 443 (IAC) the UT listed the factors which a tribunal should take into account when deciding whether to allow evidence to be given by electronic means (paragraphs 17-20). In paragraph 21, the UT gave some guidance which was 'not intended to be comprehensive'. The UT said that if it was proposed to give evidence from abroad, the party wishing to call the evidence 'must' be in a position to tell the tribunal that the relevant foreign government had raised no objection to live evidence being given from within its jurisdiction. It was not for tribunals to make the relevant inquiries, which should be addressed to the Foreign and Commonwealth Office ('FCO').
51. In 2013, the UT issued a Guidance Note No 2 entitled 'Video link hearings'. Paragraph 1 referred to rule 1 of the Rules. Paragraph 13 is headed 'Video links in overseas cases'. It provides that an application to call evidence from overseas is unlikely to be granted unless the party wishing to call the evidence satisfies the UT of seven listed points. Paragraph 14 provides that it should not be presumed that all foreign governments are willing to allow their nationals to take part in video link hearings from abroad. If there is any doubt, the party wishing to rely on the evidence should ask the FCO 'with a view to ensuring that no objection will be taken at diplomatic level'.
52. The effect of the judicial headnote of *Agbabiaka (evidence from abroad: Nare guidance)* [2021] UKUT 00286 (IAC) is that there is an understanding among nation states that their courts will not, unless they have permission to do so, exercise their powers on one another's territory. Any breach of that understanding might damage bilateral and multilateral relations, is contrary to the public interest and might harm the interests of justice. The position of the Secretary of State for Foreign, Commonwealth and Development Affairs ('the FCDO') is, therefore, that the foreign state in question must have given permission for oral evidence to be taken (either generally, or in the specific case). After the promulgation of the determination, any party seeking to rely on such evidence must ask the FCDO whether the foreign state has any objection. The headnote records that the guidance in *Nare* 'is amended to the above extent'.

53. The subject matter of the Hague Convention is clear from its title (see paragraph 45, above). The interpretation of the phrase ‘civil and commercial matters’ is ultimately a matter for diplomacy (*Agbabiaka*, paragraph 17). The position of the Secretary of State was that the Hague Convention does not apply to immigration proceedings in the United Kingdom, as they are administrative. It was unnecessary for the UT to express a view on that. Whether it is lawful for evidence to be taken in a foreign country was a question for the law of that country, whether or not it was a signatory to the Hague Convention. What the UT needed to know in all cases was whether evidence could be taken without damage to the United Kingdom’s diplomatic relations with that country (paragraph 19).
54. In paragraphs 26-29, the UT explained that the evidence showed that the FCDO’s process for checking whether there are objections to the taking of evidence by video link from abroad only related to civil and commercial matters. The FCDO did not realise until June 2021 that there was no process for checking that foreign governments had no objection to the taking of evidence in administrative tribunals. It then became clear that inaccurate replies had been given in some cases as the relevant official had not realised that inquiries from tribunals were not ‘civil and commercial matters’. The FCDO had since changed its procedures to ensure that did not happen again. Advice given previously should not, therefore, be considered authoritative. It was hoped that a new unit would be set up to cover the increase in the number of requests, which, it was anticipated, would come from administrative tribunals (paragraph 30).
55. The UT described the new process in paragraph 31. This envisaged, among other things, a check by the relevant British High Commission or Embassy with its Honorary Legal Adviser to see whether any law ‘explicitly prevents’ the giving of such evidence (paragraph 31.vi). If there is no such law, the British High Commission or Embassy would check with the Ministry of Foreign Affairs by Note Verbale if the Government has any objection to the taking of such evidence (paragraph 31.vii). This process could take months and sometimes there was no reply (paragraph 32).
56. In paragraphs 33-35, the UT referred to a witness statement of Andrew Bennett dated 15 July 2021. He was responsible for video hearings in section 94B cases. The process adopted by the Home Office was first to check whether the local laws made the taking of evidence unlawful. If there is no such prohibition, staff notify the authorities of the country in question that the Home Office intends to provide video links for appeals. Mr Bennett’s team deferred to local colleagues about the most appropriate method of notifying the authorities of the country in question. He explained that the policy was to proceed on the basis that there were no objections if the authorities stated that they had none, or if no response was received after a reasonable time. He explained that he had been told that, in the diplomatic context, notifications do not always receive a response. If the Home Office had adopted a different approach, and only proceeded once a positive response had been received, that would cause undesirable delay, which could have been long in some countries. In paragraph 41, the UT explained why the position in section 94B cases was different from that in other cases. In those cases, the Secretary of State must provide the facilities for a fair appeal; otherwise, the appellant must be brought back to the United Kingdom.

Ground 1: the fresh evidence

57. A relied on evidence disclosed by the Secretary of State in another case, *Yilmaz v Secretary of State for the Home Department* [2022] EWCA Civ 300. This evidence is said to show that the Secretary of State had a secret policy of notifying a representative of a foreign government in general terms that the United Kingdom authorities wanted to hold video-link hearings involving people who were in the territory of the foreign state, and then ‘presuming that permission had been granted’ if the notice did not elicit a response. The Secretary of State did not tell appellants or tribunals about this policy, although she is said to have unilaterally approached the then President of the FtT, Mr Clements (‘the President’), to discuss what sort of evidence tribunals might accept in such cases. The Secretary of State hoped that general notifications of this kind would not provoke a response. On this basis, the Secretary of State ‘caused tribunals (and the FTT in this case) to assume that there was no legal obstacle to the video-link hearing...and to proceed with [it] despite the appellant’s objections’. A’s case is that, in this way, the Secretary of State was deliberately behaving unlawfully.
58. A submits that the Secretary of State’s fresh evidence shows that if the Secretary of State had ‘acted lawfully’ in the past five years, and if Pakistan had been asked for its consent to a specific hearing, as it now has been, it would have refused it in the absence of a bi-lateral treaty. A submits that there has never been a lawful basis for holding a hearing with a video link to Pakistan. For this reason, A did not object to the admission of the fresh evidence from the Secretary of State, but submitted that it did not give the full picture, which only emerges from some of the material in *Yilmaz*.
59. In paragraph 27 of his witness statement dated 28 January 2022 in that case, Mr Bennett said that the Secretary of State had, between 2017 and 2021, had a policy of treating the absence of a response from a foreign government as sufficient to justify the holding of a hearing with a video link. He exhibited email chains which were said to show the development and finalising in 2017 of the approach of the Secretary of State and of the FCO to legal and diplomatic checks. In short, this material shows that, because of delays which asking formally for permission could entail, and because of its potentially ‘unwelcome consequences’, the preferred approach of the Home Office and the FCO was simply to notify an appropriate contact and not to ask formally for permission. That approach was reviewed internally in 2018 and it was maintained.
60. In 2020, the Home Office and the FCDO began, with the Ministry of Justice (‘MOJ’) to consider how to react if a state were to require a bi-lateral agreement as a condition of permitting the use, in its territory, of video links for immigration appeals. Mr Bennett said that, at that stage, no state had in fact reacted in that way.
61. An email dated 23 July 2021 summarised the current approach. It was to establish that a country’s domestic law did not prohibit video links, and then to notify that country’s authorities that the United Kingdom intended to provide video links for appellants in immigration hearings. If there was no negative response from the authorities ‘within a reasonable period we interpret the absence of a response satisfies the *Nare* condition that the country has “*raised no objection*” to our planned use of video. We have adopted that position based on the wording of the judgment in *Nare*, to avoid the inevitable delays what would arise if we only proceeded on the basis of a positive response and on the basis that we were informed by colleagues working overseas that, in the wider perspective of diplomatic relations notifications do not always receive a response. No

response is the position for most of our contacts with other countries in relation to section 94B. Until now, the FtT and the UT has not focused on this level of detail’.

62. In 2021, the UT listed the appeal in *Agbabiaka* (which was not a section 94B case). GLD applied for permission to withdraw its grounds of appeal, but the UT decided to go ahead with the appeal, as it wished to give a reported determination on giving evidence from abroad. The hearing listed for July 2021 was adjourned. There were meetings between officials to discuss a common position which would apply to administrative and to immigration appeals. The UT’s determination in that case was promulgated in November 2021 (see paragraphs 52-56, above). After the hearing in *Agbabiaka*, officials decided to review the position because of potential uncertainty in cases where the authorities of the relevant state had not said anything at all about their attitude to video link hearings from their territory. The Secretary of State then decided that, before taking any further action in section 94B cases, she would formally check whether the state in question had expressly given permission for such hearings.
63. The Secretary of State’s fresh evidence, served in part in accordance with her duty of candour, shows that more recently, the Pakistan authorities were expressly asked formally whether they would give permission for video link evidence to be taken from Pakistan in immigration appeals. Their reply, on 26 May 2022, was that they considered that ‘such matters...should be regulated either by bi-lateral agreement or by signing International Conventions, if available under International Law...’ They did not give permission, and it seems that they will not do so unless there is a bi-lateral agreement.
64. Mr Gill took strong objection to the role played by the President during 2017, in so far as it can be inferred from emails sent in 2017. I do not consider that these complaints are relevant to the issues on this appeal, and I say no more about them.

Ground 2

The relevant law

65. Part 5A of the 2002 Act was inserted by the Immigration Act 2014. It applies when a court or tribunal decides whether a decision under the Immigration Acts is a breach of article 8 and therefore would be unlawful under section 6 of the Human Rights Act 1998 (‘the HRA’) (section 117A(1)). In considering the public interest question, a court or tribunal ‘must (in particular) have regard, (a) in all cases to the considerations listed in section 117B, and (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C’ (section 117A(2)). The ‘public interest question’ is the question whether an interference with article 8 is justified under article 8(2) (section 117A(3)).
66. Section 117C(1) provides that the deportation of foreign criminals is in the public interest. The more serious the offence he has committed, the greater is the public interest in his deportation (section 117C(2)). If a foreign criminal has not been sentenced to a period of imprisonment of four years or more, the public interest requires his deportation unless Exception 1 or Exception 2 applies (section 117C(3)). Such an offender is often described in the authorities as ‘a medium offender’. If an offender has been sentenced to a period of imprisonment of at least four years, the public interest requires his deportation unless there are ‘very compelling circumstances over and above those described in Exceptions 1 and 2’ (section 117C(6)).

67. Exception 1 does not apply in this case. Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be 'unduly harsh' (section 117B(5)). 'Qualifying child' and 'qualifying partner' are defined in section 117D. The former is a child who is British citizen and has lived in the United Kingdom for a continuous period of seven years or more. The latter is a partner who is a British citizen or who is settled in the United Kingdom (within the meaning of section 33(2A) of the Immigration Act 1971).
68. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22; [2022] 1 WLR 3784 the Supreme Court dismissed the Secretary of State's appeal against a decision of this Court. The issue was whether the UT had, in three appeals, erred in law in its application of the 'unduly harsh' test in section 117B(5). As the Supreme Court has recently considered this question, it is unnecessary for me to refer to the many earlier decisions of this Court which have now been superseded by the judgment of the Supreme Court.
69. Lord Hamblen, giving the judgment of the Supreme Court, recorded in paragraph 4 that it was common ground that the effect of *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 207 was that a medium offender who cannot satisfy the unduly harsh test can, nevertheless, rely on the 'very compelling circumstances' test. Lord Hamblen assumed, but did not decide, that *NA (Pakistan)* was in that respect correct.
70. He cited paragraphs 22-23 and 27 of the judgment of Lord Carnwath in *KO (Nigeria)*. He rejected the Secretary of State's argument that the test involved a notional comparator for six reasons (paragraphs 31-39). The comparison inherent in paragraph 23 of *KO (Nigeria)* is between a level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals and the greater degree of harshness which is necessarily conveyed by the word 'unduly' (paragraph 31).
71. In paragraph 32, he noted that, in paragraph 27 of *KO*, Lord Carnwath had endorsed the UT's formula in *MK (Sierra Leone) v Secretary of State for the Home Department* at paragraph 46. The UT referred to an 'evaluative assessment... "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult...it poses a considerably more elevated threshold. "Harsh" ...denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore the addition of the adverb "unduly" raises an already elevated standard still higher'.
72. He also noted (paragraph 33) that while the reasoning of the UT which Lord Carnwath approved in *KO* involved 'echoes of the notional comparator approach', those 'considerations were not, however, being put forward as a test or essential touchstone and the reasoning being approved related to the application of an appropriately elevated threshold'.
73. He said, in paragraphs 41 and 43, that despite the fact that it was a gloss on the statutory language, the best approach was to follow the guidance in *MK (Sierra Leone)*. Having given that self-direction, the tribunal should then 'make an informed assessment of the

effect of deportation on the qualifying child or partner and make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it' (paragraph 44). That approach neither involved lowering the threshold approved in *KO*, nor reinstating any link with the seriousness of the offending (paragraph 45).

Discussion

Ground 1

74. The issue on ground 1 is whether the appeal to the FtT was unlawful, including whether there was any adequate evidence that the authorities in Pakistan had permitted a hearing by video link. A submits that the hearing was unlawful. The Pakistani authorities had been notified that the Secretary of State wished to take evidence by video link from Pakistani nationals in Pakistan, and had not objected to that course, but had not positively agreed to it. That was not good enough. The Pakistani authorities should have been asked expressly for permission. Further, it is now known that if the Pakistani authorities had been expressly asked for permission, they would not have given it. The hearing was a nullity.
75. During his oral submissions, Mr Gill was pressed by the Court for any domestic legal materials which showed that the hearing of A's evidence by video link was for that reason unlawful and a nullity. He did not refer to any. He repeated the submission he had made to the UT that the evidence of Pakistani law (see paragraph 44, above) was inadequate.
76. The primary question for this Court is whether there is any provision or rule of domestic law which shows that the FtT hearing was unlawful and a nullity. There is none. The 2002 Act expressly requires some appeals to be made from, and some to be continued from, abroad. The 2002 Act does not provide that the lawfulness of such appeals depends on any condition, such as the obtaining of permission from a foreign state. The Rules assume that a hearing can be conducted partly by video link. The Rules do not provide for any further conditions in relation to the taking of evidence from abroad. Neither *Nare* nor *Agbabiaka* suggests that the taking of video evidence from abroad without the permission of the state concerned is unlawful, or that it makes the hearing a nullity. *Agbabiaka* suggests that such a hearing might be contrary to the public interest because of its potential to damage international relations, and, thus contrary to the interests of justice, but that is a different point. I accept Mr Kovats's submission that the sanctions for such conduct are diplomatic, not legal.
77. I do not consider that the evidence about Pakistani law is relevant to the question whether, under domestic law, the hearing was unlawful or a nullity. In case I am wrong about that, I will briefly consider that evidence. I accept that the evidence was terse, but its substance was not challenged (other than by reference to its claimed inadequacy). I consider that it was a sufficient basis for the FtT's conclusion (if that conclusion was necessary) that the hearing was not prohibited by any provision of Pakistani law.
78. If the hearing was lawful and not a nullity, the only other way in which it could be impugned is on the grounds that it was unfair. A has, however, been refused permission to argue, on this appeal, that the hearing was unfair. I will say no more than that the FtT was in the best position to judge whether the fact that A's evidence was taken by video

link made his appeal unfair or ineffective. If my view on this point is necessary, I am satisfied that the hearing was fair, for the reasons given by the FtT in determinations 1 and 2.

Ground 2

79. At first glance, the reasoning of the FtT in paragraphs 112 and 113 (see paragraphs 41, and 42, above) might seem to point in opposite directions, as the FtT referred both to the formula in *MK (Sierra Leone)* and to authorities which rely on a notional comparator. The second approach is wrong in law (see Lord Hamblen's judgment in *HA (Iraq)*). It might, therefore, be thought that the FtT was confused about the test which it was applying. I consider, however, that the kernel of the FtT's reasoning is that it posed, and answered, the statutory question in the formulation used in *MK (Sierra Leone)* which was approved by Lord Carnwath in *KO* and has also now been approved by Lord Hamblen in *HA (Iraq)*.
80. The FtT discounted the effects of separation on A's wife because her evidence was exaggerated, and there was a significant gap in that evidence. It then considered the effect of separation on the children, four times judging that effect against the right test. It is true that that reasoning is framed by the first sentence of paragraph 112 and by the last sentence of paragraph 113, which refer to the wrong test. I do not consider, however, that the core of the FtT's reasoning is tainted by those two references, which, on analysis, are superfluous to and do not influence it. I note that reasoning by the UT with a similar apparent flaw was nevertheless approved by Lord Carnwath in *KO* as explained by Lord Hamblen in *HA (Iraq)* (see paragraph 72, above). I consider that Lord Hamblen's description of that reasoning can be applied to the reasoning of the FtT in this case. The 'essential touchstone' here was the approach in *MK (Sierra Leone)*, which is the right approach. I would therefore dismiss this appeal on ground 2.

Conclusion

81. For these reasons, I would dismiss the appeal.

Lord Justice Lewis

82. I agree.

Lord Justice Arnold

83. I agree that this appeal should be dismissed for the reasons given by Elisabeth Laing LJ. Since counsel for A relied in support of his submissions upon *Interdigital Technology Corp v Lenovo Group Ltd* [2021] EWHC 255 (Pat), I will add a few words explaining why it does not assist him. In that case His Honour Judge Hacon sitting as a High Court Judge decided to permit an expert witness who was a British citizen resident in Germany to give evidence by videolink from Germany at a patent trial due to start on 1 March 2021 provided that the competent authority in Germany gave permission for this. The parties had adduced conflicting expert evidence as to whether, as a matter of German law, it was lawful for a witness in Germany to give evidence remotely to a foreign court without the permission of the relevant German court. HHJ Hacon concluded that there was a real risk that, if the High Court were to give permission for the witness to give evidence by videolink from Germany without the permission of the German court, that would contravene German law. Hence the condition he imposed on

the permission he granted. As Elisabeth Laing LJ has explained, however, in the present case the only evidence before the FTT as to the position under the law of Pakistan was that it would not be unlawful for evidence to be given by videolink from Pakistan. In any event, as Elisabeth Laing LJ has also explained, the question of the lawfulness of the transmission of the evidence from Pakistan under Pakistani law is distinct from the question of the lawfulness of the reception of that evidence in the UK under UK law.