



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: PA/04542/2017

**THE IMMIGRATION ACTS**

**Heard at Newport  
On 20 February 2018**

**Decision & Reasons  
Promulgated  
On 28 March 2018**

**Before**

**UPPER TRIBUNAL JUDGE GRUBB**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**H B K  
(ANONYMITY DIRECTION MADE)**

Respondent

**Representation:**

For the Appellant: Mr D Mills, Senior Home Office Presenting Officer

For the Respondent: Mr S Clarke, instructed by Migrant Legal Project (Cardiff)

**DECISION AND REASONS**

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/2698) I make an anonymity order prohibiting the disclosure or publication of any matter likely to lead to members of the public identifying the respondent (H B K). A failure to comply with this direction could lead to Contempt of Court Proceedings.
2. Although this is an appeal by the Secretary of State, for convenience I will refer to the parties as they appeared before the First-tier Tribunal.

## **Background**

3. The appellant is a citizen of Iran who was born on 6 January 1990. He arrived in the United Kingdom on 1 March 2010. He claimed asylum on 9 March 2010 but that application was refused by the Secretary of State on 26 March 2010 and his subsequent appeal to the First-tier Tribunal was dismissed on 20 May 2010. Following the refusal of permission to appeal, he became appeal rights exhausted on 2 September 2010.
4. On 16 July 2010, he was convicted at the Worcester Crown Court on three counts: first, assault occasioning actual bodily harm contrary to s.47 of the Offences Against the Person Act 1861 and secondly, two offences of assault. In respect of the first offence, having pleaded guilty, he was sentenced to a period of fifteen months' imprisonment and, in respect of the other offences, he was sentenced to concurrent terms of three months' imprisonment in respect of each one.
5. On 25 September 2012, the appellant was notified that he was liable to be deported under the automatic deportation provisions in the UK Borders Act 2007. On 19 April 2013, a deportation order was signed against the appellant which was served upon him on 23 April 2013. On 7 March 2014, he lodged an out of time appeal against deportation. On 15 April 2014, his appeal was determined to be out of time and he became appeal rights exhausted again.
6. On 1 December 2016, in response to a s.120 notice, the appellant made further submissions.
7. On 27 April 2017, the Secretary of State refused the appellant's claims for asylum, humanitarian protection and under Art 8 of the ECHR.

## **The Appeal to the First-tier Tribunal**

8. The appellant appealed to the First-tier Tribunal. The appeal was heard by Judge Price on 4 July 2017. In a decision promulgated on 2 August 2017, Judge Price dismissed the appellant's appeal under the Refugee Convention and on humanitarian protection grounds. That decision has not been challenged by the appellant and I need say no more about it.
9. Before Judge Price, the appellant relied upon Art 8 and, in particular, his relationship with his daughter ("L"), a British citizen for whom he claimed to be the primary carer. In particular, relying upon Exception 2 in s.117C(5) of the Nationality, Immigration and Asylum Act 2002 (the "NIA Act 2002"), the appellant argued that he had a "genuine and subsisting parental relationship" with L, a qualifying child and his deportation would be "unduly harsh". Consequently, the public interest did not require his deportation in accordance with s.117C(3) of the NIA Act 2002.
10. Judge Price accepted that the appellant was the primary carer of L. The judge accepted that whilst the appellant's partner (and mother of L) was at work - she worked for the British Navy - the appellant was L's carer.

The judge accepted evidence from an independent social worker, Mr Peter Horrocks that if the appellant were deported L would “suffer great trauma and distress, which would cause harm to her emotional development because of the loss of her primary carer and her secure attachment figure”.

11. Judge Price concluded that it was not in the best interests of L to be separated from the appellant. Judge Price went on to find that it would be “unduly harsh” for the family to continue their family life in Iran and, importantly for the purposes of this appeal, that it would be unduly harsh for L to remain in the UK without the appellant. As a consequence, Judge Price allowed the appellant’s appeal under Art 8 of the ECHR.

### **The Appeal to the Upper Tribunal**

12. The Secretary of State sought permission to appeal to the Upper Tribunal on essentially three grounds. First, the judge had failed to have “full regard” to the appellant’s criminal and immigration history in concluding that it would be “unduly harsh” on L if the appellant were deported. That was contrary to the approach set out by the Court of Appeal in MM (Uganda) v SSHD [2016] EWCA Civ 450. Secondly, the judge had failed properly to have regard to the public interest by concluding that the public interest was lessened due to the fact that the appellant had rehabilitated and no longer drank alcohol, which was found by the sentencing judge to be central to his offending. Thirdly, following OH (Serbia) v SSHD [2008] EWCA Civ 694, the judge had failed to take into account two of the facets of the public interest, namely ‘public revulsion’ and ‘deterrence’ which are “weightier considerations in the public interest”.
13. On 9 October 2017, the First-tier Tribunal (Judge E B Grant) granted the Secretary of State permission to appeal.
14. On 30 November 2017, the appellant filed a rule 24 response seeking to uphold the judge’s decision.

### **The Submissions**

15. The central plank of Mr Mills’ submissions made on behalf of the Secretary of State was that the judge had failed properly to take into account the three facets of the public interest recognised in OH (Serbia) v SSHD [2008] EWCA Civ 694 in reaching her finding at paras 63 – 71 that the effect upon L of the appellant’s deportation would be “unduly harsh”. Mr Mills somewhat stepped back from the assertion in the grounds that the judge was not entitled to take into account the appellant’s rehabilitation in assessing his future risk to the public. However, Mr Mills submitted that, in accordance with MM (Uganda) v SSHD, the judge had failed to take into account the seriousness of the offence and that deportation acted as a deterrence to other foreign nationals committing offences and in reflecting the public revulsion engendered by such serious offences. Anticipating the submissions to be made by Mr Clarke on behalf

of the appellant (and foreshadowed in the rule 24 response), Mr Mills did not accept that the Supreme Court in Ali v SSHD [2016] UKSC 60 had removed from the ambit of the “public interest” that of ‘public revulsion’. He submitted that Lord Kerr’s rejection of that facet of the public interest at [168] was in a dissenting judgment and the same approach by Lord Wilson at [70], modifying what he had previously said himself in OH (Serbia), was not subject to the express agreement of the other Justices in particular Lord Reed (who had delivered the leading judgment) with whose judgment the other Justices agreed.

16. Mr Clarke, on behalf of the appellant accepted that the concept of the “public interest” went beyond assessing whether there was a risk to the public as a result of future offending. He accepted that deterrence of others was an aspect of the legitimate aim of preventing crime and disorder. Nevertheless, he submitted that in Ali the Supreme Court had, in effect, recognised that it was difficult to connect “public revulsion with that legitimate aim”.
17. Mr Clarke submitted that the judge had properly taken into account the required facets of the “public interest”. He drew my attention to her reference to the sentencing judge’s remarks at paragraph 42.1 and, he submitted, it was not necessary for the judge to repeat everything at paras 69 – 71 when referring to the “public interest” and carrying out the balancing exercise required by MM (Uganda) in assessing whether the appellant’s deportation would be “unduly harsh” upon L. He submitted that the judge had properly assessed L’s best interests which were that she should not be separated from the appellant. He submitted that to the extent that the grounds suggested that the judge had erred in assessing L’s best interests without regard to the public interest, that was contrary to the approach in ZH (Tanzania) v SSHD [2011] UKSC 4. Mr Clarke submitted that by referring to the judge’s failure to have “full regard” to the appellant’s criminal and immigration history, it was clear that the challenge was to the weight that had been given to the public interest and that was, subject to irrationality, a matter for the judge. Mr Clarke submitted that the grounds were wrong to assert that the “deterrence” facet of the public interest (and if still relevant the “public revulsion” facet of the public interest) were “weightier considerations” than the risk of reoffending, that was simply wrong.
18. Mr Clarke submitted that the Secretary of State had not established any error of principle in the judge’s decision.

### **Discussion**

19. The relevant provisions in the NIA Act 2002 in this appeal are ss.117C(3) and (5). Section 117C(3) provides that:
 

“In the case of a foreign criminal (‘C’) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.”

20. Exception 2 is set out in s.117C(5) as follows:
- “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.”
21. Judge Price accepted that the appellant had a “genuine and subsisting parental relationship” with L who was, being a “British citizen”, a “qualifying child” as defined in s.117D(1).
22. In MM (Uganda), the Court of Appeal rejected the argument that whether the deportation of an individual would be “unduly harsh” on a partner or qualifying child was to be determined solely on the basis of the impact upon that individual without regard to the public interest. At [24], Laws LJ (with whom Vos and Hamblen LJJ agreed), having set out s.117C(2) of the NIA Act, said this:
- “This steers the Tribunals and the court towards a proportionate assessment of the criminal's deportation in any given case. Accordingly, the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the 'unduly harsh' provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in the particular case. But in that case the term 'unduly' is mistaken for 'excessive' which imports a different idea. What is due or undue depends on all the circumstances, not merely the impact on the child or partner in the given case. In the present context relevant circumstances certainly include the criminal's immigration and criminal history.”
23. Then at [26], Laws LJ concluded that s.117C(5):
- “... requires regard to be had to all the circumstances including the criminal’s immigration and criminal history.”
24. In MM (Uganda), Laws LJ referred to s.117C(2) which sets out that:
- “The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.”
25. This follows the legislative statement in s.117C(1) that:
- “The deportation of foreign criminals is in the public interest.”
26. However, it is now settled law that if Exception 1 or Exception 2 applies, then the public interest does not require the individual’s deportation (see NA (Pakistan) v SSHD [2016] EWCA Civ 662).
27. In OH (Serbia) the Court of Appeal identifying three facets of the public interest in deportation: (1) the risk of reoffending; (2) the need to deter foreign criminals from committing serious crimes; and (3) as an expression of society’s revulsion that serious crime and building public confidence in

the treatment of foreign criminals who have committed such crimes (see Wilson LJ (as he then was) at [15]).

28. There is no doubt that in his judgement in Ali, Lord Kerr at [168] rejected the third facet of the public interest identified by Wilson LJ in OH (Serbia) where he said:

“Expression of societal revulsion, the third of the factors applied in the *OH (Serbia)* case, should no longer be seen as a component of the public interest in deportation. It is not rationally connected to, nor does it serve, the aim of preventing crime and disorder. Societal disapproval of any form of criminal offending should be expressed through the imposition of an appropriate penalty. There is no rational basis for expressing additional revulsion on account of the nationality of the offender, and indeed to do so would be contrary to the spirit of the Convention.”

29. Lord Kerr dissented on the outcome of the appeal before the Supreme Court. None of the other Justices expressly agreed with his judgment.

30. However, Lord Wilson returned to his views expressed in OH (Serbia) as to the content of the “public interest” in deportation cases at [69] and [70]. At [69], he did not accept Lord Kerr’s analysis that “customarily, the risk of re-offending will be of predominant importance” (expressed at [96] of Lord Kerr’s judgement). Lord Wilson reiterated that the “deterrent effect upon all foreign citizens (irrespective of whether they have a right to reside in the UK) of understanding that a serious offence will normally precipitate their deportation” was likely to be a powerful aid to the “prevention of crime”, perhaps even more so than the removal of one foreign criminal “judged as likely to re-offend” (at [69]).

31. Then, at [70], Lord Wilson returned to the “public revulsion” facet and said this:

“By his Counsel, the appellant mounts a sustained objection to my statement and I am constrained to agree with part of it. I regret my reference there to society’s revulsion at serious crimes and I accept Lord Kerr JSC’s criticism of it at paragraph 168 below. Society’s undoubted revulsion at certain crimes is, on reflection, too emotive a concept to figure in this analysis. But I maintain that I was entitled to refer to the importance of public confidence in our determination of these issues. I believe that we should be sensitive to the public concern in the UK about the facility for a foreign criminal’s rights under Article 8 to preclude his deportation. Even though, for the purposes of the present appeal, we must ignore s.19 of the Immigration Act 2014, the depth of public concern has earlier been manifest not in s.32(4) of the 2007 Act but also in the amendments to the Immigration Rules introduced on 9 July 2012 to which I will return in the next paragraph. Laws serve society more effectively if they carry public support. Unless it lacks rational foundation (in which case the court should not pander to it), the very fact of public concern about an area of law, subjective though that is, can in my view add to a court’s object analysis of where the public interest lies: in this context it can strengthen the case for concluding that interference with a person’s

rights under Article 8 by reason of his deportation is justified by a pressing social need.”

32. It might be said that Lord Wilson’s statement is, with respect, potentially ambiguous. Although he rejects the language of “revulsion”, he nevertheless considers that public opinion (reflecting concerns about foreign criminals remaining in the UK) might be taken into account in a “court’s objective analysis of where the public interest lies”. Perhaps, Lord Wilson, having eschewed his own use of the word “revulsion” in OH (Serbia), was seeking to point up the importance of, and significant weight to be given to, the public interest in deportation of foreign criminals. That has been reflected in s.117C of the NIA Act 2002 as a result of its amendment by the legislative provision to which he refers, namely s.19 of the Immigration Act 2014.
33. In any event, as Mr Mills submitted, neither Lord Kerr’s views (in his dissenting judgment) nor Lord Wilson’s views (in his concurring judgment) were adopted in the judgement of Lord Reed (with whom the other Justices agreed) or that of Lord Thomas in his short concurring judgment.
34. Certainly, subsequent to the Supreme Court’s decision in Ali, the Court of Appeal has referred to the three facets of the public interest identified in OH (Serbia) without suggesting that the Supreme Court has, in any way, departed from the earlier approach (see, e.g. SSHD v Quarey [2017] EWCA Civ 47, especially at [33]).
35. It is unnecessary, in my judgment to reach any concluded view as to whether a change in the content of the public interest has been effected by the decision of the Supreme Court in Ali. The reason for that is that I am not persuaded that the judge failed “fully” and properly to consider the public interest in reaching her finding that the appellant’s deportation would be “unduly harsh” upon L. I doubt, in any event, whether any change would shift the weight to be given to the public interest or affect the outcome of the balancing exercise. It would not, in my judgment, have had any effect on the outcome of this appeal.
36. The judge’s decision must be read as a whole. That is a trite statement but one which bears repetition as it is often overlooked in challenges brought by appellants and respondents alike. The judge had before her the remarks of HHJ Jukes QC in sentencing the appellant. At paragraph 42.1, albeit in her recitation of the appellant’s case, she set this out:

“42.1 On 14<sup>th</sup> August 2012, he was sentenced by HHJ Jukes QC at Worcester Crown Court on a three-count indictment. The incident arose following a disturbance at a night club, resulting in the appellant being arraigned on two counts of common assault and one account of assault occasioning actual bodily harm. The appellant pleaded guilty and was sentenced to 15-months imprisonment. HHJ Jukes QC, commented *‘that had it not been for drink, you would probably not have committed those offences’*.”

37. In the course of the parties' submissions, the Judge Price was referred to the case of Ali and s.117C of the NIA Act 2002 (see para 52). She was also referred to, and set out, the relevant factors in determining whether the appellant had established a breach of Art 8 in the Strasbourg decision of Boultif v Switzerland (2001) 33 EHRR 50 (at para 58 of her decision). Although the judge made no specific reference to the decision in MM (Uganda), it is clear that she did not approach the issue of whether the appellant's deportation would be "unduly harsh" solely by looking at the impact upon L without regard to the public interest.
38. Before the judge, it appears to have been argued that the family could move to Iran or to Fiji which was the country of origin of L's mother. The judge rejected both of these possibilities and, before me, Mr Mills did not seek to challenge that finding. The issue was, he confirmed, whether the family could be 'split up' between the UK and Iran to which the appellant would be deported. The judge's reasons for finding that it would be "unduly harsh" to 'split up' the family in this way is set out at paras 64 - 65 and 68 - 71. I omit para 66 and 67 of the judge's reasons which deal with the issue, no longer relied up by Mr Mills, that the family could relocate to Iran or Fiji. At paras 64 - 65, the judge dealt with L's best interests as follows:

"64. The Appellant is the primary carer for his daughter. He cares for her daily, from 6am to the evening whilst his partner, and mother of his child is at work. His partner works for the British Navy. I attach weight to the opinion of Peter Horrocks about the potential negative impact upon [L] should she be separated from her father, her primary carer. I have regard to the best interests of the child assessment as set out in section 55 of the Borders, Citizenship and Immigration Act 2009. It is in the child's best interest to be with both of her parents. In light of the fact that in this particular case the child's father, the Appellant is a primary carer, this carries substantial weight. I note that [ND] [L's mother], due to the nature of her work, may be deployed overseas at any point. This could be at short notice. Whilst [ND] enjoys being part of the Fijian community in Plymouth, she does not have anybody who could take over the role of caring for her daughter if she was deployed and the Appellant was deported. The prospect of her having to employ a professional child-carer to care for her child 24 hours a day for an unknown period of time, is a matter that she cannot bring herself to think about."

39. The reference to the opinion of Peter Horrocks, the independent social worker, is to his evidence which the judge set out at para 56 as follows:

"If [the appellant] were to be removed from the UK and returned to Iran, there is no question that [L] would suffer great trauma and distress, which would cause harm to her emotional development because of the loss of her primary carer and her secure attachment figure. Although [the appellant] is her father not her mother, he is her primary carer for most of the week, and consideration should be given to research which indicates that *'the occurrence of a mother-child separation of a week or longer within the first two years of life was*



*related to higher levels of child negativity (at age 3) and aggression (at ages 3-5).....”*

40. At para 68, the judge referred to the precarious nature of the family life but also that this should not factor into the best interests’ assessment in respect of L. The judge said this:

“68. I have had regard to the precariousness of family life, and the fact that the Appellant and [ND] have entered into a relationship whilst the Appellant’s status was unassured. I have also factored in that this finding should not interfere with the best interest of the child assessment in respect of [L].”

41. Although Mr Mills did not specifically rely upon this aspect of the grounds in his oral submissions, the grounds do contend that it was wrong in law for the judge to fail to have regard to the public interest in deportation and the appellant’s poor immigration history in reaching an assessment of L’s best interests. The contention in the grounds is simply wrong as a matter of law. The immigration status of a child or parent is not relevant to an assessment of that child’s “best interests” (see ZH (Tanzania) v SSHD [2011] UKSC 4 at [26] and [33]; Zoumbas v SSHD [2013] UKSC 74 at [10(7)] and R (MA) Pakistan and others v UT IAC [2016] EWCA Civ 705 at [53]). Likewise, the public interest is not relevant in assessing a child’s “best interests” although, as the case law recognises, providing the child’s best interests are taken as a ‘primary’ consideration, those best interests can, in an appropriate case, be outweighed by countervailing factors such as the public interest.

42. The judge returned to the “public interest” in paragraph 69 of her decision as follows:

“69. I have to consider the public interest, and as a foreign criminal, the public interest factor increases the more serious the offence is. The offence committed by the Appellant was an indictable offence, causing a serious eye injury to the victim, this was reflected in the sentence he received for the charge of actual bodily harm. I do not wish to undermine the seriousness of the offence; however, I have regard to the remarks of the sentencing judge, and the reference to alcohol being a contributing factor. The Appellant has rehabilitated, the offence occurred over five years ago. Since that date, he has complied with all immigration requirements. I have considered all these factors when deciding the weight to be attached to the public interest in this balancing exercise.”

43. Then, at paras 70 - 71 the judge reached her finding that the appellant’s deportation would have an unduly harsh impact upon L. The judge said this:

“70. I find the Appellant enjoys family life of a character and quality to engage Article 8. I find that the decision of the Respondent is in pursuance of a legitimate aim. I have to decide if the decision is proportionate.

71. In considering the assessment I have careful regard to Section 117C of the NIA 2002. I have made a finding that [L]’s best interests are served by being with both her parents. This is of particular importance in respect of the Appellant as he is her primary carer. [L] and her mother [ND] are British Citizens. It is in [L]’s interests to ensure that she is able to enjoy the benefits and advantages that flow from this status. It would be unduly harsh for [L] to remain in the UK without her father, having regard to the evidence from Peter Horrocks the independent social worker. I find that it would be unduly harsh to expect family life to continue in Iran in light of the [ND’s] religious beliefs.”
44. It is plain to me, when reading the judge’s determination as a whole, that at paragraph 69 she clearly had in mind the public interest based upon the seriousness of the offence. I am wholly unpersuaded that the judge failed to give full, and appropriate weight, to the full gamut of the public interest in reaching her finding that the appellant’s deportation would be “unduly harsh” on L.
45. The judge was entitled to take into account, based upon the sentencing judge’s remarks, that the appellant had rehabilitated and that that was relevant to the weight to be given to the public interest in the sense of what, if any, risk to the public the appellant presented based upon reoffending. Mr Mills accepted in his oral submissions that ‘rehabilitation’ was relevant to the risk of reoffending. The judge did no more than she was entitled to do in para 69, namely take that into account in assessing his future risk.
46. However, the judge’s reference to the public interest was not restricted to future risk to the public. She clearly had in mind the “seriousness” of the offence. She said so: she explicitly summarised the circumstances giving rise to its seriousness and, of course, at paragraph 42.1 she had already quoted the sentencing judge’s remarks. These set out the circumstances of the offence which included causing a serious injury to the victim’s eye as a result of a “flying kick” whilst he was on the floor. The injury was, as the sentencing judge remarked, “a very serious and unpleasant” one. Although Judge Price made no specific reference to the third facet of the public interest identified in OH (Serbia), even if that remains an integral part of the public interest, I am wholly unpersuaded that the judge’s assessment of the “public interest”, and the importance to that of the “seriousness” of the offence (including reflecting the deterrent effect of deportation on others), fails to reflect the proper weight to be given to the public interest in this case.
47. It is important to notice that neither in the grounds nor in Mr Mills’ submissions was it suggested that the judge reached an irrational conclusion in relation to whether the impact upon L of the appellant’s deportation would be “unduly harsh”. It is plain to me that the judge properly carried out the balancing exercise, as required by MM (Uganda), taking fully into account the public interest based upon the seriousness of the offence and the appellant’s offending and any future risk to the public

of his reoffending. In addition, the judge clearly had in mind (at para 68 of her decision) the “precariousness of family life” relied upon by the appellant. I see no basis for the criticism in the grounds, that the judge failed to take into account all the relevant circumstances, including the appellant’s immigration history which, Mr Clarke pointed out in paragraph 8 of the rule 24 reply without challenge from Mr Mills, was not specifically relied upon in the oral submissions before Judge Price.

48. As I have already pointed out, the Secretary of State does not contend that the judge’s decision was irrational. Her primary findings are not disputed, including that the appellant was the primary carer of L and that, based upon, in part Mr Horrock’s opinion, the appellant’s deportation would not be in the best interests of L. Mr Horrocks, of course, considered that L would suffer “great trauma and distress” and her “emotional development” would be harmed by the appellant’s deportation. In reaching her finding that the appellant’s deportation would be “unduly harsh” upon L, the judge fully took into account the public interest and I see no basis upon which it could be said (although of course the contrary is not contended for by the Secretary of State) that the judge was not entitled as a matter of law to find that the public interest was outweighed by the effect of deportation upon L.

### **Decision**

49. For these reasons, the judge did not err in law in allowing the appellant’s appeal under Art 8 and that decision stands.
50. Accordingly, the Secretary of State’s appeal to the Upper Tribunal is dismissed.

Signed



A Grubb  
Judge of the Upper Tribunal

15 March 2018