



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/07549/2017

THE IMMIGRATION ACTS

Heard at Manchester  
On 22 March 2018

Decision and Reasons Promulgated  
On 26 March 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SK

ANONYMITY DIRECTION MADE

Respondent

**Representation:**

For the appellant: Mr McVeety, Senior Home Office Presenting Officer

For the respondent: Mr Jagadeshm, Counsel

DECISION AND REASONS

*Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original first Appellant in this determination identified as SK.*

1. I have made an anonymity order because this decision refers to the circumstances of SK's minor children.

## **Introduction**

2. This is an appeal by the Secretary of State for the Home Department ('SSHID') against a decision of the First-tier Tribunal ('FTT') dated 3 October 2017, in which it allowed the appeal of SK, a citizen of Iran, on Article 8 grounds only, against the SSHID's decisions dated 19 July 2017 and 8 August 2017 to refuse his human rights claims.

## **Background**

3. SK has been in the UK continuously since December 2003, when he claimed asylum. This claim was refused and he became appeals rights exhausted in November 2004. He remained in the UK without leave until he was granted a residence card on 19 November 2009 following his marriage to an EEA citizen.
4. On 4 February 2013 he was sentenced to 12 months imprisonment having been convicted of two offences: using a false UK residence permit and benefit fraud in the sum of £17,383. He has not re-offended since that time.
5. SK's application for permanent residence was refused in two 2014 decisions and on 14 October 2015 a deportation order was signed against him. Thereafter, SK made further submissions in support of a fresh asylum claim and his family life in the UK. These were refused on 19 July 2017. In that decision the SSHID noted at [24] that SK's claimed spouse at the time of making the fresh submissions, Ms Popikova, was interviewed by immigration officers and initially said that she did not know SK before saying that she did marry SK but she did this to help a friend and she was never in a relationship with SK.
6. SK made further submissions. These were refused in a supplementary letter dated 8 August 2017.

## **FTT decision under appeal**

7. The FTT accepted that SK has a genuine and subsisting relationship with his spouse, MK, and played an active parental role for both their biological child together, A, and MK's child from a previous relationship, B. The FTT concluded that deportation would effectively end these relationships and would be unduly harsh.

8. The FTT also found that the asylum and humanitarian claim failed. There has been no cross-appeal regarding the protection claim, and I need say no more about it.

### **Grounds of appeal**

9. The grounds of appeal are not numbered or clearly set out but appear to be these:
  - (1) The finding that SK is in a genuine relationship with MK is inadequately reasoned.
  - (2) The FTT failed to give any weight to the public interest or the principle that it will be rare for the best interests of children to outweigh the strong public interest in deporting foreign criminals (AJ (Zimbabwe) v SSHD [2016] EWCA Civ 1012), and the balancing exercise is one dimensional.
  - (3) The FTT failed to provide any reasons why it would be unduly harsh for MK to return to Iraq with SK and the children, and to live there as a family unit.
  - (4) The FTT failed to provide reasons why it would be unduly harsh for the SK's family members to remain in the UK.
10. The SSHD was granted permission to appeal, on the basis of these grounds, by FTT Judge Bird in a decision dated 13 October 2017.

### **Hearing**

11. Mr McVeety relied upon the grounds of appeal, and invited me to allow the SSHD's appeal by setting aside the decision of the First-tier Tribunal and remitting the appeal to the First-tier Tribunal. Mr Jagadeshan relied upon a helpful skeleton argument / rule 24 response.
12. After hearing from both representatives I gave my decision that the FTT had erred in law, for reasons which I now provide.

### **Legal framework**

13. Part 5A of the Nationality, Immigration and Asylum Act 2002, in so far as it is relevant to this case states as follows;

**"PART 5A ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS**

**117A Application of this Part**

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts – (a) breaches a person's right to respect for private and family life under Article 8, and (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the 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.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

**117B Article 8: public interest considerations applicable in all cases**

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English – (a) are less of a burden on taxpayers, and (b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons – (a) are not a burden on taxpayers, and (b) are better able to integrate into society.

(4) Little weight should be given to – (a) a private life, or (b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6)...

**117C Article 8: additional considerations in cases involving foreign criminals**

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) 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.

(4) Exception 1...

(5) 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."

**Error of law discussion**

*(1) Findings of fact / reasons*

14. The SSHD clearly disputed the genuineness of the relationship between SK and MK. The summary of the submissions before the FT at [14] makes it clear that the SSHD advanced prima facie compelling reasons to doubt the relationship: (i) SK has previously entered a sham marriage; (ii) MK has

distanced herself from her witness statement and there was inconsistent evidence regarding the marriage.

15. The FTT's findings of fact commence at [17]. Reference is made therein to SK having entered into a marriage with Ms Papikova, and having obtained an EEA residence card following this. At [23] the FTT notes that SK divorced Ms Popikova in July 2016 and only relies upon his family life with MK such that the relationship with Ms Popikova "*is not, therefore relevant to family life considerations in this appeal as it has ended*". The FTT says no more about the relationship after this.
16. In my judgment it was an error of law to fail to resolve the clear submission that the appellant had entered into a marriage of convenience. If proven, such a finding is relevant to SK's general credibility; SK's approach to relationships in the past and the deception he is prepared to employ; a clearer picture of his immigration history; the wider countervailing considerations to be taken into account together with criminal and immigration history when undertaking the requisite balancing exercise.
17. It follows that in failing to make a finding on an issue clearly relevant to the SSHD's case and in any event the public interest considerations, the FTT has erred in law, and failed to provide adequate reasons for rejecting the SSHD's case on the genuineness of SK's current relationship.
18. I entirely accept as Mr Jagadeshan submitted that the FTT's finding that SK played an active parental role for A and B is a significant factor and an essential part of the reasoning provided. The FTT also accepted there was documentary evidence confirming that the couple resided together. These matters lend powerful support to the claim that the relationship is genuine. However, the FTT was still obliged to address the alleged marriage of convenience and the failure to provide any reasoning whatsoever regarding this serious allegation, adversely infects the overall finding that the relationship is genuine.

*(2) Approach to the unduly harsh test*

19. In MM (Uganda) v SSHD [2016] EWCA Civ 617 the Court of Appeal held that the more pressing the public interest in removal, the harder it was to show its effects would be unduly harsh. It is clear from MM that it is not appropriate to consider the unduly harsh questions solely from the perspective of the impact which deportation would be likely to have upon the children or partner involved and all the relevant countervailing considerations, including criminal and immigration history must be considered.
20. The FTT reached the following conclusion at [28]:

“Having taken account of all the circumstances in this case, including his criminal history and his immigration history, I very marginally incline to finding that the deportation of the appellant would be unduly harsh.”

21. Even when the decision is read as a whole, the FTT’s approach to the unduly harsh question posed at section 117C(5) is flawed. First, whilst the FTT took into account SK’s criminal and immigration history and properly directed itself that very considerable weight must be attributed to the public interest at [27], the FTT failed to take into account and make a finding upon an important aspect of SK’s immigration history: the allegation that he entered into and relied upon a marriage of convenience.
22. Second, the conclusion that SK’s deportation would be unduly harsh fails to engage with the wording in section 117C(5). It is simply not known whether the FTT regarded the effect of SK’s deportation, to be unduly harsh on his partner or child or step-child, or all three.
23. Third, the FTT has entirely failed to address the section 117B considerations, and in particular section 117B(4) – see section 117A(2): in considering the public interest question, the court or tribunal must (in particular) have regard in all cases, to the considerations listed in section 117B. It is undisputed that SK was in the UK unlawfully when he established his relationship with MK, and as such little weight must be given to that relationship.
24. Fourth, the FTT noted MK’s intention to remain in the UK with her children if SK is deported at [25] but wholly failed to consider whether that was a reasonable approach to adopt or whether notwithstanding that approach, there would be an absence of insurmountable obstacles in establishing family life in Iraq. MK is a British citizen, as are her children. However, MK is SK’s cousin, and comes from the same part of Iraq as him - Sulaymaniya. This is acknowledged to be a relatively safe part of Iraq for those who previously resided there. As recorded at [24], MK had visited Iraq in the relatively recent past. I note that there was a dispute regarding B’s relationship with his biological father in the UK, and this may have been an obstacle to family life in Iraq, however the FTT made no clear findings on this, simply noting at [25] that there was no evidence B’s father was living in the UK and visiting B every six weeks as claimed.
25. Finally, it is difficult to understand which particular circumstances were considered sufficient to “marginally incline” to finding in SK’s favour. After all the FTT did not consider the deleterious effect upon A coupled with the low risk of offending to be sufficient (see [28]) and this is a case in which very considerable weight was accorded to SK’s criminal history, and on any view his immigration history was poor.

## **Disposal**

26. I have had regard to para 7.2 of the relevant *Senior President's Practice Statement* and the nature and extent of the factual findings required in remaking the decision, and I have decided that this is an appropriate case to remit to the FTT.

## **Decision**

27. The FTT decision involved the making of a material error of law. Its decision cannot stand and is set aside.
28. The appeal shall be remade by the FTT de novo.

## **Directions**

- (1) When listing the hearing before the First-tier Tribunal it would be helpful to take Mr Jagadeshm's availability into account. Kurdish Sorani interpreter necessary.
- (2) SK's solicitors shall file and serve all evidence relied upon in one comprehensive, indexed and paginated bundle 28 days before the FTT hearing, and a skeleton argument 21 days before the hearing. These documents shall be addressed for Mr McVeety's attention.
- (3) The SSHD shall file and serve a position statement outlining her updated position seven days before the FTT hearing.

Signed:

**Ms M. Plimmer**  
**Judge of the Upper Tribunal**

Date:

**22 March 2018**