Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/16571/2019

THE IMMIGRATION ACTS

Heard at Field House
On 22 October 2020

Decision & Reasons Promulgated
On 10 November 2020

Before

UPPER TRIBUNAL JUDGE SHERIDAN

Between

MR DAVINDER [S]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr D Bazini, Counsel instructed by JJ Law Chambers
For the Respondent: Mr T Lindsay, Senior Home Office Presenting Officer

This has been a remote hearing which has been consented to by the parties. The form of remote hearing was video by Skype (V). A face to face hearing was not held because it was not practicable and all issues could be determined in a remote hearing. I did not experience any difficulties and neither party expressed any concern with the process.

DECISION AND REASONS

1. The appellant is a citizen of India who resists deportation primarily on the basis of his relationship with his British national children, one of whom has been diagnosed as autistic.

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2. He is appealing against a decision of Judge of the First-tier Tribunal Baldwin ("the judge") promulgated on 14 February 2020 in which it was found that (a) he is a persistent offender within the meaning of s117D(2)(iii) of the Nationality Immigration and Asylum Act 2002 ("the 2002 Act"); (b) his deportation would not be unduly harsh for his wife and children under s117C(5) of the 2002 Act; and (c) there are not very compelling circumstances under s117C(6) of the 2002 Act.

3. On the question of whether it would be unduly harsh for the appellant's eldest son, who has been diagnosed with autism, to be separated from the appellant as a consequence of the deportation, the judge stated at paragraph 31 of the decision:

> "For the elder boy, the impact may be harsh, but large numbers of children have special needs of one kind or another and his needs have been identified and are now being addressed within the community and in a mainstream school. Even for him, I conclude, the impact of his father's deportation will not be unduly harsh."

4. Mr Bazini, in the grounds of appeal and in his oral submissions, made a range of arguments. However, it is not necessary to consider all of them because there is one clear error in the decision. The error is that, as is apparent from paragraph 31, the judge relied on a comparator with other children with special needs to assess whether the effect of deportation on the appellant's autistic son, which he accepted would be harsh, reached the threshold of being "unduly harsh". In so doing, the judge fell into the error identified in *HA (Iraq) v SSHD* [2020] EWCA Civ 1176, where it was described as "dangerous" to compare an individual to "some commonly encountered pattern". At paragraph 56 Underhill LJ stated:

> "The test under Section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold acceptable level. It is not necessarily wrong to describe that as an ordinary level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, ordinary is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach, see para. 52 above. There is no reason in principle why cases of undue harshness may not occur quite commonly. Secondly, if Tribunals treat the essential question as being is this level of harshness out of the ordinary? they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of ordinariness."

5. Mr Lindsay argued that the judge properly considered the particular circumstances of the appellant's eldest child. He noted, for example, that at paragraph 15 of the decision the judge considered his statutory care plan and specific needs. That may be the case but the error is not that the judge failed to properly consider the evidence about the appellant's eldest son, it is that when determining whether the unduly harsh threshold was met the judge gave weight to whether the situation fit a

commonly encountered pattern (in this case, provision for disabled children) in a way that is inconsistent with *HA (Iraq).*

6. This error, although understandable given that *HA(Iraq)* had not been promulgated when the decision was made, is clearly material; and it renders the decision unsafe.

7. Mr Lindsay and Mr Bazini disagreed on whether any findings of fact in the decision of the First-tier Tribunal should be preserved for the remaking of the decision. Mr Bazini argued that the decision contains findings that are unreasonable and inappropriate, and which undermine the assessment of the evidence as a whole. He pointed to paragraph 25 where it appears that the judge attached weight to the demeanour of the appellant's children during the hearing, as he stated that they showed "little apparent interest in their father who was seated alongside them". I agree with Mr Bazini that it is unclear why the judge considered the behaviour of the children during the hearing relevant or in any way indicative of the relationship between them and the appellant. Mr Bazini also highlighted the judge's comment at paragraph 30, where it is stated that the appellant's wife "may still love him but she must surely know that he has most certainly not proved he loves her and his children enough to sort himself out…". I agree with Mr Bazini that this is speculative and is not a conclusion that can reasonably be inferred from the evidence. Mr Lindsay submitted that I should be slow to interfere with findings of fact and that it could not be said that the judge's findings were perverse. Although for the most part the judge made sustainable and reasonable findings, the findings at paragraphs 25 and 30 identified by Mr Bazini and referred to above in this paragraph are not.

8. The remaking of the decision will require, inter alia, careful consideration to be given to (preferably, up-to-date) evidence concerning the circumstances of (and the effect of the appellant's deportation on) each of the appellant's two children and his wife's daughter. Considering the matter in the round, and noting the problematic findings referred to above in paragraph 7 of this decision, I am in agreement with Mr Bazini that no findings of fact should be preserved. Given the extent of further fact-finding necessary, I also agree that the appeal should be remitted to the First-tier Tribunal to be heard afresh.

Notice of Decision

9. The decision of the First-tier Tribunal involved the making of an error of law and is set aside.

10. The appeal is remitted to the First-tier Tribunal to be heard afresh by a different judge. No findings of fact are preserved.

Signed

D. Sheridan

Upper Tribunal Judge Sheridan 29 October 2020