IAC-AH-CJ/CO/KRL-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/15988/2017 (V)**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 7 April 2021	**On 6 May 2021**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

JSA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr D Bazini, Counsel from JJ Law Chambers
For the Respondent: Mr T Melvin, Home Office Presenting Officer

DECISION AND REASONS

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

The background

1. The Appellant is a citizen of India. His date of birth is 27 December 1968. He married an Indian national in 1994. They have two adult children; a daughter, J, born on 29 October 1996 and a son, B, born on 17 February 2000. On 6 December 1998 the Appellant was issued with a tourist visa. He entered the UK using this visa. He made a claim for asylum on 22 June 1999. This was refused on 5 July 2000. He did not appeal this decision. He overstayed.

2. The Appellant's wife, SKA, (date of birth 23 March 1971), came to the UK on 13 January 2001 with the couple's two children on the pretext of visiting for two weeks. On 16 December 2004 the Appellant made an application for ILR. He was granted ILR exceptionally outside of the Rules on 22 May 2006. The rest of the family were granted ILR in line with him. The Appellant's wife and children were subsequently naturalised as British citizens.

3. On 10 July 2012 the Appellant was convicted at Southeast Suffolk Magistrates' Court on 79 counts of fraud, concerning the falsification of tachograph records. The offences were committed on various dates in 2010 during the Appellant's employment as a haulier. The Appellant told his offender manager that he had an outstanding credit card debt of about £50,000 which he was paying off in instalments and the falsification of the records was to enable him to work excessive hours in order to earn more money. On 9 August 2012 he was sentenced to eight months imprisonment. On 16 May 2012, when on bail for the offences, he committed the offence which triggered his liability to automatic deportation. On 29 July 2013 he was convicted at Ipswich Crown Court of causing death by dangerous driving. He was sentenced to a term of imprisonment of 42 months. When sentencing the Appellant at Ipswich Crown Court on 1 August 2013 the judge said as follows:

> "Your driving on 16thMay last year took the life of xxxx a young thirty-four year old wife and mother of a seven year old who was working here to support her family. That, of course, taking of her life, was never your intention. But an accident – and a serious one – was the overwhelming likely consequence of driving, as you did … You were driving forty-four tonnes of metal at fifty-five or fifty-six– miles an hour – ten or twelve percent above the limit for that vehicle – in good road conditions, good lighting and relatively light traffic. The speeding as such as it was, on its own, of course, as the jury were told, would never have warranted conviction, on its own, for dangerous driving. What is plain, [JSA], is that for a significant part of that journey on the A14, something like half of it, or close to it, you were on the telephone. Now, Bluetooth or not, hands-free or not, you were not concentrating on the road ahead travelling at fifty-five miles an hour in a forty-four tonne vehicle."

4. The Appellant was informed of his liability to deportation on 26 August 2013. A deportation order was signed on 20 January 2015. On 1 May 2015 he entered

immigration service detention following his release on licence. Immigration bail was granted on 15 May 2015 and the Appellant was released with reporting conditions. The initial decision to deport him made on 20 January 2015 envisaged that he would only be able to bring an appeal against deportation after he had left the country however following the judgment in R (Kiarie and Byndloss) v SSHD [2017] UKSC 42 a consent order was made and the decision to deport him was withdrawn.

The error of law hearing

5. A panel comprising the Honourable Lord Matthews sitting as a Judge of the Upper Tribunal Judge and Upper Tribunal Judge McWilliam found that the First-tier Tribunal Judge made an error of law and set aside his decision dismissing the Appellant's appeal. The panel found that grounds 1 and 2 were made out. The relevant parts of the decision read as follows.

> "14. In presenting the appeal Mr Bazini drew our attention to paragraph 71 of the determination which is in the following terms:
>
> > 'But even if I am wrong to find that both questions arising under paragraph 399(b) must be answered in the affirmative for Exception 2 to be made out, I do not consider that the criteria in 399(b)(iii) are made out, having regard to the guidance given in KO (Nigeria) v SSHD [2018] UKSC 53 and RA (Iraq) as to the unduly harsh test. One is looking for a degree of harshness going beyond what would be necessarily involved for any qualifying partner faced with the deportation of their spouse. The expression 'unduly harsh' sets a high threshold. It is not enough for the outcome to be severe or bleak. SKA coped with the separation from her husband when he was in prison. Although she continues to suffer from panic attacks and to break down in tears (as she did both at the hearing and at the meeting with Dr Balu), on a holistic assessment she continues to display reasonable resilience and adequate coping skills. Where (sic) this is not the case, she would not be able to work to provide for the family. She also adequately coped with (B)'s distress when the appellant's deportation appeared to be imminent. She stopped (B) from continuing to destroy furnishings with a knife, and (B) did not at any point attempt self-harm. SKA was not mentally broken in 2015, and I am not persuaded that she is mentally broken now. I am also not persuaded that if she chose to remain in the UK, rather than to accompany her husband to India, she would suffer a mental breakdown.'
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> 15. Paragraph 77 is in the following terms:
>
> > 'I accept that (B) is emotionally dependent on his father, but I do not accept that there is a real risk of him self-harming, still less attempting to commit suicide, if his father is removed. He did neither of these things in the past, when he was younger and more vulnerable, and when he had not had the benefit of receiving a course of therapy.'
>
> 16. Paragraph 78 suggests that B could go to India with his father and in paragraph 79 It is suggested that eventually he will develop sufficient maturity and confidence to be able to lead a life independently from his father.
>
> 17. Mr Bazini submitted that the treatment of the medical evidence was deficient. It had not been challenged but had been rejected without adequate reasons having been given. As Mr Melvin in due course pointed out, the determination at paragraphs 24 to 40 sets out

the salient details of some of the medical evidence but by no means sets out all of it. However, setting out the evidence is not the same as reaching conclusions upon it and giving reasons for those conclusions. Mr Bazini took us through a number of pages in the medical evidence relating both to B and to his mother and it is fair to say that the nature of the problems set out there and the opinions and recommendations are, or might be thought to be, significant. We do not wish to say much more about it at this stage since the decision will have to be remade,

18. The medical evidence forms the main thrust of the appellant's case. It was unchallenged and it was appropriate, if it was going to be rejected, that the judge should give proper reasons for that. On the face of it, at least, there do appear to be significant concerns for the mental health of both B and his mother in the event that the appellant is deported. It is true to say, as does Mr Melvin, that the other side of the equation is not properly addressed, namely what might be the effect on the family if they all went to India.

19. Given the failure to address the medical evidence, we do not think it appropriate simply to make a finding that the family could go to India. Those circumstances should be reconsidered in the context of a reasoned discussion of the medical evidence.

20. Mr Melvin argued that the judge had fully understood the medical evidence and had made findings that were open to him. It is not apparent to us that he did understand it and, though the findings were certainly open to him, they were not adequately reasoned. We consider, therefore, that Grounds 1 and 2 are made out and that the errors of law are material.

21. Ground 3 appears to us to be something of a makeweight. In paragraph 85 of his determination the judge said the following:

> 'In any event, the public interest in the appellant's deportation remains high simply on account of the seriousness of his index offending as reflected in the length of the sentence imposed.'

22. This followed three paragraphs, 82, 83 and 84 where the FtT accepted that the appellant's index offending was not deliberate in the sense of being premeditated and that he was genuinely remorseful. He went on to say that the Tribunal in MS held that the effect of Section 117C(6) is that the court or Tribunal must take into account the seriousness of the particular offence for which the foreign criminal was convicted, together with any other public interest considerations. He also accepted that the public interest in his deportation was not fortified by the appellant presenting a significant risk of reoffending. He noted what was said by the Court of Appeal in AS (Pakistan) v Secretary of State for the Home Department [2008] EWCA Civ 1118. That was also a case of causing death by dangerous driving and in paragraph 22 the court said the following:

> 'In the present case the appellant had been formally assessed as presenting a low risk of re-offending, so the public interest in his deportation lies very much in its deterrent effect. However, I think there is some force in Miss Knight's submission that in a case of this kind deterrence is of less weight than in cases of serious and deliberate wrongdoing. At all events, these are matters that must be taken into account in deciding whether the interference with private and family life resulting from deportation is proportionate to the objects sought to be achieved by it.'

23. Mr Bazini said that paragraph 85 was in conflict with AS and showed that the FtT put too much weight on the nature of the offence.

24. We do not agree. At paragraph 84 he said the following:

> 'With regard to deterrence, while I note what was said by the Court of Appeal in AS (Pakistan), I do not consider that the court was ruling that deterrence cannot be a significant public interest factor in dangerous driving cases, as distinct from holding that there is 'some force' in the submission that deterrence is of less weight in a case of dangerous driving than in a case of deliberate wrongdoing. I consider that it is appropriate to give some weight to the public interest in deterrence as it is in the public interest to deter foreign nationals from engaging in reckless behaviour which endangers life by getting them to understand that, whatever the other consequences, one consequence of engaging in reckless behaviour which leads to a loss of life may well be deportation.'

25. As we have pointed out, in paragraph 85 the judge found that the public interest in the appellant's deportation remained high simply on account of the seriousness of the index offending as reflected in the length of the sentence imposed. We do not consider that this is materially in conflict with what is said in AS. Mr Melvin suggested that AS was now a doubtful authority in view of its age and the new statutory provisions. We are inclined to agree with Mr Bazini that this still represents the law. We accept, however, that what the Court of Appeal said in AS must now be considered through the lens of the statutory provisions which tell us that the deportation of a foreign criminal is in the public interest. What the judge said at [85] is entirely consistent with s.117C (2). We find that the approach taken by the judge was in any event consistent with AS. The FtT did not overstate the interest in deportation in the appellant's case."

6. The Appellant, SKA, J, B and Dr Balu attended the hearing before me. They gave evidence. They were cross-examined by Ms Cunha.

The Legislative framework

7. By section 3(5)(a) of the Immigration Act 1971, a person who is not a British citizen is liable to deportation from the United Kingdom if the Secretary of State deems his deportation to be conducive to the public good.

8. Provision is made for the automatic deportation of foreign criminals by section 32 of UK Borders Act 2007, which so far as is material for present purposes states:

> "**32 Automatic deportation**
>
> (1) In this section "foreign criminal" means a person –
>
> (a) who is not a British Citizen,
>
> (b) who is convicted in the United Kingdom of an offence, and
>
> (c) to whom Condition 1 or 2 applies.
>
> (2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
>
> …
>
> (4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33)."

9. Section 32 accordingly requires the deportation of a foreign criminal who has been sentenced to a term of at least 12 months' imprisonment, as PG was, but is subject to the exceptions set out in section 33 of the Act, which so far as material provides:

> "**33 Exceptions**
>
> (1) Section 32(4) and (5) –
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below),
>
> …
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) a person's Convention rights, …"

10. In this appeal, it is contended that deportation of the Appellant would result in breach of his rights, under article 8 of the Convention, which provides:

> "(1) Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> (2) There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic wellbeing of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

11. With effect from 28th July 2014 part 5A of Nationality, Immigration and Asylum Act 2002 has made specific provision in relation to the consideration of article 8 in circumstances such as the present. Section117C provides:-

> (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 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

12. Also with effect from 28th July 2014, the Immigration Rules were amended to make provision for consideration of article 8 claims by persons liable to deportation. So far as is material, the amended Rules provide:

"398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

…

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK

The resumed hearing

13. I was not greatly assisted by the parties. The written submissions and skeleton arguments were out of date. Ms Cunha relied on Mr Lindsay's submissions which were made before (and therefore did not take into account) Dr Balu's most recent evidence. Mr Bazini cited a number of cases in oral submissions which were not raised in his written submissions. He told me that a file of authorities had been sent to the Tribunal. This was not before me. The solicitors had sent a file to the UT containing only HA (Iraq) & RA (Iraq) v SSHD [2018] EWCA Civ 1225. Some of the cases cited by the parties did not assist. They simply reinforced the need for a full evaluative assessment of the facts. From the limited help given to me by the parties, I have attempted to summarise succinctly the diffuse submissions contained in the various documents together with oral submissions. Similarly, I have attempted to summarise relevant case law. The witnesses made a number of witness statements. There had been no attempt to produce a single up to date witness statement for each. I have summarised their evidence, as best I can.

Case law

14. I summarise the relevant law from the following cases; KO (Nigeria) v SSHD [2018] UKSC 53, HA & RA (Iraq) v SSHD (where the Court of Appeal clarified Lord Carnwath's assessment of unduly harsh in KO), [2016] EWCA Civ 662, NA (Pakistan) v SSHD, GM (Sri Lanka) v SSHD [2019] EWCA Civ 1630, Akinyemi v SSHD [2019] EWCA Civ 2098, CI (Nigeria) v SSHD EWCA Civ 2027 and SSHD v Garzon [2018] EWCA Civ 1225.

The unduly harsh test (s.117C (5))

i. The statutory test of unduly harsh has an elevated nature but it is not as high as very compelling circumstances in s117C (6). The degree of impact required to meet the test sits between the "low level" which applies in non-deportation cases and the high level required applying s117 C (6). Tribunals should make an informed evaluative assessment.

ii. The test requires an appellant to establish a degree of hardship going beyond a threshold "acceptable level"

iii. With reference to the "nothing out of the ordinary" this should not be used to mean rare. There is nothing in principle why cases of "undue harshness" may not occur quite commonly

iv. Lord Carnwath's approval of the self direction by the UT in MK (Sierra Leone) v SSHD [2015] UKUT 223 is to be followed.

Socially and culturally integrated (s. 117C (4))

v. Criminal offending and time spent in prison are in principle relevant to whether a foreign criminal is socially and culturally integrated in the UK; in so far as that indicates that a person concerned lacks legitimate social and cultural ties in the UK. The impact will depend on the nature and frequency of offending and how deeply the individual was socially and culturally integrated in the UK to begin with

Very compelling circumstances (s. 117C (6))

vi. There is no "exceptionality" requirement but cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life such as aging parents in poor health or the natural love between parents and children will not be sufficient. It is necessary to carry out a full proportionality assessment if the Appellant cannot meet the requirements in s117C (5). In conducting this two stage assessment, the Tribunal does not have to "cudgel its brains" into making a definitive finding in respect of the first stage where there is a clear answer in the Appellant's favour. "Very" imports a very high threshold. "Compelling" means circumstances which have a powerful, irresistible and convincing effect.

vii. The test for an assessment outside of the IR is whether a "fair balance" is struck between the competing public and private interests. Reference to "exceptionality" must be construed as NOT imposing any incremental requirement over and above that arising out of the application of the proportionality test. The list of factors to be considered is not closed.

viii. The public interest is flexible and moveable: it is not a fixed interest. The strength of the public interest will be affected by factors in the individual case.

s.117B

ix. The little weight provision in section 117B (4) only applied to private life or family life formed when a person was in the UK unlawfully. It does not apply when family life was created during a precarious residence. The presence of someone here with ILR is not unlawful.

Public revulsion as a facet of the public interest

x. Paragraph [70] of Lord Wilson's judgment in Hesham Ali v SSHD [2016] UKSC 60 expressed regret of his reference to society's revulsion in OH (Serbia) v Secretary of State for the Home Department [2008] EWCA Civ 694, [2009] INLR 109, on reflection, too emotive a concept to figure in this analysis. However, he maintained that he was entitled to refer to the importance of public confidence determination of these issues and that courts 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.

The Appellant's evidence

15. The Appellant's adopted his witness statements as evidence-in- chief. He was cross examined.

16. The Appellant first arrived here in November 1998. He lives with his wife and their adult children. The Appellant's wife has health problems. Before the incident he was happy here working hard to keep his family. The Appellant is currently on immigration bail. His licence expired on 31 January 2017.

17. He is sorry for the offence that he committed. It is seven years since the incident but not a day goes by without him thinking about it. He was released from prison in 2015. He tried contacting the victim's family several times in order to ask for forgiveness. He tried to contact the family through the police. He wanted to visit the victim's grave. After the accident the Appellant suffered depression and stress. He asks God for forgiveness. Whilst he was in prison he taught English and acted as a mentor.

18. The Appellant's daughter, J, was aged 16 at the time of the accident and as a result attended Hounslow Youth Counselling under the NHS from 2015 to 2016. She was depressed and had suicidal tendencies. She had an emotional breakdown. She is completely dependent on the Appellant. As a result of impending deportation her

mental health has deteriorated and the Appellant describes her as "very disturbed". She benefits from the Appellant's support. Whilst he was in prison her school work deteriorated.

19. The Appellant's son, B, was aged 13 at the time of the accident. He suffered the most as a result and still does. Whilst the Appellant was absent he became withdrawn and depressed. He stopped gaining weight and started to wet the bed. He has tried to kill himself and was taken to West Middlesex Hospital on 10 November 2015. He was admitted for self-harm. He was taken to the GP on 9 November 2015 and was assessed as having suicidal tendencies. He was put under the observation of Child and Adolescent Mental Health Services (CAMHS). The teachers at school were very concerned about him. He has been described by a psychiatrist as "frail" and having failed to thrive emotionally and physically.

20. He has nothing and he would be homeless in India. His marriage is interfaith and not accepted by his parents. The Appellant does not know whether he would take his family back to India with him. He cannot live without them but feels guilty and does not want to ruin and uproot their lives. When his children visited India when they were younger they hated it. He could not put his wife through the trauma of returning. She has become mentally and physically weak over the years.

SKA's evidence

21. SKA adopted her witness statements as evidence –in chief and was cross examined. The family live with the guilt of the Appellant's driving offence. Since then the family has collapsed. She was a single parent whilst the Appellant was in prison and had to support her family both morally and financially. However, they needed their father. His absence caused her major stress and her health deteriorated. She developed hypertension, high blood pressure, anxiety and depression.

22. She is very distressed at the news of his possible deportation. She cannot envisage life without the Appellant. Since he has returned to the home he is able to share parenting and the children now have a father figure. His relationship with the children is special. As a result of the accident their son's health and education deteriorated. Their daughter became depressed.

23. The Appellant is now back in the family home having completed a 21 month custodial sentence. There has been a drastic change since he returned to the home, which is positive. The children have started to live again. A deportation will be a second punishment for the Appellant as he will be forced to live without his family. Since the Appellant has come out of prison, he has become very spiritual.

24. What she should do if the Appellant has to return to India is impossible to answer. Her family will be torn apart. If she takes B, his mental health will deteriorate. He will be with his father but he will be leaving behind the UK. He will not have any friends and he will have to leave college which "will kill him". J will lose her career, family and friends. She will become depressed. She cannot leave her children here and she could not ask them to follow her to India. There would be no support in

India. She married against the will of her family. She gave up her family for her husband.

25. She has a secure job in the UK. She has been employed for the past twelve years. The Appellant has for a long time been the main income source however the situation presently has prevented him from working. She has had to support the family which has depleted her mentally and physically. The Appellant has always been a good father. She needs her husband to help her parent the children.

B's evidence

26. B relied on his witness statements as his evidence-in-chief and was cross examined. He was aged 13 when his father went to prison and since then life has been very difficult. Not a day goes by when the family does not think about the victim of the accident and her family. The family go to the temple and pray for the victim. Before the Appellant went to prison life was perfect. He relies on his father for guidance. When the accident happened everything changed. He became depressed. He attempted suicide. He received counselling. Life was devastating when his father went to prison. Since his return everything has changed for the better. If he was to go to India he would consider this to be a punishment. He feels as if his life would end. He has no home, no friends and he would have to leave his degree course without completing it. The family cannot afford a home there and the quality of life would be less. The family would be starting from nothing.

27. He is in the second year of a degree in civil engineering with sustainability. It is an unusual course and he would not be able to do the exact degree in India. The best university in Mumbai does not compare to the UK course. He has already started using a student loan here. He has been through the education system here. He is a British citizen so he would not be able to apply for a student loan in India because he is not a citizen there. In any event he would not be able to guarantee a loan.

28. Remaining here without his father would worsen his mental health. Just thinking about it gives him panic attacks and makes him feel anxious. Separation would kill him. His father is his role model and hero.

J's evidence

29. J adopted her witness statements as evidence- in – chief and was cross-examined. She was aged 16 when her father was sent to prison. She was confused and scared, having been extremely close to her father. It took a heavy toll mentally on her and her family. She is dependent on her father for advice and guidance. Everything has improved since he returned to the home. She will fall back into depression should he be deported. Should she go back to India it would jeopardise her career any everything that she has worked hard for. She now has a job in Canary Wharf for which she worked extremely hard and underwent three interviews. She has passed her probation period of six months and is a member of one of the biggest news publishers in the UK. She has no experience of the media industry in India and would struggle to communicate there. She does not know how she could remain

here without her father who has been there since the day she was born. Her feelings about India echo those of her brothers.

Dr Balu's evidence

30. Dr Balu prepared three reports. He attended the hearing and gave oral evidence. His first report is dated of the report is 3 June 2019. He prepared an addendum report dated 28 February 2020. He has prepared a third report of 31 March 2021.

31. Dr Balu is a consultant psychiatrist. He interviewed and examined the family on 1 June 2019. He spent three hours reviewing the documents and witness statements of all the members of the family and 90 minutes interviewing B and speaking to his family. Whilst preparing the report he had sight of a report of 12 November 2015 from a Consultant Child and Adolescent Psychiatrist, Dr Joglekar. A CAMHS Tier 3 Discharge Summary Letter of 30 September 2016 and letters from Feltham Community College and Sixth Form about access arrangements for examinations and a letter from Dr Raj K Singh, GP Principal at St Singh's Surgery which covers the medical history of the whole family.

32. He described an incident when B learnt of the possibility of his father being deported and he took a knife in anger and damaged some of the furnishings at home. He records suicidal ideation and self-harm attempts upon hearing this and he was taken to West Middlesex Hospital. He was found to be actively suicidal and kept in hospital overnight following an attempt by the Home Office to deport the Appellant in November 2015. However the Appellant was successful in obtaining a stay and B was discharged the following day.

33. Dr Balu is of the opinion that B's symptoms fulfil the diagnostic criteria for depressive disorder with moderate to severe depression without psychotic symptoms. It is his opinion that his symptoms are suggestive of depressive disorder. If his father was separated from the family, the consequences could be grave. There is a possibility of attempted suicide. The whole family is suffering, the Appellant's wife is described as "a very broken woman mentally and doesn't seem to have the emotional strength to support herself, let alone support her children. She suffers from panic attacks and I could see her children…getting distressed and tearful when seeing her suffer". Dr Balu is not confident that she would be able to care for B should his condition deteriorate. Any psychological or medical intervention will have diminished benefits if the fear of separation continues. His psychological condition would deteriorate significantly and the probability of him recovering would reduce. In his opinion it is "imperative for his psychological welfare that he should be assured strongly that he will not be separated from his father permanently." Further in Dr Balu's opinion "living with his father and his emotional support would be very important for his recovery and maintenance of his present high-level functioning". Continued uncertainty about the future of the Appellant's immigration status is not helping B's mental state and the fear of separation.

34. In the addendum report Dr Balu states that SKA has suffered from severe anxiety and panic attacks for several years and her mental health has worsened. She

collapsed with loss of consciousness and was admitted to the local hospital on 15 February 2020. She presented with an abnormal ECG possibly because of loss of blood flow to certain parts of the heart or enlargement of the heart muscle.

35. When she was seen by Dr Balu she was distressed and tearful. In Dr Balu's opinion her mental health condition and panic attacks have been triggered by the fact that she could be forcibly separated from her husband. He states that the difficult family circumstances worsen her condition "and can cause irreversible harm". He states that her mental state is affecting her physical health. In the event of separation she will undoubtedly suffer more harm, intense anxiety and panic attacks will worsen. Chronic anxiety and depression would be the likely consequences.

36. With respect of relocation, Dr Balu refers to her having no support in India because her family have rejected her as a result of marriage with someone from another religion. Having a mental health condition is a taboo in India and a sign of weakness. She will feel "uncomfortable and unsupported" and that this is likely to have a profound negative effect on her mental health. A forced move would make her mental condition significantly worse and get in the way of her recovery. She will not feel accepted and supported which is very important for recovery.

37. Should B be forced to relocate to India he would not be able to pursue his choice of education and career. He would lose everything he has worked hard for. The sense of loss and limited career options will cause mental anguish and stress. He has a history of mental health issues which also led him to have suicidal thoughts. Any further sense of loss and distress could cause more harm to his mental wellbeing and trigger self-harm thoughts. He was extremely distressed to the point of feeling suicidal when his father was taken into custody. They are close. It is likely that he "will not be able to function to his best abilities if he remained in the UK without his father". He will certainly suffer deterioration of his mental health as evident by his previous deterioration when his father was in prison.

38. In respect of J she is similarly close to her father. Her hard work has managed to land her a "dream job" in a major UK media industry. She would not be able to secure a similar job on relocation to India with a similar salary package. She would not be able to adjust to the new work culture. She does not have any social support. She would find it difficult to integrate. It would undoubtedly place severe strain on her mental health. There would be a sense of loss and limited future career options would cause mental anguish and distress.

39. She witnessed her mother go through severe stress and her brother have suicidal thoughts when her father went to prison and this has made her very anxious and disturbed. She almost has a post-traumatic stress type response when she has to recall the past. She is very likely to develop anxiety disorder.

40. Dr Balu confirmed that when he originally assessed the Appellant and his family he had before him evidence relating to the CAMHS referral. Dr Balu's evidence is that B's condition has not improved in the last three years.

41. Dr Balu prepared the third report when he had sight of the family's medical notes. He concluded that in the light of them it was not necessary to re-examine the family and that his previous conclusions remained valid. He adds that SKA has needed emergency care at A &E in March 2021 and is suffering from possible heart failure. He expressed agreement with the Appellant's GP that stress, depression and the uncertainty of the family's future contributed towards deterioration of the Appellant's diabetes. He notes that the family members have had several contacts with the GP and concluded that the medical conditions of the family have not improved in the last three years and have deteriorated to a certain extent. The Appellant's presence has been reassuring to the family which has coped reasonably with his support. Both the children are dependent on him. Any adverse decision will very likely result in a deterioration of SKA's health in the light of her mental and physical vulnerability.

42. The Appellant has diabetes. He is not a specialist in diabetes but believes that poor mental health can impact on this. He confirmed that the impact of deportation will be deterioration in the health of the family. The Appellant's presence is a protective factor although they would be able to emotionally support each other if they were to return together to India it would a huge shock and the environment would impact on their health. The family is used to a certain way of life. There are environmental factors which would destabilise their psychological wellbeing.

Submissions

43. Ms Cunha relied on Mr T Lindsay's skeleton argument of 12 January 2021 and those of Mr Melvin of 2 March 2020. This was not particularly helpful as much of what was in the former is repeated in the latter. Both predate the latest report from Dr Balu. Ms Cunha said that she also relied also on the decision letter. I will attempt to summarise the main points to accurately set out the Respondent's case.

44. It is argued that no weight should be attached to the evidence of Dr Balu. He did not have before him medical notes pertaining to the family and with reference to paragraphs 10.10 and 10.11 of the Practice Directions of the Immigration and Asylum Chambers of the First-tier Tribunal and Upper Tribunal. Moreover, the expert was asked by the Appellant's solicitors to address "the detrimental effect on family members". This detracts from the weight that should attach to its conclusions. It is submitted that Dr Balu exceeded his remit in purporting to give evidence regarding conditions in India. This fell outside his expertise (paragraph 10.6 of the Practice Direction). Any further evidence from Dr Balu should include full GP records for the Appellant's family, including for the period March 2017 to date.

45. Ms Cunha did not, however, seek to persuade me not to attach weight to Dr Balu's evidence, despite indicating she relied on Mr Lindsay's skeleton argument. She urged me to consider the medical evidence in the round. However, she said that Dr Balu's findings were based on what he was told by the Appellant.

46. The family is anxious and they have exaggerated. It would not be unduly harsh for the family to return to India or for them to be separated from the Appellant.

47. When B was aged 14 he was clearly upset by the prospect of removal of his father. He underwent counselling (CBT and DBT) for low mood and suicidal thoughts. He was discharged from CAMHS in September 2016. The team were satisfied that the immediate risk was low and that his father was the main protective factor.

48. There is little in the way of medical evidence of further treatment of B between the discharge from CAMHS and the further psychiatric report of Dr Balu produced for the hearing in June 2019. He is now an adult and a student. Removal of the Appellant would not present a serious risk of suicide self-harm that would show compelling circumstances or undue harshness. Dr Balu has not adequately considered that B maturity and that he was successfully treated by Mental Health Services. B evidence does not support that he has suicidal ideation as Dr Balu states. The family can use Skype and B will be able to access the support of his mother, sister, university and support services within the NHS. It is not accepted that the Appellant's removal would create a situation whereby B would not be able to cope.

49. In respect of the Appellant's diabetes and the evidence of Dr Balu, Ms Cunha submitted that Dr Balu's evidence is unsupported by any academic analysis about the impact of mental health on diabetes.

50. SKA coped adequately whilst the Appellant was in prison when the children were younger. She is in stable employment. J is working and B is studying. It is understandable that the Appellant's wife is anxious about her husband's relocation but this does not amount to deportation being unduly harsh. It may be unreasonable and difficult but it is not unduly harsh. It would not be unduly harsh for her to return with the Appellant to India. The Appellant and his wife married in 1994 and spent seven years of their lives together in India where the Appellant had a job. There is no reason why B could not relocate to India with his father and attend a university course there.

51. In respect of J, when her father was in prison in 2013 (when she was aged 16), she did not appear to have needed any counselling or mental health treatment. She went on to complete a university degree and obtain employment in publishing. She now works full-time and assists the family financially. The assertions of mental health difficulties in relation to J are not reflected in the medical evidence.

52. Neither B nor J has been medicated. Neither has counselling. The involvement of CAMHS has ceased. Both have managed to successfully educate themselves.

53. Mr Bazini relied on his skeleton argument of 2 March 2020. In addition he made oral submissions.

54. In respect of the evidence of Dr Balu, in respect of his first reports, he had before him (AB, page 165) a report from Dr Joglekar, a consultant child and adolescent psychiatrist of 12 November 2015. It is a new patient assessment summary relating

to B. Under the heading " History of presenting problems/current concerns" it is said that B has been deeply affected by "adverse life events over the past two and a half years". When finding out about the Appellant's deportation he "reportedly took a knife in anger and damaged some furnishings. SKA was concerned he may harm himself and managed to deescalate the situation acquiring a promise from B he would not repeat such behaviour again". There is a very long history from various sources of the Appellant's family's mental health problems which have continued for years.

55. It is submitted that the impact on the Appellant's wife of separation would be unduly harsh because of her medical problems. The medical evidence going back to at least 2013 is indicative of the serious mental health issues that the family suffered and continue to suffer in view of the Appellant's deportation with the impact of separation on her adult children.

56. It would be unduly harsh for the Appellant's wife to return with him to India. She has been here for a long time. She has a part-time job here. She has no family or connections in India. She would have to deal with her own mental health problems in addition to coping with separation from her son and daughter and their mental health problems. If they returned as a family to India, it would be unduly harsh on her. There is no home or support system in India. The children are completely integrated into the British way of life. Neither is able to speak or write Urdu/Punjabi. They are at pivotal times in their career and education. Relocation to India would be devastating to their prospects. The impact would be greater than normal given their existing mental health vulnerabilities. The adult children would lose fundamental life opportunities. They have no friends or effective family in India. They have significant student loans approaching £70,000 which they will not possibly be able to repay should they leave the UK.

57. The family was reunited for the first time in May 2015 when the Appellant was released. However, in October he was detained by the Home Office (he was then bailed). There was a decision made to remove the Appellant pursuant to the deportation order on 12 November 2015; however, he obtained a court injunction preventing his removal. As a result of the decision to remove, B felt "agitated and suicidal". He conveyed these thoughts to the staff at school and was taken to West Middlesex Hospital for an urgent assessment. Once there he was found to be "actively suicidal". He was a bit better when he learnt that the Home Office had cancelled the removal.

58. B became increasingly sad and isolated when his father was in prison. He would struggle to get to sleep and have nightmares. He was 13 at the time events began. He had no previous history of mental health problems however he started to wet the bed. However, this reduced and then stopped on his father's return home. B confirmed that he gets into states of agitation and at times feels lost. He described being very distressed and upset with his mind preoccupied with thoughts about losing his father. He confirmed that he would see no point carrying on without him. He described his closeness to his father.

59. The reason why counselling did not continue is because the Appellant returned to the family home to provide support to his family. Mr Bazini referred to B's oral evidence that he has "counselling" with his father every couple of weeks.

60. The Appellant is a supportive and loving husband and father and contributes hugely to the wellbeing of his family. If his wife accompanied him to India there would be immense anguish concerning leaving their adult children here. B's mental health would deteriorate. If she were to remain here she would lose the support of her husband and witness the deterioration of her daughter and son. The consequence of the impact of deportation is not the same as it would be on a person of good health. If he were to return alone, she would know that he would suffer there without a family or income.

61. Taking into account the evidence, there are very compelling circumstances. The Appellant was lawfully settled in the UK at the time of the offence. His wife and children are British and no doubt he could have become British if he had so applied. In any event there are very compelling circumstances. The Appellant has very strong private life here.

62. Mr Bazini referred me to the sentencing remarks of the judge and the offence committed which triggered deportation. The sentence was at the lowest range. The Appellant is extremely remorseful and is at low risk of reoffending. The sentencing judge described him as "a fundamentally decent man" and gave him a sentence at the low range of the guidelines. Mr Bazini referred me to communication from the Probation Service and the content and conclusions of the OASys assessment. He has always been employed when lawfully entitled to work.

Findings and reasons

63. Despite the focus by Ms Cunha on whether or not B has suicidal ideation at the date of the hearing, though a relevant factor, it is not determinative of this appeal which is not an appeal on Article 3 (health grounds).

64. I had the benefit of hearing oral evidence from the family members. I found them to be straight forward and credible. While it is the case that at the time of the assessment, Dr Balu did not have sight of the Appellant and his family's medical notes, he did have sight of crucial documentation significantly concerning CAMHS intervention which supported his conclusions. In addition, he updated his evidence having seen the medical notes. These have now been produced by the Appellant. Ms Cunha did not raise any issue about the content of the medical notes. She did not submit that they undermined Dr Balu's conclusions. I have considered them for myself and they would support Dr Balu's conclusions. The evidence undermines the Secretary of State's challenges to the report. Any defects in the presentation of the report do not undermine the conclusions.

65. I heard evidence from Dr Balu. His evidence was impressive. There was no meaningful challenge to it that was capable of materially undermining his conclusions as regard the health of the family.

66. I attach weigh to his evidence. I accept that the instructions from the solicitors are not very helpful. This is a criticism of the solicitors, however and not Dr Balu. Having considered his evidence, together with the evidence of medical notes including the evidence from CAMHs, this does not in my view undermine his conclusions. The challenge concerned Dr Balu not having seen the medical notes pertaining to the family; however, these are now available and support his conclusions. Ms Cunha having indicated that she relied on Mr Lindsay's written submissions (which urged the UT to attach no weight to Dr Balu's evidence) asked me to consider it in the round. This may be because the written submissions pre-date the medical notes having been produced. However, this was not made clear by Ms Cunha. Her approach to the expert evidence lacked clarity. In any event, there is medical evidence in the form of medical notes and correspondence from the family's GP which is consistent with the conclusions of Dr Balu. It is immaterial that Dr Balu is not an expert in diabetes which was a point raised by Ms Cunha. It is not challenged that the Appellant has diabetes and any connection between diabetes and stress in not material to the outcome of this appeal.

67. I turn my mind to the impact of deportation on the Appellant's wife in the context of her remaining here without him. She did not cope well when her husband was incarcerated. She has a number of health problems which are not necessarily serious (she is waiting for a cardiac MRI), but cumulatively they are problematic. Her mental health is poor. She is anxious. Part of her anxiety is caused by the uncertainty of the situation, but I find that the major cause is fear of the family being separated. I accept that this family as a whole and individually relies heavily on the Appellant. While B is now an adult and is studying, he still lives at home within the family unit and he is dependent emotionally on his father. I find that his mental health is fragile. On any account, he suffered terribly when his father was sent to prison. While he no longer has treatment, he is heavily reliant on his father. While he was not suicidal at the date of the hearing before me, I am satisfied that his mental health will deteriorate following his father's deportation. It is reasonably likely that another separation will cause him to have suicidal ideation. While he is not a child, he is still vulnerable and dependent.

68. Ms Cunha made the point that neither B nor his sister is currently seeking therapy, counselling or medication. While this is true, they have had the benefit of the Appellant having returned to the family. I do not find that this is indicative of the family being able to cope any better with separation than they did when their father was imprisoned and when he was first informed of the decision to deport him.

69. While I accept that B is now an adult, I find that his mental health is likely to deteriorate on separation of the family. J is more robust than B. She is, however, still heavily reliant on her father and the family unit remaining intact. The negative

consequences on them will exacerbate the Appellant's wife's mental health problems and her own sense of loss. I am satisfied that the degree of hardship goes beyond the acceptable level described by Underhill LJ in HA & RA.

70. I have to consider the impact of deportation on the Appellant's wife should she return with him to India. The adult children are British citizens. J has a job which she described in evidence is her dream job and B is in the second year of an Engineering Degree. They are British citizens and entitled to remain here. I must consider the impact on their mother of returning to India without them. I have no doubt that the impact of this would be an unacceptable level of hardship. Not only are there unacceptable risks in respect of the health of the family because of the separation, these are exacerbated by the inevitable financial hardship which is reasonably likely to impact on B's ability to remain in full-time education here. The impact on the Appellant's wife would be unduly harsh. It is the position of the Appellant's wife which falls to be considered and whether it is unduly harsh cannot be conditional on B and J returning with her. I did not hear any argument on this point. It would be open to the family to return together as a unit. This would not meet the unacceptable level. This is because it is the separation of this family which is causes the Appellant's wife such distress that the unacceptable level is reached. However, there would be very significant difficulties for the family relocating as a unit. I have no hesitation in concluding that there are very compelling circumstances in the context of s. 117C (6) for the following reasons.

71. While they are not minors, both B and J are emotionally dependent on their father. They live together as a family unit. I have no hesitation in concluding that they have *Kugathas* dependency (Kugathas v SSHD [2003] EWCA Civ 31). Proportionality must be considered on this basis. As regards the separation of the family, I remind myself of the approach taken by the House of Lords in Huang v SSHD [2007] 2 AC 167, 186:

> "[T]he main importance of the [Strasbourg] case law is in illuminating the core value which article 8 exists to protect. This is not, perhaps, hard to recognise. Human beings are social animals. They depend on others. Their family, or extended family, is the group on which many people most heavily depend, socially, emotionally and often financially. There comes a point at which, for some, prolonged and unavoidable separation from this group seriously inhibits their ability to live full and fulfilling lives. Matters such as the age, health and vulnerability of the applicant, the closeness and previous history of the family, the applicant's dependence on the financial and emotional support of the family, the prevailing cultural tradition and conditions in the country of origin and many other factors may all be relevant."

72. I must consider proportionality. Deportation of the Appellant is in the public interest and this weighs very heavily in favour of the Secretary of State. I have taken into account OH (Serbia) [2008] EWCA Civ 694, [2009] INLR 109 qualified by Lord Reed's later comments. Though it is clear that risk of re-offending is only one facet of the public interest, I am satisfied that there is a low risk of re-offending. I have taken into account the comments of the sentencing judge. The outcome of the Appellant's criminality is serious and devastating. In assessing the public interest, I accept that there is lower culpability where the outcome was not intended or even envisaged.

73. The Appellant did not rely on private life grounds (exception 1 of s.117C (4)) because it was conceded that he has not been lawfully resident in the UK for most of his life. I raised the other two limbs of s.117C (4) with the parties at the hearing; however, neither made meaningful submissions on the issue. There is no evidence that there would be very significant obstacles to integration so far as the Appellant is concerned; however, I am satisfied that the Appellant's social and culture ties were not broken by the conviction and custodial sentence. While it is the case that social and cultural integration in the UK connotes integration as a law-abiding citizen (see Binbuga v SSHD [2019] EWCA Civ 551), the Appellant was settled here before his crimes. I find that his criminality did not break this integration. He had a significant family life here before and after his incarceration which is an aspect of private life. I attach some weight to this.

74. There would be a huge impact on the whole family by uprooting and living in India. I find that it would be devastating for B and J. They are British citizens who have never lived in India. I accept that there is no extended family in India. There would be very significant obstacles to their integration applying Kamara v SSHD [2016] EWCA Civ 813 and conducting a broad evaluative judgement. They are British citizens who have been educated here. They both have vulnerabilities, especially B. The evidence relating to the Appellant and his wife's mixed marriage and estrangement from family was not challenged by Ms Cunha. The Appellant and witnesses were broadly speaking consistent on the issue.

75. In order to maintain family life in India, I am satisfied that B would have to leave university here and J her job. The family would have to start again. They have no property there. They live in council accommodation in the UK. While they would be together, even if there are not very significant obstacles in the *Kamara* sense and I am wrong about that, there would be significant economic and practical difficulties facing them and indeed the whole family. There would be a significant interference with their private lives. It would not be fair or reasonable to expect dependent adult children to re-locate as a result of their father's lack of judgement and carelessness giving rise to his criminality.

76. It is not only the uncertainty of the situation that is causing the family so much upset and distress. The main cause is the prospect of separation. However, the family as a whole struggle living with the knowledge that the Appellant is responsible for taking a life. It plays heavily on their mind. There is a black cloud continually hanging over

the family, resulting from the Appellant's poor judgement and carelessness. The last few years have been very difficult for them.

77. The Appellant's actions and consequences flowing there from have taken their toll on his family. While mindful of what was said by Sedley LJ in Lee v SSHD [2011] EWCA Civ 348 about the impact of deportation on families, the Appellant that case had been sentenced to 7 years imprisonment having pleaded guilty to a number of counts of possession with intend to supply class A drugs. I have taken full account of the Appellant having a previous conviction (despite Ms Cunha having not made reference to this in oral submissions). I take into account that he received a custodial sentence of 8 months. I attach weight to the OASYs assessment and correspondence from the probation service. The evidence supports the Appellant's evidence of remorse and that he is at low risk of re-offending. I find that he is rehabilitated and attach some weight to this.

78. Whether they go with their father or stay here without him, the impact of the decision on the Appellant's family, (a material factor when assessing proportionality (Beuko-Betts v SSHD [2008] UKHL 39) will be devastating. It is significant in this case that the adult children are *Kugathas* dependents. If they were under 18, this appeal would have been allowed under s117C (5). Should the Appellant be removed to India, whatever his family chooses to do; the impact will be bleak and grim for all of them. Poor health issues and dependency exacerbate the problems for this family.

79. There are very compelling circumstances in the context of s.117C (6). In the light of all relevant factors, having conducted an evaluative assessment, I conclude that the decision of the Respondent breaches the Appellant's rights under Article 8.

80. I allow the appeal on Article 8 grounds.

Notice of Decision

The Appellant's appeal is allowed.

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

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed *Joanna McWilliam* Date 28 April 2021
Upper Tribunal Judge McWilliam