



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-004809
First-tier Tribunal No:
HU/50129/2021

THE IMMIGRATION ACTS

Decision & Reasons
Issued:
On 1 October 2023

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE DAVIDGE

Between

ARASH SHAHMANSOURI
(NO ANONYMITY ORDER MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the appellant: In person (without a lawyer)

For the respondent: Ms S Lecointe, Senior Presenting Officer

Heard at Field House on 5 September 2023

DECISION AND REASONS

Introduction

1. In this decision, Mr Shahmansouri is referred to as “the appellant” because he is appealing against the decision of the Secretary of State (referred to in this decision as “the respondent”). We shall refer to the appellant’s wife (although in fact there has been a religious marriage, not a civil registration) as “SG”.
2. This is the re-making decision in the appellant’s appeal against the respondent’s refusal of his human rights claim (the claim is based on what is called Article 8, which relates to a person’s private life and family life human rights). This follows an earlier error of law decision by Upper Tribunal Judge Norton-Taylor and Deputy Upper Tribunal Judge Symes, sent out on 9 February 2023. This decision overturned the decision of the First-tier Tribunal (Judge Ruth), which in turn had allowed appellant’s appeal against the refusal of the human rights claim. The error of law decision is attached to the end of this re-making decision.
3. There is no need for us to set out again the general background to the case because the error of law decision helps to explain this. Instead, it is important to read paragraphs 3-15 and 28-51 of the error of law decision. For the benefit of the appellant, the error of law decision essentially said that Judge Ruth had not given proper reasons for allowing the appeal. In particular, he had not properly considered the questions of delay and rehabilitation (in other words, the risk of any re-offending).

The important issues in the appellant’s appeal

4. The appellant continues to rely on his family life with SG and the couple’s two young children, born in May 2020 (their daughter) and May 2023 (their son). The appellant also relies on his long residence in the United Kingdom and his relationships with his parents and siblings, in particular the assistance he provides to his mother.

5. The error of law decision makes it clear that certain issues are no longer relevant in this case and we will not be considering them (see paragraph 52):
 - (a) The appellant cannot satisfy what is called Exception 1 under section 117C of an Act of Parliament, the Nationality, Immigration and Asylum Act 2002. This means that although the appellant has spent a long time in this country, he could set up a new life in Iran without there being very significant obstacles;
 - (b) Although the appellant has in the past said that he was a refugee because of a claimed Christian faith and other matters, this has previously been rejected and he does not rely on any such claim anymore. This means that the appellant is not at risk from the Iranian authorities if he were returned to that country.;
 - (c) The appellant cannot show that he has any very serious medical problems that would put him at risk if he were to be returned to Iran.
6. There are some matters which paragraph 52 of the error of law decision confirms are not in dispute and which are in the appellant's favour (although this does not mean that his appeal must succeed):
 - (a) The appellant has a genuine relationship with SG and his daughter. His bond with his daughter is "intense" and he has a "strong attachment" to her (this comes from the social worker's report);
 - (b) SG and the couple's daughter are British citizens;
 - (c) It would be unduly harsh (a legal test under section 117C of the 2002 Act referred to previously - we will say more about this later) for SG and their daughter to go with him to Iran and live there permanently.
7. Since the decision by Judge Ruth and then the error of law decision, the appellant and SG have had another child, their son. We have seen his birth certificate and are satisfied that he is also a British citizen.

8. There has been no suggestion from Ms Lecointe that the appellant does not have a good relationship with his son. In addition, she has not suggested that the son could go with the appellant and live in Iran permanently. This means that we accept that the appellant has a loving relationship with his son and that it would be unduly harsh for the son to go and live in Iran.
9. All of the above means that there are two legal questions for us to decide in this case:
 - (a) Would it be unduly harsh on SG and/or his children if he were to be deported to Iran alone and therefore separated from them? If it would be unduly harsh, the appellant will win his appeal;
 - (b) If it would not be unduly harsh, are there what are called very compelling circumstances in his case (in other words, are there very strong facts, including matters not necessarily connected to SG and the children)? If there are, the appellant will win his appeal. If there are not, the appellant will lose his appeal.

The legal tests

10. We appreciate that the appellant is not a lawyer and does not at the moment have any legal representation. However, it is important that we explain as best we can what the legal tests in his case are.

Unduly harsh

11. There is a judgment from the United Kingdom Supreme Court called HA (Iraq) [2022] UKSC 22. It is mainly about the unduly harsh test under section 117C of the 2002 Act. We must follow what the Supreme Court said about the unduly harsh legal test because of the way in which the legal system operates in the United Kingdom.
12. The unduly harsh test is a difficult one to satisfy. This is because the 2002 Act and the Supreme Court's judgment make it clear that the

test is not just about whether it would be harsh on SG and/or children if he were to be deported. The test is stricter than that. The word “unduly” is important because the appellant’s case (like that of anyone else who has been convicted of criminal offences) involves a strong public interest in trying to deport him.

13. The test must focus on the particular circumstances of SG and the children. In particular, we are not comparing his children with other children (sometimes called a “notional comparator”): we must look at the effect on his daughter and son if he were to be deported to Iran.

14. The law also says that even if it is in the children’s best interests for the appellant to remain in their lives, this does not necessarily mean that it would be unduly harsh for them to be separated from him.

Very compelling circumstances

15. As we have said before, we will only look at this test if the appellant cannot satisfy the unduly harsh test.

16. The Supreme Court in HA (Iraq) also looked at the very compelling circumstances test. The Court’s judgment makes it clear that this test is even more difficult than the unduly harsh test. There must be very strong facts indeed. We are able to look at all the circumstances of the case, including matters involving, for example, the appellant’s parents and siblings, as well as his long residence in the United Kingdom.

The evidence

17. We have looked carefully at all of the evidence in this case. We have considered the evidence in the appellant’s bundle and the respondent’s bundle which were provided for the hearing before Judge Ruth. We have also considered the letters of support and photographs sent in by the appellant after the error of law decision.

18. The appellant and SG attended the hearing and they both answered questions from Ms Lecointe and us. We made it clear that our questions were only being asked so that we could have a full picture of the appellant circumstances. We were not trying to help the respondent's case.
19. The answers given by the appellant and SG were all recorded on the Tribunal's digital recording system. We also took a written note of these. We do not need to set out all of this evidence here. We will deal with the relevant information provided by them when carrying out our assessment of all of the evidence later on.

Submissions

20. The submissions are what we call the comments made by Ms Lecointe and the appellant after all of the questions and answers had finished. Again, these were all recorded and we also took a written note.
21. Ms Lecointe made the following points. She did not have any objections to the credibility (truthfulness) of the answers given by the appellant and SG at the hearing. She said that "little weight" should be given to the social worker's report from February 2022 because the interview had been virtual, the couple's daughter had been very young at the time, and the report had been made for the appellant's appeal. If the appellant was deported, SG and the children could have support from the large extended family in the United Kingdom. His mother could get help from other family members or social services. The appellant had got together with SG when he did not have lawful status in this country. To split the family would not be unduly harsh and there were no very compelling circumstances.
22. The appellant made the following comments. He stated that his mother was "highly disabled" and asked us to look at a GP letter. He emphasised his close relationship with his children. He did not have contact with anyone in Iran and his life was entirely in the United

Kingdom. He was remorseful in terms of his previous offending and was now a changed person. SG and the children need him here. He did not get married for any immigration purposes. He described his daughter as being “the love of my life”.

23. At the end of the hearing, we told the appellant that we would not be making our decision straightaway. Instead, we would go away and think about all of the issues very carefully before writing our decision.

Assessment

24. We confirm that we have reached our decision in this case after reading all of the relevant documents and taking account of the answers given at the hearing. We have taken account of the recent letters of support and the photographs. We have also taken account of what Ms Lecointe said and what was written in the respondent’s refusal of the appellant’s human rights claim back in December 2020. We have taken full account of the fact that the appellant has not been legally represented. That does not of course mean that what he is said is any less important than if he had had a lawyer.
25. We note that there were no supporting witnesses at the hearing. The explanation for this was not entirely satisfactory. The appellant told us that he thought the hearing might get too crowded if other people came along. SG told us that she had not wanted to involve her family members because she wished to keep the situation private. In the end, the fact that no one else came to the hearing does not make very much difference. We accept that the letters provided by the appellant show support for his case. They emphasise the close nature of the extended family on both sides of the couple’s relationship. The letters do not add very much which is not already included in the evidence given by the appellant and SG.
26. We turn to deal with the two legal tests described earlier, together with the evidence which is relevant to those tests.

The unduly harsh test: the appellant's daughter

27. We confirm what was said at paragraph 52 of the error of law decision. The appellant enjoys an intense and strong attachment to his daughter. This assessment was based on the position when the social worker wrote her report in February 2022 and when daughter was 1½ years old. She is now over 3 years old. On the evidence before us, there is nothing to suggest that the appellant's relationship with his daughter is any less strong.
28. We find that the appellant does not live full-time in the same property as SG and the children. It is not entirely clear to us why this is the situation. We accept that he could not be on the tenancy agreement because of his lack of status in this country. However, we do not see why this would prevent him from staying there on a full-time basis. We accept the evidence that SG and the children stay over the appellant's parent's house fairly regularly. The appellant probably stays at SG's house on a couple of nights a week. Overall, we accept that he does see his daughter on a daily basis and that he is fully engaged with her as a loving father.
29. We find that the appellant's daughter does not suffer from any medical conditions.
30. We accept that it is in the daughter's best interests if she can continue to have both her parents with her in her day-to-day life. As we have mentioned earlier, the best interests of the daughter is an important fact (sometimes called a primary consideration), but it does not necessarily mean that the unduly harsh test will be met.
31. The social worker's report is important in this case. The fact that the interview was done virtually and that the report was made for the appellant's appeal does not mean that it should carry little weight. The report is not simply a recitation of information provided by the appellant

and SG. It also includes the social worker's own evaluation and opinions. We place appropriate weight on the report.

32. The report says very clearly that it would be best for the daughter if the appellant stays in this country. It says that a separation from the appellant would be distressing and could potentially affect the daughter's well-being. The section entitled "Conclusions and Recommendations" includes the reference to the "intense bond" between the appellant and his daughter (see paragraph 52 of the error of law decision and paragraph 6 of this re-making decision). Having looked at the whole of the report, we find that it certainly supports that appellant's case.
33. In addition to what the report says, we have also taken account of what the appellant and SG have said about their daughter's relationship with her father and how she is likely to feel about him being removed from her life.
34. We accept that the appellant's daughter would be very upset if he were to be deported: that is clear from the intense attachment he has with her. There is the potential that her longer-term well-being might be affected. We do not assume that any distress would simply disappear the moment the appellant left the United Kingdom. The emotional impact of the appellant's deportation on his daughter is an important fact which we take into account.
35. We must also take account of the other close family relationships enjoyed by the appellant's daughter in this country. It is obvious that she has a devoted and very capable mother who has done, and would continue to do, all she could to ensure the well-being of her daughter. In addition to this, the evidence before us clearly shows that there is a significant and close (emotionally and geographically) extended family network. We find that the appellant has three siblings (two brothers and a sister), all of whom live relatively close to SG's home. There is a very good relationship between the siblings (in particular the appellant's sister) and SG and the daughter. The daughter has a good relationship with her paternal cousins. There is clearly a strong and loving relationship

between the appellant's parents and his daughter. In our view, there is no doubt that the appellant's siblings would provide strong emotional and practical help to the daughter were the appellant to be deported. We find that the appellant's parents would at least be able to provide love and emotional support, although we accept that they would not be in a position to give significant practical assistance given their medical conditions.

36. SG has a large family, comprising her mother, three sisters, auntie's, uncles, nieces, nephews, and cousins. The evidence is that there is a strong bond within this extended family. There is regular contact and many of the family members live close to each other. SG in fact lives across the road from her mother. We find that the emotional and practical support which SG's side of the family could provide to the daughter is likely to be just as strong, if not stronger, than that from the appellant's side.
37. It is clear to us that SG is a capable, well-qualified, and resilient individual. On the evidence before us, we find that although SG would herself be very upset by the appellant's departure from this country, the support provided by both sides of the family would, in combination with her own personal strengths, be enough to allow her to continue to care for her daughter and help reduce the risk of longer-lasting distress to the young girl.
38. If the appellant were to be deported, there are ways of having contact through various Internet video-based platforms. We appreciate that this is clearly not the same as daily face-to-face contact. We have considered whether there is a realistic possibility of SG and the children visiting the appellant in Iran. SG told us that she would not wish to go there at this time because of security concerns and we take those concerns into account. We accept that she has not been to the country since about 2018. We do, however, note that the appellant's parents have travelled to Iran every 4-5 years and have relatives in that country. SG's father lives there and he has been able to leave and return on an

annual basis. We are satisfied that both sides of the family do not possess an adverse profile in the sense that the Iranian authorities have prevented travel in and out of that country. In our view it is a realistic possibility that SG and the children could travel to Iran on British passports without there being a substantial risk of being prevented from leaving again. There is a further possibility that the family unit could meet up in another country, such as, for example, Turkey.

39. When we bring everything together, we conclude that whilst it would be harsh on the appellant's daughter to be separated from him, it would not be unduly harsh. The difficult test which we have described earlier in our decision has not been satisfied.

The unduly harsh test: the appellant's son

40. In some ways our assessment of the appellant's son's circumstances is quite similar to that of his daughter's. We accept that the appellant has a loving relationship with his son and the fact that they do not live together on a full-time basis is not particularly relevant. As with the daughter, it is in the son's best interests for him to have his father in his day-to-day life.
41. The son has no medical conditions.
42. The capabilities of SG and the very strong extended family network in this country would come together in the same way as with the appellant's daughter if he were to be deported. We find that there would be significant emotional and practical assistance provided to and for the son.
43. An obvious difference between the daughter and the son is that of age. The son is only a few months old and will not have formed the same type of emotional bonds with the appellant as has the daughter. We do not seek to unfairly diminish the importance of a baby having both parents in their life, but it would be wrong to ignore the age difference.

44. Overall, we find that, as with the appellant's daughter, a separation would not be unduly harsh.
45. We also find that even taking the impact on both children together, the difficult unduly harsh test is still not satisfied.

The unduly harsh test: SG

46. It is clear that the appellant and SG are a loving couple who are devoted to each other and the care of their children. It is also clear that a separation would cause real distress to them both, apart from the upset caused by knowing that the children would not have their father in their day-to-day lives. We take that distress fully into account in our assessment.
47. As described earlier, SG has a very strong family network around her in this country. That support comes from her own relatives and those of the appellant. Beyond the important support that the extended family would be able to provide in respect of the children, we are satisfied that similar support would be given to SG herself in order to help cope emotionally with the appellant's departure and also in terms of practical matters such as, for example, childcare and helping SG to get back into work (if she wished to).
48. We conclude that whilst it would be difficult for her, it would not be unduly harsh on SG if the appellant were to be deported.

The very compelling circumstances test

49. The appellant has not been able to show that the unduly harsh test is satisfied in his case. As we said earlier, this does not necessarily mean that his appeal must fail. We now go on to consider whether the very compelling circumstances test can be satisfied. The appellant must remember that this test is even more strict than the unduly harsh test.

50. We take account of all of the considerations discussed under the unduly harsh test and relating to both of the children and SG.
51. We also take account of other considerations which we have not yet looked at. The first of these is the appellant's long residence in the United Kingdom. He has been here since the age of 9. He is now 31 years old. He has obviously been here for a very significant period of time. We accept that his life is based in this country and not Iran.
52. We are prepared to accept that the appellant does not maintain contact with relatives in Iran. This makes sense, given that he regards his life as being based in this country and there is no particular reason why he should have kept in contact with more distant relatives in Iran. Having said that, his parents have travelled there every so often and there is extended family in that country. There is no new evidence before us which undermines the finding of Judge Ruth that there were no very significant obstacles to the appellant establishing himself in Iran, despite him not having lived in the country for many years. Therefore, we place some weight on the long residence in the United Kingdom, but overall this is not an important factor.
53. The next consideration is the appellant's care for his mother. We accept that his mother does suffer from a number of medical conditions, including epilepsy, arthritis, asthma, and cellulitis. It is difficult to accurately assess the particular nature of these conditions and their impact on her day-to-day life because we do not have independent evidence such as a report from any relevant Consultant, a detailed letter from a GP, or an assessment of personal care needs from social services. However, we are prepared to accept that the types of medical conditions are likely to result in care needs.
54. We are prepared to accept that the appellant does in fact provide assistance to his mother. His sense of duty as a son, expressed to us at the hearing, makes such assistance likely. In addition, the fact that he lives with his parents for the great majority of the time means that he is in a position to give assistance. We basically accept what the appellant

told us at the hearing about his assistance. We find that he helps to clean the house, helps his mother to take her various medications, and will help to cook if this has not been done by his father. The appellant honestly told us that he did the “daily stuff” but did not help with what might be called more intimate care needs, such as washing and going to the toilet. Assistance with those things is carried out by the father, who we accept is the registered carer and who is in receipt of Carer’s Allowance for that purpose.

55. We accept that the appellant’s father suffers from anxiety. However, this condition is not in our view very significant. We have no medical report to indicate that it is. In addition, the father does in fact assist the appellant’s mother with a number of personal care needs. We find that such assistance could continue even if the appellant were to be deported. The father would have support from his family and, if necessary, social services.

56. At the hearing, we asked the appellant about possible care provision if he were not in the country. In our view, the appellant gave an honest answer to this. He said that care could be given by his father and “a carer”, which we take to mean professional carers arranged by social services (or, potentially, a private-sector provider). We also bear in mind the strong family network which would certainly step into assist in terms of practical assistance or, at least, helping to make arrangements for future care. We find that suitable care arrangements for the appellant’s mother could be put in place if he were to be deported.

57. Therefore, we do place some weight (importance) on the appellant’s current caring role for his mother, but the weight is not very significant.

58. We acknowledge the earlier medical reports relating to the appellant’s own mental health. As far as we can tell, the most recent full mental health report is dated 2017, although there is a GP letter from November 2021. This letter confirms that the appellant continued to suffer from depression and anxiety and was on relevant medication for

those conditions. We accept that he has suffered from depression and anxiety in the past. We do not have up-to-date medical evidence, but are prepared to accept that the appellant continues to have some symptoms of the conditions. These are probably based on the uncertainty relating to his position in the United Kingdom (we disregard any claimed links between poor mental health and past ill-treatment in Iran - the appellant will remember that we are not considering any refugee claim in this appeal). We do not accept that the current symptoms are significant. As we said earlier in our decision, we are not considering any serious risk to the appellant's mental health if he were to be deported to Iran.

59. We have not overlooked the feelings of the extended family members in terms of being separated from the appellant. We have said on a number of occasions now that this is a close extended family network on both sides of the couple's relationship. We have no doubt that all of those family members will be very upset if he had to leave this country and we take that fact into account. Having said that, there is no evidence of any special dependency between the appellant and any of his siblings or his father.
60. We have considered his mother's position already. The fact that the appellant has provided a lot of assistance to his mother is likely to have built up a stronger bond. His departure from this country is likely to be felt very strongly by his mother and we take particular account of that fact.
61. Finally, we briefly deal with some other considerations. Judge Ruth had said that there was a long delay by the respondent in terms of processing the appellant's case. However, as discussed at paragraphs 23-44 of the error of law decision, in reality there was no significant delay which could be said to be the respondent's fault. It is true that the legal proceedings took a long time, but this was really because of a combination of matters including the length of appeal processes, the further representations made on the appellant's behalf about a claimed risk in Iran, and the fact that the appellant did not leave the United

Kingdom voluntarily after his first appeal was finished in January 2017. In short, delay is not a relevant consideration in this case.

62. The second point is about rehabilitation. We accept that the appellant has not been in any trouble with the police at all since his last conviction in 2014. That is to his credit, but it does not have any real importance in his appeal because the Supreme Court judgment in HA (Iraq) says that just keeping out of trouble is not enough to make much of a difference in a case like this. The appellant has not engaged in, for example, community-based programmes to address offending behaviour or deter others from committing offences. This consideration does not carry any real weight.
63. The third brief point concerns the appellant's status in this country when he began his relationship with SG and when both of the children were born. Although the appellant did have indefinite leave to remain, this was taken away after his appeal was turned down in January 2017. He has never had any permission to stay in the United Kingdom since then. The relationship with SG is genuine, but because he was in this country unlawfully when this began and that all times afterwards, we put less weight on this factor than if he had permission to stay.
64. Bringing all of the considerations we have discussed together, we conclude that the appellant cannot show that there are very compelling circumstances in his case. There are certainly factors which count in his favour, but they are not enough to outweigh the very strong public interest in deporting foreign nationals who have committed offences in the United Kingdom. The very strict test has not been satisfied.

Summary

65. The appellant cannot show that his deportation would be unduly harsh on SG and/or his children. In addition, the appellant cannot show that there are very compelling circumstances in his case.
66. This means that his appeal must be dismissed, which means that it fails.

Anonymity

67. No anonymity direction has been made in this case so far. There has been no change at this stage of the case which would justify the making of a direction. The fact that two children are involved does not mean that the appellant should not be identified by name. We have not named the children. The principle of what is known as open justice is very important. This means that there is a public interest in knowing who is involved in cases such as this one, particularly where the person has committed criminal offences in the past.

Notice of Decision

The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law and that decision has been set aside.

The decision in this appeal is re-made and the appeal is dismissed.

H Norton-Taylor
Judge of the Upper Tribunal
Immigration and Asylum Chamber
Dated: 11 September 2023

ATTACHMENT: THE ERROR OF LAW DECISION

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

Appeal Number: UI-2022-004809

THE IMMIGRATION ACTS

**Heard at Field House
on 6 June 2022**

Decision & Reasons Promulgated

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Before

**UPPER TRIBUNAL JUDGE NORTON-TAYLOR
DEPUTY UPPER TRIBUNAL JUDGE SYMES**

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**ARASH SHAHMANSOURI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant: Mr E Tufan, Senior Home Office Presenting Officer

For the respondent: Mr M Murphy, Counsel, instructed by Arlington Crown Solicitors

DECISION AND REASONS

Introduction

- 1.** For ease of reference, we shall refer to the parties as they were before the First-tier Tribunal. Thus, the Secretary of State is once more “the respondent” and Mr Shahmansouri is “the appellant”.
- 2.** The respondent appeals against the decision of First-tier Tribunal Judge Ruth (“the judge”), promulgated on 2 June 2022, following a hearing on 24 May 2022. By that decision, the judge allowed the appellant’s appeal against the respondent’s decision, dated 3 December 2020, refusing his human rights claim, which had been made in response to a deportation order under section 32(5) of the UK Borders Act 2007.
- 3.** The appellant is a citizen of Iran, born in 1992. He arrived in United Kingdom in December 2001, aged 9 years and 10 months, with indefinite leave to enter as the dependent of his father, who had previously been recognised as a refugee in this country. In 2009, the appellant was convicted of assault, criminal damage, and harassment, and was given a non-custodial sentence (it appears as though this was in the context of domestic violence). In January 2014 the appellant was convicted of two counts of actual bodily harm and one of assault, perpetrated against his partner at the time. He was sentenced to 24 months’ imprisonment. Deportation action was initiated, a deportation order was signed on 20 June 2014, and an appealable decision issued. A subsequent appeal was dismissed in 2015, but that decision was subsequently overturned by the Upper Tribunal and the appeal remitted. A supplementary decision was issued in 2016, relating to what apparently had been an outstanding protection claim made by the appellant. The remitted appeal was also unsuccessful, it being finally determined in January 2017. The appellant then made further representations in October 2017 and again in October 2020. Those representations referred to both protection and Article 8 issues. In respect of the protection element, the appellant claimed to have been at risk on return to Iran because of a conversion to Christianity, issues surrounding military service, and the fact that he had certain tattoos on his body. In respect of Article 8, the appellant relied on his

private and family life in United Kingdom, contending that he had spent most of his life in this country and had established a strong family life with his British citizen partner (whom he married in 2018) and their British citizen daughter, born in late May 2020. What appeared to be a free-standing Article 3 medical claim was also raised.

4. The respondent's refusal of the human rights claim can be summarised as follows. As regards the private life Exception 1 under section 117C(4) of the Nationality, Immigration and Asylum Act 2002, as amended ("the 2002 Act"), the respondent accepted the fact of lawful residence for most of the appellant's life (15 years with leave in the United Kingdom before residing here unlawfully after his last appeal was finally determined in January 2017), but concluded that he was not culturally and socially integrated in this country and that in any event would not face very significant obstacles to integration into Iranian society if deported.
5. As to the family life Exception 2 under section 117C(5) of the 2002 Act, the relationship between the appellant and his wife and their daughter was accepted. So too was the fact that it would be unduly harsh for his wife and daughter to accompany the appellant to Iran. However, it was not unduly harsh for the family unit to be split.
6. Finally, it was said that there were no very compelling circumstances under section 117C(6) of the 2002 Act.

The decision of the First-tier Tribunal

7. The judge recorded that no protection or Article 3 medical issues had been pursued on appeal: [9]-[10].
8. The judge began his analysis and conclusions with Exception 1 and private life. There was said to be no very significant obstacles to integration and so the third element of section 117C(4) of the 2002 Act could not be satisfied. On this basis, Exception 1 did not apply to the appellant: [49]-[51].

- 9.** The judge confirmed the respondent's concession as to the so-called "go scenario" under section 117C(5) of the 2002 Act: it would be unduly harsh for the appellant's wife and daughter to go to Iran: [55].
- 10.** The judge concluded that the best interests of the child rested in the appellant remaining in the United Kingdom, but that was not a "trump card": [57]. Unchallenged evidence from an independent social worker described the relationship between the appellant and his daughter as being "intense" and there having been a "strong attachment" between the two. That evidence stated that a separation would have a "seriously detrimental" impact on the child: [58]. Notwithstanding this, at [59] the judge concluded that, all other things being equal, separation would not be unduly harsh.
- 11.** However, there was an additional element which, in the judge's view, rendered what would otherwise have simply been harsh, unduly so. That element was what the judge described as a "long delay" between the deportation order being signed in June 2014 and "any effective action being taken by the respondent": [60]. At [61]-[63], the judge said as follows:

"61. Even if I discount the period between the signing of the deportation order in 2014 and the appellant exhausting his appeal rights in 2017, that still leaves the period between that year and now during which the respondent appears to have taken no effective action to implement the deportation order. It was precisely during this exact. That the appellant met his wife, married her and had child whose best interests it is not disputed would not be served by the deportation of this appellant.

62. Indeed, had the respondent taken the deportation action that she should have taken in 2017, the child would never have been born and this situation would not have arisen. The delay by the respondent has given this child the opportunity of being born into a close knit and loving nuclear family this should not have happened in the context of a deportation order signed in 2014, with all appeal rights exhausted by 2017, before the parents of the child even married.

63. In those circumstances, I conclude that the level of harshness imposed upon the child by deportation of this appellant is too great and is undue.”

- 12.** In respect of the appellant’s wife, the judge concluded that, but for the respondent’s delay, a separation would not have been unduly harsh. However, this case was “rather unusual” and the delay did go to cross the relevant threshold: [64]-[66].
- 13.** The judge concluded that the so-called “stay scenario” within Exception 2 had been satisfied and on that basis the appellant was entitled to succeed in his appeal.
- 14.** The judge went on and reached an alternative conclusion on very compelling circumstances under section 117C(6) of the 2002 Act. On the respondent’s side of the balance sheet, he took account of the seriousness of the offending. On the appellant’s side, he noted the absence of any re-offending since 2014, the fact that the probation service “did not regard him as a high risk to the public”, and that he had pleaded guilty to the index offences: [69]-[70]. The judge clearly regarded the respondent’s “long delay” as constituting a significant factor in the appellant’s favour. The respondent’s apparent lack of action during the “intervening five years” between 2017 and 2022 resulted in “a situation which, in my judgment, reduces the weight to be attached the public interest to such an extent that the circumstances in this case are very compelling”: [71].
- 15.** The appeal was accordingly allowed.

The grounds of appeal and grant of permission

- 16.** The respondent’s grounds of appeal are fairly lengthy and we shall say more about their merit later. In summary, they make the following points, all under the umbrella heading of “misdirection in law and/or failure to provide adequate reasons”: (1) the undue harshness threshold was not met by the facts of this case, with reference to SSH D v PG (Jamaica) [2019] EWCA Civ 1213; (2) the judge failed to consider or make findings on

whether the appellant's wife could get support from other sources if he was deported; (3) the judge erred in his consideration of delay, particularly by failing to acknowledge case-law and failing to take account of the fact that the appellant should have left United Kingdom after his remitted appeal was concluded in 2017; (4) the judge placed impermissible weight on the rehabilitation issue when considering very compelling circumstances; (5) the judge failed to consider the mandatory considerations under section 117B of the 2002 Act, particularly section 117B(4).

- 17.** Permission to appeal was granted by the First-tier Tribunal on 4 October 2022.
- 18.** There has been no cross-appeal in respect of the judge's conclusion on Exception 1 under section 117C(4) of the 2002 Act.

The hearing

- 19.** We heard concise submissions from Mr Tufan, who relied on the grounds of appeal. In respect of the delay issue, he emphasised the fact that there had been no tardiness in making the initial decision to deport the appellant following his conviction and sentencing and that the appellant could and should have left United Kingdom voluntarily when his previous appeal was concluded in 2017. In essence, the judge had failed to give legally adequate reasons for his significant reliance on delay, both in respect of Exception 2 and very compelling circumstances.
- 20.** Mr Murphy relied on his helpful skeleton argument and urged us to exercise real restraint before interfering with the judge's decision. The judge had been entitled to regard the delay as "long" and to have found that the appellant's family life with his wife and daughter had arisen during the period of delay. There was nothing irrational about the judge's analysis or conclusions.

Discussion and conclusions

21. Before turning to our analysis of this case we remind ourselves of the need to show appropriate restraint before interfering with a decision of the First-tier Tribunal, having regard to numerous exhortations to this effect emanating from the Court of Appeal in recent years: see, for example, Low [2021] EWCA Civ 62, at paragraphs 29-31, AA (Nigeria) [2020] EWCA Civ 1296; [2020] 4 WLR 145, at paragraph 41, and UT (Sri Lanka) [2019] EWCA Civ 1095, paragraph 19 of which states as follows:

“19. I start with two preliminary observations about the nature of, and approach to, an appeal to the UT. First, the right of appeal to the UT is "on any point of law arising from a decision made by the [FTT] other than an excluded decision": Tribunals, Courts and Enforcement Act 2007 ("the 2007 Act"), section 11(1) and (2). If the UT finds an error of law, the UT may set aside the decision of the FTT and remake the decision: section 12(1) and (2) of the 2007 Act. If there is no error of law in the FTT's decision, the decision will stand. Secondly, although "error of law" is widely defined, it is not the case that the UT is entitled to remake the decision of the FTT simply because it does not agree with it, or because it thinks it can produce a better one. Thus, the reasons given for considering there to be an error of law really matter. Baroness Hale put it in this way in AH (Sudan) v Secretary of State for the Home Department at [30]:

"Appellate courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

22. Following from this, we bear in mind the uncontroversial propositions that the judge's decision must be read sensibly and holistically and that we are neither requiring every aspect of the evidence to have been addressed, nor that there be reasons for reasons. Finally, should the need arise, it may be appropriate to consider the underlying materials before the judge in order to better understand his/her reasoning: see, for example, English v Emery Reimbold and Strick Ltd. [2002] EWCA Civ 605; [2002] 1 WLR 2409, at paragraphs 11 and 89.

- 23.** The crux of this case relates to the issue of delay, although other matters raised in the grounds are nonetheless relevant. Before addressing these, however, we make following general observations about the respondent's grounds of appeal.
- 24.** It is, somewhat unfortunately, not uncommon for the Upper Tribunal to see grounds of appeal from the respondent which cite particular judgments of the Court of Appeal, accompanied by quoted passages, which appear to be utilised as what might be described as factual precedents. In other words, the facts in the judgment cited are compared to those in the instant case in order to show that the latter should not/could not have succeeded. The judgment in PG (Jamaica) is a frequently deployed example of this.
- 25.** The higher courts have repeatedly cautioned against the practice of identifying the facts of one case as a comparator with those in another. Such caution applies all the more so to judgments of the Court of Appeal or the Supreme Court, which are, after all, not concerned with fact-finding, but deal instead with whether the tribunal below (either the First-tier Tribunal or the Upper Tribunal) were entitled to reach the conclusion it did.
- 26.** We urge the respondent to consider this issue more carefully when drafting her grounds of appeal.
- 27.** In the present case, the attempted comparison with the facts of PG (Jamaica) adds nothing to the respondent's challenge. It does not, of itself, identify any error of law on the judge's part.
- 28.** We turn to the delay issue. It is undoubtedly the case that delay is capable of being a relevant consideration in Article 8 cases, both in context of non-deportation and deportation cases. The general authoritative statement of the proposition is contained in the well-known passages of Lord Bingham's opinion in EB (Kosovo) v SSHD [2008] UKHL 41; [2008] Imm AR 713, at paragraph 14-16. Whilst not a deportation case, what was said there has application in the deportation context, subject to consideration of additional matters such as the enhanced public interest and other factors contained within the statutory framework of Part 5A of the 2002 Act.

29. In respect of the question of whether the deportation of an individual would be unduly harsh on other family members, there is authority which confirms that delay has no bearing on Exception 2 under section 117C(5) of the 2002 Act. In Logan Reid v SSHD [2021] EWCA Civ 1158, a case concerning a very significant delay on the respondent's part, Edis LJ concluded at paragraph 59 that:

“The only truly exceptional feature in the case was the delay in enforcing the 1998 deportation order after Mr. Reid's release from prison. Nothing was done for something like a decade. However, this is not a factor tending to make his deportation now unduly harsh to the qualifying child. It is irrelevant to that question.”

- 30.** It is plain from the judge's decision that he based his conclusion on undue harshness squarely on the delay. In light of Logan Reid, that was a clear error of law.
- 31.** However, we appreciate that this issue was not expressly raised in the respondent's grounds of appeal, nor was it canvassed at the hearing (it became apparent during the course of drafting this decision). Therefore, we do not predicate our error of law decision on this error.
- 32.** Notwithstanding the above, we have concluded that the judge did in any event materially err in law when attributing what was plainly significant weight to the delay issue, both in respect of undue harshness and very compelling circumstances. The error can properly be categorised as an inadequacy of reasons, when seen in the context of this particular case. We are satisfied that the respondent's grounds of appeal encompass the error.
- 33.** Having regard to the *obiter* comments of Jackson LJ at paragraph 42 of SSHD v M N-T (Colombia) [2016] EWCA Civ 893 (which was either not cited to the judge, or, if it was, not addressed in the decision), we accept that delay is capable of reducing the public interest in the deportation of a foreign criminal. This is so for one or more of the following reasons: rehabilitation during a period of delay may indicate that the individual is less of a risk to the public; the deterrent effect is potentially weakened if

the respondent fails to act; society's concern at dealing with foreign criminals may be undermined by inaction.

- 34.** In principle, then, the judge was entitled to take account of any delay on the respondent's part (leaving aside what we have already said at paragraphs 29-31, above).
- 35.** The grounds of appeal rely on RLP (BAH revisited - expeditious justice) Jamaica [2017] UKUT 00330 (IAC) for the proposition that administrative delay is unlikely to tip the balance in an individual's favour when conducting the proportionality exercise under Article 8. Whilst we harbour certain concerns as regards the apparent inflexibility of what is stated in the judicial headnote of that decision (we need not address the issue in this particular case), the essential point which the respondent was entitled to derive from RLP (and in respect of which we see no conflict with what was said in M N-T) is that reliance on delay as anything more than a relatively insignificant factor requires clear reasons. Whilst brevity of reasons is, not a "red flag" indicating legal error, and the need for restraint before interfering with a judge's decision is vital, what is set out by way of reasoning must provide sufficient clarity and detail.
- 36.** In our judgment, the adequacy of reasons will be determined by the context of the case. Here, the general context was that of deportation, which in itself engages an important public interest over and above the need to maintain effective immigration control. On a more specific contextual level, the key factor in the case, as identified by the judge, was delay.
- 37.** What the judge was required to do was adequately explain the particular nature and extent of the delay in order that the respondent could properly understand why it was regarded as the critical factor in respect of Exception 2 and the assessment of very compelling circumstances.
- 38.** The judge described the delay as being "long". Clearly, he would not have been properly entitled to take the delay as running from the signing of the deportation order in June 2014. The subsequent appellate process pursued by the appellant did not end until January 2017 and the respondent could

not have been criticised in respect of that period. At [61], the judge recognised this, at least implicitly.

- 39.** There are, in our judgment, important unacknowledged - and therefore unexplained, aspects of the delay (including its nature and extent) which, taken cumulatively, disclose the inadequacy of the judge's reasoning.
- 40.** First, within [61] there is reference to the period between 2017 and "now" as representing material inaction by the respondent. The use of the term "now" must, as we read it, have related to the date of the hearing in May 2022 (or the date the decision was signed off, that being 2 June 2022). Our interpretation is reinforced by what the judge said at [71], referring to the lack of action by the respondent "in the intervening five years", that clearly calibrating the delay from 2017 to 2022. Yet, there was no possibility of the respondent actually seeking to remove the appellant during these appellate proceedings, which were initiated shortly after the refusal of the human rights claim was served in early December 2020. Thus, on the face of it, the judge appears by his reasoning to have taken into account a period of time (December 2020 to May/June 2022) which could not have constituted any relevant delay. In turn, this undermines the judge's explanation of the delay as being sufficiently "long" for the appellant to have succeeded in his appeal.
- 41.** Second, the judge was obliged to adequately explain why the respondent was at fault in failing to implement the deportation order once the appellant's previous appeal was finally determined in January 2017 when, as is clear from the materials before him, the further representations submitted in October of that year raised new protection issues (including religious conversion, military service, and tattoos) and an Article 3 medical claim. Plainly, it was not a situation of the respondent simply doing nothing whilst the appellant got on with his life in this country and without engaging with the authorities. Following a period of at most 10 months after the conclusion of the appeal in January 2017, the appellant actively asserted that there were several new issues which would have prevented him from being removed from the United Kingdom, and which required

careful consideration (in the event, none of the protection issues or the medical claim were pursued on appeal, indicating that they lacked any real merit).

- 42.** Third, the judge failed to explain why the appellant could not have been expected to leave the United Kingdom voluntarily following the final determination of his previous appeal in January 2017. If the reason why a voluntary departure could not have been expected was because of a claimed fear on the appellant's part, this would lead back to what we have said in the preceding paragraph.
- 43.** Fourth, the appellant's indefinite leave to remain was extinguished as result of the final determination of his appeal in January 2017. He has resided unlawfully in this country ever since (what the judge said at [47] does not contradict this; it simply recognised what the respondent had said in her decision letter). That fact engaged section 117B(4)(b) of the 2002 Act. It was during a period of unlawful residence that the appellant met and married his wife. The judge failed to engage with this mandatory consideration and whilst he deemed it significant that the relationship had begun and developed during the course of a delay, he failed to explain whether he had engaged with the "little weight" provision and, if he had, how he had resolved that engagement.
- 44.** Fifth, it was of course the case that the appellant's daughter was born whilst his further representations of October 2017 remained outstanding. She was born in May 2020, 2 years and 7 months after the representations had been submitted, which means that she was conceived around September of 2019, that being less than 2 years after submission. She was approximately 6 months old when the respondent made her decision to refuse the appellant's human rights claim. As with certain other aspects of the delay issue, we cannot see that the judge has adequately explain the nature and extent of the delay being relied on.
- 45.** In light of the foregoing, the reasons challenge succeeds and the judge's decision should, in the exercise of our discretion, be set aside on that basis alone.

- 46.** Turning to other matters contained within the grounds of appeal, we conclude that there is merit in the respondent’s contention that the judge failed to deal with the issue of rehabilitation by way of legally adequate reasons.
- 47.** It is clear from the authorities, in particular SSHD v HA (Iraq) [2022] UKSC 22; [2022] 1 WLR 3784, that rehabilitation can constitute a relevant factor in the proportionality exercise: paragraph 53. At paragraph 58 of his judgment, Lord Hamblen JSC (with whom the other Justices agreed) concluded that:

“58. Given that the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case. I do not, however, consider that there is any great difference between what was stated in *Binbuga* and by the Court of Appeal in this case. In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then, in general, that is likely to be of little or no material weight in the proportionality balance. If, on the other hand, there is evidence of positive rehabilitation which reduces the risk of further offending then that may have some weight as it bears on one element of the public interest in deportation, namely the protection of the public from further offending...”

- 48.** Although the Supreme Court’s judgment was only given on 20 July 2022, the passage quoted above had a declaratory effect and in any event really did nothing more than re-state propositions contained in previous judgments of the Court of Appeal.
- 49.** What the judge said at [70] related only to negative rehabilitation, as it were; in other words, the absence of any further offending and the fact that the probation service did not regard the appellant as a “high risk”. In our judgment, the judge failed to engage with the effect of the authorities in terms of the potential weight attributable to rehabilitation. In turn, this resulted in a lack of adequate reasons. The judge did not adequately

explain (a) what weight he was attributing to this factor; or, (b) if he was attributing material weight, the reasons why he was doing so in light of the authorities. Further or alternatively, the judge failed to direct himself to relevant authorities, or at least the propositions contained therein, as they went to the question of what weight could be attributable to rehabilitation.

- 50.** Rehabilitation was a material factor in the judge’s assessment of very compelling circumstances, albeit not as significant as that of delay. The error identified in the preceding paragraph is of itself sufficient for the decision to be set aside.
- 51.** As regards the question of whether the appellant’s wife could have sought assistance from other sources if he was deported, the judge made no findings on the evidence. We need not say anything further on this as the errors of law previously identified must result in his decision being set aside in any event. This question will, however, potentially be relevant to a re-making of the decision in this appeal.

Disposal

- 52.** There is no basis for remitting this appeal to the First-tier Tribunal. A number of facts are not in dispute and several findings can be preserved, specifically:
- (a) that the appellant cannot satisfy Exception 1 under section 117C of the 2002 Act;
 - (b) that the appellant’s wife and daughter are both British citizens;
 - (c) the genuineness and subsistence of the appellant’s relationship with his wife and daughter and that the appellant enjoys an “intense” and “strong attachment” to the latter;
 - (d) the fact that it would be unduly harsh for the appellant’s wife and daughter to go to Iran;
 - (e) that the appellant is not at risk on return to Iran, nor can he establish a medical claim based on Article 3;

- 53.** Additional evidence can be provided by the appellant. Any relevant fact-finding can be undertaken by the Upper Tribunal.
- 54.** This is not a case in which the First-tier Tribunal's decision has been infected by procedural unfairness.
- 55.** In all the circumstances, remittal is not appropriate.

Issues for the resumed hearing

- 56.** The relevant issues to be determined at the resumed hearing will be:
- (a) whether it would be unduly harsh on the appellant's wife and/or daughter for him to be deported to Iran and for them to remain in the United Kingdom: section 117C(5) of the 2002 Act;
 - (b) if it would not be unduly harsh, whether there are nonetheless very compelling circumstances such as to render the appellant's deportation disproportionate: section 117C(6) of the 2002 Act;
 - (c) a consideration of any relevant factors under section 117B of the 2002 Act.

Anonymity

- 57.** The First-tier Tribunal did not make an anonymity direction. We make no such direction. The importance of open justice is significant. The existence of a child in this case does not, of itself, require a direction to be made. There are no protection issues in the case.

Notice of Decision

- 58. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.**
- 59. We exercise our discretion under section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 and set aside the decision of the First-tier Tribunal.**

60. This appeal will be listed for a resumed hearing in due course, following which the decision will be re-made.

Directions to the parties

1. The appellant shall file and serve a consolidated bundle of all evidence relied on (with any evidence not before the First-tier Tribunal clearly identified) no later than 35 days after this decision is sent out to the parties. The evidence must be relevant to the issues set out at paragraph 56, above;
2. The respondent shall file and serve any further evidence relied on no later than 21 days following receipt of the appellant's consolidated bundle;
3. The appellant shall file and serve a skeleton argument no later than 10 days before the resumed hearing;
4. The respondent may, if so advised, file and serve a skeleton argument no later than 5 days before the resumed hearing;
5. The parties are at liberty to apply to vary these directions.

Signed: H Norton-Taylor

Date: 12 December 2022

Upper Tribunal Judge Norton-Taylor