



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2022-006519
First-tier Tribunal No:
HU/07364/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 06 July 2023

Before

DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

MR AJMAL ANSARI
(Anonymity order not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Richardson, counsel

For the Respondent: Mrs Nolan, Home Office Presenting Officer

Heard at Field House on 12 June 2023
Prepared at Field House on 16 June 2023

REASONS FOR FINDING A MATERIAL ERROR OF LAW

The Appellant

1. The appellant is a citizen of Pakistan born on 2 January 1969. His appeal against a decision of the respondent dated 9 September 2020 to refuse an article 8 claim was allowed by Judge of the First-tier Tribunal Barker sitting at Birmingham on 17 August 2022. The respondent appeals with leave against that decision and the matter therefore comes before me as an appeal by the respondent. For the sake of convenience however I will continue to refer to the parties as they were known at first instance. This appeal arises because the appellant was convicted at Luton Crown Court of possession of false identity documents and was sentenced to 2 years and four months imprisonment. On 28 August 2020 the respondent signed a deportation order against the appellant.

The Appellants' Case

2. The appellant relied upon the second exception contained within section 117C of the Nationality, Immigration and Asylum Act 2002 to argue that the public interest did not require his deportation. The second exception applies where (inter alia) an appellant has a genuine and subsisting relationship with a qualifying child, in this case the appellant's oldest child is a British citizen. The appellant submitted that it would be unduly harsh on his wife and two children if he were to be removed to Pakistan. He produced to the tribunal judge four expert reports in support of this contention, they were from a chartered psychologist, a cognitive behavioural psychotherapist, a consultant psychiatrist and an independent social worker. Judge Barker recorded at [45] of the determination that none of this evidence was challenged. The appellant's wife was receiving treatment for mental health issues and this was likely to be significantly disrupted were she to travel to Pakistan. The education of the oldest child would suffer and he too had mental health issues. This in turn would impact on the wife's ability to care for the children. The children were reliant on the appellant to meet their care needs because of the issues suffered by the wife.

Decision at First Instance

3. At [63] the judge found that the effect of the appellant's removal on the oldest child would be unduly harsh if either the family relocated to Pakistan with the appellant ("the go scenario") or remained in the United Kingdom without the appellant ("the stay scenario"). The appellant thus met the second exception contained within section 117C of the 2002 act. I pause to note here that the appellant's wife and younger child were not qualifying parties at the time of the hearing at first instance but since the hearing the appellant's wife and youngest child have been granted leave to remain in the United Kingdom.
4. At [41] the judge considered the meaning of the phrase "unduly harsh". She noted that the higher courts have not sought to define that phrase with any particularity. Although the appellant's wife was not a qualifying partner, her situation was highly pertinent to the care available to the children when considering the question of whether it would be unduly harsh for the children to remain in United Kingdom without the appellant or to relocate to Pakistan with him. The judge allowed the appeal.

The Onward Appeal

5. The respondent's grounds of onward appeal argued that the judge had failed to give adequate reasons for his conclusion that the appellant's

deportation would be unduly harsh for the children. Whilst the wife and children could not be required to leave the United Kingdom the option of returning to Pakistan with the appellant as a family unit remained. The expert evidence suggested the children only spoke English but the judge found as a fact that they did speak some Urdu. The older child's previous mental health issues were predominantly as a result of the separation whilst the appellant was in prison. There would be no separation if they all returned to Pakistan together. There was background evidence showing the availability of mental health facilities in Pakistan. Inadequate reasons were given why the appellant's wife would be unable to access such care. The family had made several visits to Pakistan which should have led the judge to consider what family ties the family might have there.

6. The application for permission to appeal came on the papers before First-tier Tribunal Judge Hatton who granted permission stating that the judge was wrong to say that the higher courts had not sought to define the meaning of the phrase "unduly harsh". Referring to the authority of HA Iraq [2022] UKSC 22, judge Hatton noted that unduly harsh denoted something severe or bleak. The failure to apply that test may have tainted the judge's consideration of whether the facts in the case really did demonstrate undue harshness given that the eldest child's mental health issues were found by the judge to be particularly as a result of the impact of separation. It was arguable that the circumstances were insufficient to prevent the children from relocating to Pakistan with the appellant. The judge's comment that the eldest child's language skills and ability in Urdu would place the child at a disadvantage on return was insufficient to cross the elevated threshold set out in HA Iraq.
7. In response to the grant of permission the appellant prepared a response under rule 24. This argued that in the light of the grants of limited leave to remain to the wife and younger child the respondent had accepted that the argument that the family could go with the appellant back to Pakistan was not a particularly strong one. Furthermore, the grounds of the respondent's onward appeal were different to the case put by the respondent in the First-tier. At [41] the judge had shown that she was aware of the test in HA Iraq. There were serious concerns as to the effect on the oldest child's mental health, well-being and future development were he to be required to relocate to Pakistan. The determination did not contain a material error of law.

The Hearing Before Me

8. In consequence of the grant of permission the matter came before me to determine in the first place where there was a material error of law in the decision of the First-tier Tribunal such that it fell to be set aside. If there was then I would make directions on the rehearing of the appeal. If there was not the decision at first instance would stand.

9. In oral submissions the respondent placed reliance on the grounds of onward appeal. For the appellant, counsel relied on the rule 24 response to the grant of permission. This argued that at the hearing at first instance the judge had been put in a difficult position by the approach to the appeal taken by the presenting officer at that time. The presenting officer's view at the time was that it was not a strong argument to suggest the family should go with the appellant. That had led the judge to say at [46] when dealing with this issue: "I can be brief". The judge's reasoning was adequate, the respondent's grounds of onward appeal were a mere disagreement with the result. The judge had given comprehensive reasons why the effect on the children would be unduly harsh. Although the oldest child could speak some Urdu he could not read or write it. The child would have to master a different alphabet on return. The judge was entitled to conclude that if the mother's health was disrupted that would have an impact on the child. Even if there was an error it was immaterial as the facts in the case crossed the high threshold of unduly harsh.

Discussion and Findings

10. This is a reasons based challenge by the respondent against the decision of the judge to allow a deportation appeal. It is clear from the wording of the determination that the judge was aware of the test to be applied if either the family returned to Pakistan with the appellant or if they remained in the United Kingdom whilst the appellant was removed to Pakistan.
11. There are two issues that need to be resolved in this onward appeal before I can determine whether there is or is not a material error of law in the determination. The first is whether the respondent's grounds of onward appeal are significantly different to the case put forward first instance such that it would be an abuse of process to allow the respondent to appeal the judge's determination on the basis set out in the respondent's grounds. The second issue, if I accept that the respondent is entitled to argue as she has done is whether the circumstances as found by the judge (which were not in dispute by the respondent) do indeed cross the high threshold of showing the situation to be unduly harsh.
12. Dealing with the first issue, the judge noted that the respondent in the refusal letter had argued that the family could return to Pakistan with the appellant. The presenting officer at first instance accepted it was unrealistic to argue that the children could relocate to Pakistan given the grant of leave to remain. However the point was not conceded as such because as the judge records later on in [40] it was not conceded that it would be unduly harsh for the family to relocate to Pakistan with the appellant. That being so both the go and the stay scenario were still live. The judge stated at the end of [40] that she would consider both. At [46] the judge said given the position taken by the presenting officer she could

be relatively brief on the go scenario. The judge's view was that the go scenario was undermined by the grant.

13. If the judge had not been given a fully reasoned argument as to why she should consider the effects on the family of relocating with the appellant, it might be unfair to criticise her for not dealing fully with an issue which was not being pursued with any vigour before her. However it was accepted by counsel for the appellant that the judge did in fact go on to consider the go scenario in some detail at [47] onwards. Whilst therefore the approach of the respondent in the First-tier was a little muddled the judge did nevertheless consider the issue in some detail. She decided it would be unduly harsh. I therefore find no abuse of process for the respondent to take issue with the judges findings on relocation. The appellant knew from the refusal letter what the case was he had to meet and the judge did take some time to deal with the go scenario in her determination.
14. This leads me to the second issue namely whether the judge was entitled to say on the basis of the facts as found by her that the situation for the family to relocate to Pakistan would be bleak. As Judge Hatton pointed out in granting permission to appeal the problem starts with the judge's view at [41] that the higher courts have not sought to define the phrase unduly harsh. That is simply wrong. What the higher courts have done is to approve the self-direction given by the Upper Tribunal in the case of MK Sierra Leone [2015] INLR 563,. This was: *"unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher."*
15. Does the failure to recognise the existing jurisprudence potentially infect the judges findings? The answer to that is not necessarily, provided that what the judge sets out is indeed an effect(s) that is unduly harsh. This was the argument put forward by the appellant in the alternative. The judge found the appellant to be a credible witness and that the eldest child, 11 at the date of the hearing was particularly vulnerable. He would be placed at a disadvantage on return from an educational point of view although I respectfully agree with Judge Hatton's comment that this would not of itself amount to undue harshness. Mental health facilities in Pakistan were extremely limited for children and the judge found there was a real risk that they would not be accessible. Nevertheless that meant some mental health facilities did exist and the evidence was that the mental health issues were mainly concerned with separation. It is difficult to say that a risk of being unable to access mental health care corresponds to an unduly harsh outcome.
16. A return would not be in the best interests of the children but that too as the judge herself acknowledged is a primary but not the primary consideration, see [41]. The oldest child was said to have an extremely strong bond with his father but this could be maintained if the family

relocated with the appellant. At [53] the judge went on to consider what the situation was if the appellant left and the family remained behind. That point is not made in the respondent's grounds of onward appeal and I do not therefore need to consider it. The respondent must therefore show a material error in the judge's consideration of the "go scenario". Whilst the judge was clear at [52] that relocation to Pakistan would be unduly harsh on the children the agreed facts as presented in the determination do not necessarily amount to evidence of undue harshness. It is not clear what the judge understood by "undue harshness" given her self direction that the phrase had not been defined by the higher courts. In those circumstances I find that there was a material error of law in the judge's determination and the issue remains as to whether it would be unduly harsh to expect the appellant's wife and children to relocate to Pakistan with the appellant when the appellant is removed.

17. This will involve a re-evaluation of the expert evidence relied on. The findings made by the judge such as the restrictions on the ability to access proper mental health care and the disadvantage the elder child would have at school in Pakistan should be preserved. Similarly the evidence in the experts' reports that the appellant provides a significant amount of support for his wife should also be preserved see [55]. The appellant may also wish to file further evidence in support of his contention that it is unduly harsh to for the family to relocate Pakistan with him. The First-tier Tribunal may wish to consider the effect of Sicwebu [2023] EWCA Civ 550 on the approach to undue harshness. That decision was handed down on 19 May 2023 after the hearing at first instance in this case. As I find that there is a material error of law in the judge's decision I set it aside and direct that the appeal be reheard before the First-tier on the first available date to be heard by any judge except judges Barker and Hatton.

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error of law and I set aside the decision to allow the Appellant's appeal against the respondent's decision.

Respondent's onward appeal allowed

I direct that this matter be remitted to the First-tier with the judges findings of fact preserved.

I make no anonymity order as there is no public policy reason for so doing.

Signed this 16th day of June 2023

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Judge Woodcraft

Deputy Upper Tribunal Judge

TO THE RESPONDENT
FEE AWARD

No fee award was made by the First-tier and there can be no fee award at this stage.

Signed this 16th day of June 2023

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Judge Woodcraft
Deputy Upper Tribunal Judge