



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-003142

First-tier Tribunal No: HU/08118/2014

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 23rd of May 2024

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JA

(ANONYMITY ORDER MADE)

Respondent

Representation:

For the Appellant: Mr A Mullen, Senior Home Office Presenting Officer

For the Respondent: Mr Forrest, instructed by McGlashan MacKay Solicitors

Heard at 52 Melville Street, Edinburgh on 9 April 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the appellant and his family, are granted anonymity.

No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the appellant or other person. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

1. The Secretary of State appeals with permission against a decision of First-tier Tribunal Judge Prudham, promulgated on 13 January 2022, allowing JA's appeal against a decision of the Secretary of State to make a deportation order against him.
2. I have maintained the anonymity order made by the First-tier Tribunal. Neither party has submitted that I should not do so.

Background

3. The respondent is a citizen of Pakistan born on 30 October 1980. He has lived in the United Kingdom since 2002 and on 8 April 2003 was granted indefinite leave to remain in the United Kingdom as the spouse of a British citizen. The couple have five children although by the time of the appeal to the FtT, one was over 18.
4. The respondent has been convicted on two occasions. On 4 November 2014 he was convicted of impersonating a police officer and behaving in a threatening or an abusive manner for which he was fined. On 2 June 2016 he was sentenced to nine months' imprisonment for sexual assault.
5. Subsequent to that, on 5 December 2016, the Secretary of State served him with a decision to make a deportation order; the order itself was served on 3 February 2017. The respondent made a human rights claim against that decision which was refused on 18 July 2017.
6. The appeal was initially allowed by the First-tier Tribunal on 24 November 2017. The Secretary of State appealed against that decision and on 26 March 2018 the Upper Tribunal overturned the decision of the First-tier Tribunal and dismissed his appeal. The respondent then appealed against that decision to the Inner House of the Court of Session which allowed his appeal and on 29 April 2021 the Upper Tribunal remitted the case back to the First-tier Tribunal for a fresh hearing. It was on that basis that the appeal came before Judge Prudham.

Hearing Before the First-tier Tribunal

7. The judge heard evidence from the respondent and his wife, their elder daughter and three further witnesses including the respondent's father-in-law and brother-in-law.
8. The judge directed himself [27] that the first matter to be decided was whether the respondent meets Exception 2 set out within Section 117C (5) observing that this did not require a full proportionality assessment as it was a self-contained exercise, directing himself in line with HA (Iraq) v SSHD [2020] EWCA Civ 1176. The judge found that:-
 - (i) The respondent works whilst his wife looks after the children including home schooling their two youngest children and that all the children have a close emotional relationship with the respondent [29];

- (ii) adequate financial support would not be available for the respondent's wife and children who would face having to claim benefits or becoming a breadwinner herself which although would not be unduly harsh would have a knock-on effect on the home schooling of the two youngest children [30];
 - (iii) the report by Dr Johnstone in her report indicated that deportation would impact negatively on the children's education [31];
 - (iv) deportation would have an unduly harsh effect on the children and as, given the respondent had a large family who was the breadwinner, the effect would be amplified; two of the children are at an important stage of their education and this would have a negative impact on four of the children.
9. The judge allowed the appeal on the basis that Exception 2 had been established.
10. The Secretary of State sought permission to appeal on the grounds that the judge had erred in that:-
- (i) although it had been accepted that it would be unduly harsh for the wife and children to relocate to Pakistan inadequate reasons were given as to why it would be unduly harsh for them to remain in the United Kingdom without the appellant;
 - (ii) the judge had failed to direct himself that the unduly harsh test is a high one and failed to give adequate reasons for finding the impact would reach that threshold;
 - (iii) the judge had failed to identify reasons to suggest that deportation would have an adverse effect on the children's day-to-day welfare and development or that they would not continue to have a safe and healthy upbringing in the United Kingdom;
 - (iv) the judge failed to take into account the fact the children who are currently home schooled would have access to state education and did not explain why this would not be adequate; failed to give reasons as to why the educational prospects of the older children would be adversely impacted; and, failed to explain why deportation would have a negative impact on the educational prospects of the children.
11. On 1 July 2022 First-tier Tribunal Judge Beach granted permission on all grounds observing that it was arguable that the basis for the findings were unclear, the judge not identifying factors which would mean that the deportation would have an adverse impact on the children's education.

The Hearing on 9 April 2024

12. Mr Mullen relied on the grounds submitting that the judge has failed to explain what was meant by unduly harsh and had failed to engage with that test or provide sufficient reasons as to why it would be unduly harsh.

13. Mr Forrest submitted that this was simply a reasons challenge and that although the judgment was not lengthy, the reasons were adequate. The judge had drawn conclusions open to him and in particular had relied on Dr Johnstone's report which was critical. He submitted further that the whole report needed to be considered. In response, Mr Mullen submitted that there were no quotations from Dr Johnstone's report and that the consideration that there would be an impact was simply speculative.

The Law

14. In assessing the First-tier Tribunal's approach to this matter I bear in mind what was said in Volpi v Volpi [2022] EWCA Civ 464 at [2]. I bear in mind also what was held in HA (Iraq) [2022] UKSC 22 at [72]:

It is well established that judicial caution and restraint is required when considering whether to set aside a decision of a specialist fact finding tribunal. In particular:

- (i) They alone are the judges of the facts. Their decisions should be respected unless it is quite clear that they have misdirected themselves in law. It is probable that in understanding and applying the law in their specialised field the tribunal will have got it right. Appellate courts should not rush to find misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently - see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49; [2008] AC 678 per Baroness Hale of Richmond at para 30.
- (ii) Where a relevant point is not expressly mentioned by the tribunal, the court should be slow to infer that it has not been taken into account - see *MA (Somalia) v Secretary of State for the Home Department* [2010] UKSC 49; [2011] 2 All ER 65 at para 45 per Sir John Dyson.
- (iii) When it comes to the reasons given by the tribunal, the court should exercise judicial restraint and should not assume that the tribunal misdirected itself just because not every step in its reasoning is fully set out - see *R (Jones) v First-tier Tribunal (Social Entitlement Chamber)* [2013] UKSC 19; [2013] 2 AC 48 at para 25 per Lord Hope.

15. I bear in mind the uncontroversial propositions that the decision must be read sensibly and holistically and that it is not necessary for every aspect of the evidence to have been addressed, nor that there be reasons for reasons. Justice requires that the reasons enable it to be apparent to the parties why one has won and the other has lost: English v Emery Reimbold & Strick Ltd [2002] EWCA Civ 605, [2002] 1 WLR 2409 at [16]. When reading the Decision, I am entitled to assume that the reader is familiar with the issues involved and arguments advanced.
16. There are two strands to the Secretary of State's case: first, that the judge did not properly apply the law when assessing that deportation in this case would be unduly harsh; and, second, in any event failed to provide sufficient reasons for doing so.

17. It is not a requirement of the law that a judge should set out all the relevant provisions or direct himself with respect to specific cases. The judge clearly identified the relevant provision, Exception 2 set out within Section 117C(5) of the 2002 Act and did refer to HA (Iraq) in the Court of Appeal, his decision being promulgated before that case was taken on appeal to the Supreme Court. As Judge Beach observed when granting permission there is indication at [28] that the judge did understand the difference between harshness and unduly harshness. In that context and given that the test is well-known I am not satisfied that the judge was unaware of the test or for that matter that the threshold is a high one.
18. The judge relied to a significant extent on the evidence of the witnesses and the report of Dr Johnstone, all of which was fully known to the Secretary of State.
19. It is sensible also to bear in mind the terms of the Joint Minute by which the Court of Session set aside the decision of the First-tier Tribunal. That again was before the judge. That was founded on the acceptance by both parties that the Upper Tribunal had not properly addressed what was meant by "unduly harsh". In the circumstances, I am not satisfied that the failure to make a self-direction amounted to an error of law, or that the judge did not apply the relevant law.
20. The evidence from in the witness statements from the father-in-law and mother-in-law focus on the effect of what difficulties there would be if the children had to relocate to Pakistan. The witness statement from SH and the statement from UA say little about the effect there would be if the respondent was to be deported other than an observation that UA thinks it would be very difficult and the mother would struggle. There are also observations that it would be difficult to live without her father.
21. The respondent's wife's evidence as set out in her statement says that she currently home schools the two younger children and they would need to return to mainstream education if the respondent were to return to Pakistan and that she would not like to have to put them into care after school or give them to a childminder were she to work. She explains also that they would be heartbroken as a family and they do not talk about this possibility much in front of the children.
22. Dr Johnstone is a chartered clinical psychologist who was formerly head of Child and Family Clinical Psychology at NHS Forth Valley. There are no challenges to her credentials as an expert and the Secretary of State was fully aware of the contents of the report.
23. In her report Dr Johnstone sets out the interview she had with the family [7] and that specialist assessments were undertaken with the children to assess their emotional and behavioural functioning. She did, however, note [8] that the family had not consented to her asking the school about the children's functioning as they did not want the school to know about their predicament and that she had not provided the school report cards, associated papers, nor did she have access to GP records. That, however, was not criticised by the Secretary of State.

24. Having observed [12] that bereavement or loss of a parent is a risk factor for problem development and that children who experience family disruption by separation and divorce are at elevated risk of problems [14] indicative of adjustment problems and other issues as well as often a grieving process [15] to [16]. This letter concludes [19] that the children of deported parents who face forced separation are at risk of developing problems with mental health (anxiety, depression and post-traumatic stress disorder) and psychological distress, educational disadvantage and economic disadvantage which impacts their life chances.
25. Having set out the information regarding the family [20] to [73] setting out also in respect of the children results of assessed strengths and difficulties questionnaire assessed their current mental health, these all were close to the average or within the average range.
26. Dr Johnstone then set out her observations on the family and reached an overall opinion in which she said as follows:-
 - “82. I have no information to indicate that any of the children present with any underlying or premorbid emotional, cognitive, behavioural or mental health problems. On the contrary, they appear to be settled and well-adjusted.
 83. Outwith [the respondent’s] offending, there is no data available to me to indicate any other psychosocial or mental health difficulties. The same applies to Ms K [the respondent’s wife]. Although, as indicated the objective data was limited.
 84. The elder three children told me they were aware of the possibility of their father’s deportation and expressed anxiety concerning this in terms of their own personal losses but the wider impact this would have on the family functioning (emotionally, financially, educationally and practically). They also expressed concern about the knock-on effect whereby, if their mother was on her own, she would need to fulfil the parenting and breadwinner roles and there was concern that this would cause her stress and distress and undermine her ability to parent her children effectively. This was echoed by the parents.
 85. The younger children did not appear to be aware of the family’s predicament but did give an account of their father that indicated that he had a strong presence in the family, was available to them, and they enjoyed a relationship with him.
 86. Outside of the immediate family, it would appear that access to practical, financial and emotional support may be limited. If [the respondent] is deported, [his wife] would effectively be a single parent of 5 children”.
27. Dr Johnstone observed also notwithstanding the lack of data in the form of education or health records the available psychological research indicated that parental loss and separation in childhood constitutes a major event linked to significant distress and that a knock-on effect of the respondent’s absence from the family would elevate the risk of other known factors for abnormal child development including maternal distress, maternal absence (if she were working) and economic stressors which would reduce the level of support. She concluded that it was more likely than not if the data is reliable, that each of the children’s life chances would be significantly

reduced if they experienced a forced separation from their father. She found also they would be likely to experience a grief response which would be followed by the occurrence of various other risk factors for psychological problems which would in turn be compounded by the fact that many of the aspects of the “My World Triangle” had been identified as necessary for healthy child development.

28. In considering this material, which the judge took into account, I bear in mind what was held in *Sicwebu v SSHD* [2023] EWWCA Civ 530 at [27] – to [29]

27. In *HA (Iraq)* the Supreme Court gave authoritative guidance on the approach to the question posed by section 117C(5) 2002 Act. In summary, first, when considering whether the effect of deportation would be unduly harsh, the decision-maker should adopt the following self-direction, namely, that the concept:

"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."

When applying this self-direction, decision makers should recognise that it involves an appropriately elevated standard and make an evaluative judgement of the effect of deportation on the qualifying child and/or partner in order to judge whether the elevated standard has been met on the facts and circumstances of the individual case being addressed: see paragraphs 41 and 44.

28. Secondly, the seriousness of the parent's offending is not a factor to be weighed in the balance when assessing the interests of the child in applying the unduly harsh test. The child is not to be held responsible for the conduct of the parent.

29. Thirdly, there is no "notional comparator" which provides the baseline against which undue harshness is to be evaluated. In this regard, the Supreme Court affirmed the approach explained by Underhill VP in this court ([2020] EWCA Civ 1176) as follows:

"56...if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

29. Although this postdates the decision of Judge Prudham, it is declaratory of the law as it applied when the decision was written.

30. This was on any view a generous decision. But equally it must be borne in mind the number of people involved, the different factors involved, involving the different children of different ages, the financial situation, the impact on their education and the long-term effects likely to arise as noted by Dr Johnstone. This is a case in which findings of fact were made and expert evidence was evaluated. Whether or not deportation is “unduly harsh” is a finding of fact. Reference towards the findings of the judge who heard all the evidence is necessary and I bear in mind what was said in Riley v Sivier [2023] EWCA Civ 71 at [13].
31. Drawing all of these factors into account and reading the decision as a whole, I consider that the reasons given by the judge in this case were, although short, adequate in explaining how he concluded that, viewed cumulatively, the effect on the children and wife, it having already been accepted that requiring them to go to Pakistan would be unduly harsh, is adequate and accordingly the decision is sustainable.
32. As a footnote, I observe that the issue of whether the respondent is a foreign criminal on the basis of having cause serious harm does not appear to have been addressed at any stage.

Notice of Decision

- (1) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

Signed

Date 14 May 2024

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul