



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM
CHAMBER

Case No: UI-2024-002526
First-tier Tribunal No:
HU/01093/2023

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On the 06 November 2024**

Before

UPPER TRIBUNAL JUDGE RUDDICK

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ARAS AHMED RASHED

Respondent

Representation:

For the Appellant: Mr Jafar, Counsel instructed on a direct access basis

For the Respondent: Mrs Nolan, Senior Home Office Presenting Officer

Heard at Field House on 31 October 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Dineen allowing Mr Rashed's appeal against her decision to refuse his human rights claim.
2. For the purposes of this decision, I shall hereinafter refer to the Secretary of State as the respondent and Mr Rashed as the appellant, reflecting their positions as they were in the appeal before the First-tier Tribunal

Background

3. The appellant is a national of Iraq born in March 1986. He arrived in the UK in 2001 and has remained in the UK for the ensuing 23 years. He claimed asylum shortly after his arrival and although the respondent

refused his asylum claim she granted him limited leave to remain valid through March 2004. On 3 April 2004, the appellant was involved in a road rage incident, which culminated in his stabbing another man with a knife, causing serious injury to his wrist. On 24 November 2005, he was convicted of wounding with intent to cause grievous bodily harm and sentenced to five years in custody in a Young Offenders Institution.

4. The respondent made a decision to make a deportation order against the appellant in May 2008, but later withdrew this decision due to circumstances in Iraq. She served a second notice of a decision to make a deportation order on 4 November 2009, and the appellant's appeal against this decision was unsuccessful. On 17 December 2010, the respondent proceeded to make a deportation order against the appellant.
5. On 6 August 2012, the appellant applied for revocation of the deportation order, on 13 November 2012, the respondent refused this application, and on 19 February 2013, the appellant's appeal against the refusal was dismissed.
6. On 21 February 2019, the respondent married his wife, a Dutch citizen who is settled in the UK. In 2019 and 2020, the appellant made three applications for EEA residence cards, all of which were refused.
7. The couple have two British children, born in the UK in March 2020 and May 2021.
8. On 17 November 2022, the appellant applied for leave to remain on the basis of his family and private life, and it is the respondent's refusal of that application on 20 March 2023 that is the subject of this appeal.

The appeal before the First-tier Tribunal

9. The appellant's appeal came before the First-tier Tribunal at Hatton Cross on 16 February 2024, and in a decision promulgated on 22 March 2024, the Judge allowed the appellant's appeal. The Judge set out the key points of the appellant's and the respondent's cases from [10-21] and [22-33], respectively. The Judge then set out his findings at [34-44]. His key findings were that the appellant and his wife had both given truthful evidence [36-38], that the appellant was not a danger to the public [40] and that he was in a genuine and subsisting relationship with his wife and children [41-44].
10. The Judge then directed himself to the legal framework established by Section 117C of the Nationality, Immigration and Asylum Act 2002 and the definition of unduly harsh and very compelling circumstances, in the following terms:

"49. The effect of the decision of the Supreme Court in KO (Nigeria) v SSHD [2015] UKUT 223 is that "unduly harsh" means more than uncomfortable, inconvenient, undesirable or difficult, but requires severity or bleakness. It

requires consideration of factors including the degree of emotional dependency among the appellant and his family, financial consequences of deportation, and the availability of support in the UK and the country of deportation.

“50. Very compelling circumstances can include the degree of severity of the above matters, linked with surrounding circumstances including considerations such as the rehabilitation of the foreign criminal appellant.”

11. He then referred to the evidence before him concerning conditions in Iraq and the children’s young ages and found that it would clearly not be in the best interests of the children for them to relocate there. [51-52]
12. He then turned to the consequences for the family if the appellant were removed without him. The children would lose a relationship with their father that had been established at birth, and remote communication “would clearly not be an adequate substitute.” [53] Their mother would lose her husband, her employment and the family home [54]. Removal would break up a “successful family unit”. Moreover, the appellant speaks English, was financially independent and “would be removed to a country in which he has not lived during his adult life.” [55] For these reasons, the consequences of his removal would be “unduly harsh” [56].
13. Turning to the question of whether there were very compelling circumstances (which was a necessary question, due to the length of the appellant’s sentence), the Judge took into account that the consequences for the family would be unduly harsh “to an extreme degree”, that the appellant had lived in the UK for a lengthy period, beginning when he was a minor [57], that “notwithstanding the serious nature of his offence”, he had not offended either before or after that offence, had proven himself genuinely committed to changing his behaviour during his period of incarceration, and “is not considered to be any threat to society” [58]. He found that there were very compelling circumstances as defined at Section 117C and therefore the appellant’s removal was not in the public interest [59-60]

The grounds of appeal

14. The respondent sought permission to appeal on the ground that the Judge had materially misdirected himself in law. This misdirection was described in several different ways:
 - (i) The Judge had “not properly defined” the two separate legal tests of “unduly harsh” and “very compelling circumstances” in line with HA (Iraq) v SSHD [2022] UKSC 22;
 - (ii) He had failed to apply the elevated threshold for undue harshness and his finding that it was met was not adequately reasoned;
 - (iii) He had not referred to any supporting evidence for his finding that it would be unduly harsh to an “extreme degree”, which the respondent

here defined as “more than would be expected when a family is separated with the ensuing temporary disruption this may cause.”;

- (iv) The finding of very compelling circumstances was based on four considerations only: the unduly harsh effects on his family, his length of residence and the facts that he had only committed one offence, and as a “juvenile”. The Judge could not have found that these were very compelling circumstances if he had had regard to Section 117C(6); and
- (v) By way of summary, “The evidence and reasoning falls far short from establishing a ‘very strong claim indeed,’”.

15. The First-tier Tribunal refused permission to appeal on the grounds that the decision was brief but adequately reasoned. The respondent renewed her application to the Upper Tribunal. Deputy Upper Tribunal Judge Parkes then granted permission to appeal on the grounds that:

“The circumstances described by the Judge in paragraphs 53 to 55 are typical of those faced by a family where one of the adult members has to leave the UK. It is not clear from the decision how it could be said that their circumstances in the Appellant’s absence would be bleak or severe. While the level of harshness may be such that they amount to very compelling circumstances it is difficult to see how that level is reached on the findings made by Judge Dineen having regard to the observations made above. The question of the circumstances of the remaining family is an objective one based on the situation they will face in the absence of the deportee, how the individual to be deported came to be in that position is not necessarily part of the assessment.”

16. The matter then came before me for hearing at Field House.

Discussion

17. In deciding whether the Judge’s decision involved the making of a material error of law, I have reminded myself of the principles set out in Ullah v Secretary of State for the Home Department [2024] EWCA Civ 201 [26] and Volpi & Anor v Volpi [2022] EWCA Civ 464 [2-4], and of the danger of “island-hopping”, rather than looking at the evidence, and the reasoning, as a whole. See Fage UK Ltd & Anor v Chobani UK Ltd & Anor [2014] EWCA Civ 5 [114].
18. Bearing the guidance in mind, and after having heard forceful submissions from both representatives at the hearing before me, I do not find that the First-tier Tribunal Judge fell into any material error of law. At [49] and [50], the Judge set out concisely the two separate tests of “unduly harsh” and “very compelling circumstances”, in line with the substance of the Supreme Courts’ guidance in HA (Iraq). It is no error of law that the only specific case he referred to was MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) [46], which was endorsed by the Supreme Court in KO (Nigeria) [2018] UKSC

53. What matters, as reiterated in Ullah at [26(v)] is the substance of the law the Judge applied, not the cases cited. The respondent has failed to point to any of the Judge's reasoning that suggests he was not aware of the two different tests discussed at [19-45] and [46-71] of HA (Iraq). He sets them out at separate paragraphs at [59] and [60], and then considers them separately at [51-56] and [57-59].

19. In her grounds, the respondent complains that the Judge has failed to identify factors that would meet the definition of undue harshness, which she defines as something more than "would be expected when a family is separated with the ensuing temporary disruption this may cause". DUTJ Parkes agreed that it was arguably an error for the Judge to rely on circumstances that are "typical of those faced by a family where one of the adult members has to leave the UK." These arguments are misconceived, as they impermissibly seek to resurrect the "notional comparator" rejected at length in HA (Iraq). Mrs Nolan accepted this at the hearing before me.
20. Mrs Nolan submitted that even if the Judge had set out the "unduly harsh" test correctly, he could not have actually applied it, because it simply could not be considered to be met on the factual findings he had made. I disagree. The Judge began his findings of fact by expressly accepting the credibility of the witness statements and the oral evidence of the appellant and his wife [36-37]. The appellant said the following in his written statement:

"13. I know that if I am deported, my wife can't take care of the children without me. She is at present being on maternity leave is receiving support from the DWP. She is to present herself back to work in 3 months time. She is a qualified dispensing pharmacist. If I am not there to take care of the children, she will not be even able to work let alone take care of them. They will face economic hardship, housing instability, and food insecurity. Now with me in their lives, she can work even extended hours knowing that I am there. [...]

"14. My boys are so much used to my presence that even if I have to temporarily be away for a day or two, they get disturbed and miss me. They would be totally lost if I am not there in their lives. My wife is so traumatised with even the thought of that she gets emotionally disturbed, even her eating and sleeping pattern gets disturbed. She gets panic attacks. She shows anxiety, sadness, anger over everything."

His wife wrote:

"7. Not only is Aras my husband but he is also my emotional support and keeps me going. My mum has been ill for sometime and he always encourages me to come to London to visit her where he will look after the kids for the day so [I] can spend quality time with my mum and visa versa. They too have a strong bond. He has been there for me through one of the

most difficult times for me mentally and emotionally and I genuinely don't know what I would do without him."

21. In his findings, the Judge then went on to refer to the children's young ages [51] and the impact on them of the separation from their father, noting that they have lived with him since birth and that electronic communication "would clearly not be an adequate substitute" [53]. The statements also set out the details of the daily life care each parent provided, and there is no challenge to the Judge's finding at [54] that the family would lose their home if the appellant were deported. The appellant's bundle of evidence further contained a scholarly report on the seriously adverse "psychosocial effects" of a parent's deportation, and the Judge's references at [51] to the material on Iraq in the skeleton argument makes it clear that he had read the skeleton with care. Here, Ullah [26(iv)] is relevant. There was no requirement for the Judge to refer back to the specific details of the evidence that he had explicitly accepted in its entirety and to point to precisely which sections of it had persuaded him that the impact on the children would be severe. See Ullah [26(iv)].
22. Mrs Nolan's submission was, essentially, that even having accepted all of this evidence, if the Judge had turned his mind to the definition of "unduly harsh", he could not have found that it was met. Here, I am persuaded by Mr Jafar's submission that what was described in the accepted evidence could be found by a reasonable judge to go considerably beyond "uncomfortable, inconvenient, undesirable or merely difficult". It was open to the Judge to find that for his wife to lose her job, struggle with anxiety, sadness and anger over "everything" and for the children to lose one of their primary carers at a young age and face "economic hardship, housing instability, and food insecurity" would be very bleak. Perhaps this was a more generous finding than another judge would have made, but it is not one that it was not open to the Judge on the evidence before him. (See Ullah [26(vi)]).
23. When the Judge proceeded to apply the "very compelling circumstances test", he began with his finding that the "unduly harsh" test was met. There was no error in his doing so. He added here that it would be unduly harsh to an "extreme degree", and I do find that it is not clear on what basis he found that this set of facts would be "extreme". After careful consideration, however, I find that the lack of any explanation for why this harshness is "extreme" is not material. It would be material if this was the only finding that the Judge looked to in order to meet the threshold of circumstances that are "over and above" those set out at Exception 2, which was necessary due to the length of the appellant's sentence. But the Judge pointed to a range of other factors "over and above" the impact on the appellant's family. These included the appellant's more than 20 years of residence in the UK, since the age of 15 [57], his lack of offending either before or after the index offence, a commitment to changing his behaviour that dated back to his period of incarceration almost 20 years ago, and that he was "not considered a danger to society" [58]. The Judge's findings as to rehabilitation must be understood in the context of

[14-17], where he set out the appellant's case about his rehabilitation and the reasons for it, and found it "credible in light of his overall character" [16]. He had also found at [55] that the appellant had not lived in Iraq "during his adult life", when considering the unduly harsh question. Although the relevance to the unduly harsh test is not immediately clear (Mr Jafar suggested that perhaps it was relevant to whether the family could relocate together), it is another factor relevant to the very compelling circumstances test.

24. DUTJ Parkes found that it was arguable that none of these factors was relevant to the "very compelling circumstances" test, because that is concerned only with the effect of deportation on the family, and not with "how the individual to be deported came to be in that position." Mrs Nolan did not pursue this argument before me. All of the factors the Judge identified - length of residence, seriousness of the offence, lapse of time since the offence, the appellant's subsequent conduct, and social ties (or lack thereof) in the country of removal - are set out in HA (Iraq) at [55-59] and specifically identified as potentially relevant to the "very compelling circumstances" question.
25. The appellant arrived in the UK at the age of 15, committed one very serious offence just after he turned 18, and the Judge found him credible, put weight on relevant probation reports, and found that he had taken positive steps towards rehabilitation beginning almost 20 years ago and posed no danger to the community. It was open to the Judge to find that these factors, combined with the unduly harsh effects of his removal on his young children and his wife, constituted very compelling circumstances.

Notice of Decision

26. The making of the decision of the First-tier Tribunal did not involve a material error on a point of law requiring it to be set aside. The respondent's appeal is dismissed and Judge Dineen's decision to allow the appellant's appeal stands.

E. Ruddick

Judge of the Upper Tribunal
Immigration and Asylum Chamber

5 November 2024