Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09393/2018

THE IMMIGRATION ACTS

Heard at Field House via Skype	**Decision & Reasons Promulgated**
On 22 April 2021	**On 27 May 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR KADIR ALI
(NO ANONYMITY DIRECTION IN PLACE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Miss T Srindran, Direct Access
For the Respondent: Miss S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals against a decision of the Secretary of State made on 21 February 2018 to refuse his human rights claim consequent on the making of a deportation order against him pursuant to Section 32(5) of the UK Borders Act 2007. His appeal against that decision was allowed by the First-tier Tribunal for the reasons set out in a decision promulgated on 23 April 2020. For the reasons set out in my decision of 22 December 2020 that decision was set aside although the findings of fact were preserved.

Background

2. There is little dispute as to the underlying facts of this case.

3. The appellant is a citizen of Bangladesh born on 6 May 1986. He entered the United Kingdom on 4 June 1988 with his mother on family entrance clearance and on 21 January 1997 he was granted indefinite leave to remain. He has remained in the United Kingdom since then with the exception of spending nine months in Bangladesh in 2000 and a subsequent visit for two weeks in 2011 for a wedding.

4. The appellant was married on 20 March 2016 to Miss Boshir, a British citizen. The couple have two children who are British citizens. His mother lives in the United Kingdom as does his brother and family and two sisters.

5. The appellant has been convicted of numerous offences on several different occasions. On 24 March 2006 he was convicted of possessing an offensive weapon in a public place and given a conditional charge of 24 months. On 24 May 2006 he was convicted of driving whilst uninsured, driving otherwise than in accordance with a licence, failure to give a name and address and failure to surrender to bail, resulting in a fine and six penalty points. He was fined a further £50 which was not paid, resulting in a sentence of one day's imprisonment.

6. In February 2006 he was convicted at Croydon Crown Court of possessing a controlled drug with intent to supply (heroin) and was sentenced to two years' imprisonment in a Young Offenders Institute. On 28 November 2007 he was convicted at Inner London Crown Court of possession with intent to supply cannabis, resulting in a further sentence of two years' imprisonment.

7. In 2008 the appellant was served with notice of an intention of liability to deport and he appealed against that decision. On 30 October 2008 his appeal against that decision was allowed. Subsequent to that he was informed that deportation action would not take place but he was also warned that should he come to adverse notice in the future, the Secretary of State would be obliged to give further consideration as to whether he should be deported. His indefinite leave to remain was revoked on 24 November 2008 and consideration was to be given to a grant of discretionary leave.

8. On 8 June 2009 the appellant was convicted at Harrow Crown Court, resulting in two months' imprisonment and ten months' imprisonment to run concurrently and on 23 June 2009 he was convicted of possession of heroin and fined £500.

9. The appellant was again on 28 October 2009 served with intention of liability to deport and he was again on 19 November 2009 told that deportation would not take place on that occasion but warned that he could face deportation in the future were he to come again to adverse attention.

10. On 9 June 2010 the appellant was convicted of driving offences, resulting in a suspended imprisonment term of sixteen weeks amongst other penalties and on 15

August 2013 he was convicted of burglary with intent to steal and sentenced to 34 months' imprisonment.

11. On 18 September 2013 the respondent deemed the appellant's deportation to be conducive to the public good. He was served with an intention of liability to deport. A deportation order was signed on 26 February 2014. He appealed against that decision and it was dismissed. His application for permission to appeal to the Upper Tribunal was unsuccessful and finally he became appeal rights exhausted on 2 March 2017. At that point his deportation order came into force but he did not leave the United Kingdom.

12. On 26 September 2017 an application was made for his deportation order to be revoked. That application was refused and his deportation order was made.

13. The appellant's case is that:-

    (1) He is in a genuine and subsisting parental relationship with his two children and it would be unduly harsh for them to live in Bangladesh and/or it would be unduly harsh for them to remain in the United Kingdom when he is deported;

    (2) that he is in a genuine and subsisting relationship with his wife and

        (i) the relationship was formed at a time when his immigration status was not precarious,

        (ii) it would be unduly harsh for her to live in Bangladesh because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM and

        (iii) it would be unduly harsh for her to remain in the United Kingdom without the appellant.

    (3) The appellant also asserts that he has been lawfully resident in the United Kingdom for most of his life, is socially and culturally integrated into the United Kingdom and there would be very significant obstacles to his integration into Bangladesh.

14. The respondent's case is that although it is accepted that he is in a genuine and parental relationship with his children it was not accepted that it would be unduly harsh for them to live in Bangladesh nor would it be unduly harsh for them to remain in the United Kingdom with their mother when he was deported. The Secretary of State was also of the view that the appellant's relationship with his partner had been formed when his status was precarious: his mother had contacted his wife's parents to ask for her hand in marriage and initially this had been refused because of the threat of deportation. She also considered in any event that it would not be unduly harsh for his wife to live in Bangladesh, given that she had cultural ties to the country, nor would it be unduly harsh for her to remain in the United Kingdom if the appellant were deported.

15. The Secretary of State considered also that although the appellant had been lawfully resident in the United Kingdom for most of his life he was not socially and culturally integrated into the United Kingdom, given his serious offending which includes possession of controlled drugs with intent to supply, his failure to see the error of his ways and his continued offending despite receiving two warning letters about his future conduct as well as his setting up a business when subject to a deportation order. It was not accepted that there would be very significant obstacles to his integration into Bangladesh.

16. The Secretary of State did not consider either that there were very compelling circumstances such that he should not be deported, noting that there was a significant public interest in deporting him because of his eight criminal convictions indicating a propensity to reoffend, relying significantly on his unsuccessful appeal in August 2014.

17. Having had regard to paragraphs 390 and 390A and 391A of the Immigration Rules, the Secretary of State was not satisfied that it would be appropriate to revoke the deportation order.

The Hearing

18. I heard evidence from the appellant, the appellant's wife, two of the appellant's sisters, the appellant's brother and two other witnesses who gave evidence in support. In addition, I heard submissions from both representatives, both of whom relied on written submissions. I also had before me the following:

    (1) Respondent's bundle.

    (2) Appellant's bundle.

    (3) Appellant's supplementary bundle.

19. The appellant adopted his witness statement, confirming that he had worked in ASDA part-time as a first job and so he had not required any prior experience. He had become experienced in customer services, which is why the managers from that shop moved on and he was later able to get another job at ASDA in a customer service role. He said it had been hard to get a job, and he had gone door to door handing out CVs in shops but that this had not been successful. The appellant said that if his appeal is successful he would look for work albeit nightshift or weekends but he says he has only been able to work recently in 2018 cash in hand as the Home Office had his passport and he was not allowed to work.

20. Asked about the index offence, the burglary, he said he accepted that he had broken into the house and that he had considered the repercussions for the victim. He said that in 2013 he had become separated from his friends, then ended up with the wrong people in whose company he had committed the offence. He was separated from his peer group.

21. The appellant said that after being released from prison on that occasion he had been able to get a job at Heathrow through the uncle of somebody he had been in prison with. It had not worked out as it had been too far to travel and he had been on a tag, which made it difficult. He said it was no longer his intention to do business studies.

22. The appellant's wife gave evidence, adopting her witness statement, adding that her original family all live in Cardiff. She said that they had visited often although not recently owing to COVID. She said she had been a teacher for ten years, initially in Cardiff, now in London. She said she did not have any family left in Bangladesh as they are all here and she had not been there since 1991. She said she spoke broken Bengali and although she understood more she was not fluent. She said she could not read or write Bengali as her mother had been illiterate and there was no possibility for her to have learnt growing up in Cardiff. She said she was trying to teach her children Bengali but that it was hard.

23. She said that she had continuing back problems and the school had provided adjustments for her in the forms of a footstool, chair, cushions etc., and that they had been very understanding. She said that she got anxious about the possibility of the appellant being deported to Bangladesh as they had not discussed or made plans about this. She said that she and the children would not go to Bangladesh. She said that she had made a lot of sacrifices and worked extremely hard to reach the position she had as a teacher. She had fought to go to university and had gone through a lot of struggles and she did want to give that up to go to Bangladesh nor did she want her children not to have the opportunities they would have in the United Kingdom. She said that the children had not gone into a nursery initially although, as a key worker, this would have been possible as she thought it would be better for them to be at home with their father and they had been able to put things up in the garden to keep them occupied.

24. I heard evidence from the appellant's sister Silfiah Khatun, who adopted her witness statement. I then heard evidence from the appellant's brother, who adopted his witness statement. He said he is not in a position at present to buy a house, it would be difficult for him to support him and they would not be able to afford the cost of travelling there to visit. There were very few family left in Bangladesh, only distant.

25. I then heard evidence from Shiria Khatun, who again adopted her witness statement and was cross-examined. She says at present the appellant and his family were not paying rent to live in the house which was owned by her and her mother. She said that she owned her own house and that her husband works part-time three days a week so that he could look after the children. She said he does not have family in Bangladesh and she had no present intention to visit there. She accepted it was culturally normal to take family there to view the children and to show them to family but they could not afford to do so. She said that her brother (the appellant) was a sociable person and likeable but she was not sure that that was what despite his convictions allowed him to get a job.

26. I heard evidence from Mr Rubal, the appellant's wife's brother. He adopted his witness statement. He said he lived with his parents and that it was expected of him to support them, which he did. He also paid maintenance for his child. He said that he did help some distant relatives in Bangladesh and that it was common for people in the United Kingdom to receive letters for help from relatives even if they were not closely related or from villagers in the assumption that people who live in the United Kingdom are wealthy and could do so. He said he did give some money by way of charity from time to time.

27. I then heard evidence from the final witness, who adopted his witness statement and was cross-examined. He said he was a friend of the appellant, they had known each other as they had met volunteering at the London Borough of Newham.

28. I then heard submissions. Miss Cunha stated that the Secretary of State was no longer arguing that it would not be unduly harsh to expect the appellant's wife or children to relocate to Bangladesh but was submitting that it would not be unduly harsh to expect them to remain in the United Kingdom and for the appellant to be deported. She submitted also that the appellant had not shown that there were very significant obstacles to his integration into Bangladesh.

29. Miss Cunha submitted that the appellant would get the assistance of his own community in Bangladesh and that he had family who had things there. She submitted that insofar there is an impact on the wife, she is highly educated, had a job which she could change if she wanted to and she would be able to go to live again in Cardiff with the support of her family.

30. She submitted that in any event the appellant's wife would be able to continue living in London with the children and the assistance of what was clearly a close and loving family. She submitted that as the children were now at nursery there was no reason why the appellant's wife would not be able to continue in her employment or, as the school had been flexible in the past, she could reduce her hours (again, this was not put to her). Miss Cunha submitted also that it was considered that the appellant's wife and children would be able to continue living in the house which is rent-free and it was owned by the family.

31. Turning to the social work report in respect of the children, Miss Cunha submitted that it was accepted that there was a strong relationship with the appellant and significant that the children had a close bond with their father. She submitted the breach of this, even if it was contrary to the best interests of the children, would not amount to undue harshness which did not arise on the facts of this case.

32. She submitted further that there would not be very significant obstacles for the appellant on return to Bangladesh properly understood as he would have the mechanisms to integrate.

33. Miss Srindran relied on her submissions, submitting that account should be taken of the long gap since the appellant had last offended. She submitted that it would be unduly harsh on the particular facts of this case for the father to be separated from

the children, given the closeness of the bond which had deepened during the last year during lockdown as he had become very much the primary carer for the children most of the time as the mother had gone out to work. She submitted further on the basis of the expert report that the appellant would have very significant obstacles to re-integration.

The Law

34. Section 117C of the Nationality, Immigration and Asylum Act 2002 provides as follows:

> "117C Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> (4) Exception 1 applies where—
>
> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
>
> …
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

35. The Immigration Rules provide, so far as is relevant, as follows:

> A398. These rules apply where:
>
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
>
> (b) a foreign criminal applies for a deportation order made against him to be revoked.
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

> (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
>
> (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,
>
> the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

36. Paragraph 399 and 399A provide:

> This paragraph applies where paragraph 398 (b) or (c) applies if –
>
> (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and
>
> (i) the child is a British Citizen; or
>
> (ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision;
>
> and in either case
>
> (a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and
>
> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
>
> …
>
> 399A. This paragraph applies where paragraph 398(b) or (c) applies if –
>
> (a) the person has been lawfully resident in the UK for most of his life; and
>
> (b) he is socially and culturally integrated in the UK; and
>
> (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

37. With respect to Section 117C and paragraph 398 of the Immigration Rules the key issue here is undue harshness. The law on this is summarised in TD (Albania) [2021] EWCA Civ 619 at [20]ff:

> "20. In *KO (Nigeria)*, Lord Carnwath, with whom the other members of the Supreme Court agreed, explained the nature of the test of undue harshness:
>
> "23 On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of

> foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence…"

21. The appeals in *HA (Iraq)* arose from decisions of the Upper Tribunal giving guidance on the application of *KO (Nigeria)*. The decision of this court underlined that what is required in all cases is an informed evaluative assessment of whether the effect of deportation on a child or partner would be unduly harsh in the context of the strong public interest in the deportation of foreign criminals. The leading judgment of Underhill V-P contains these passages:

> "51 … The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest in the deportation of foreign criminals."
>
> "53 … It is inherent in the nature of an exercise of the kind required by section 117C(5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be "unduly harsh" in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value."
>
> "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.
>
> 57 … Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that

> effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras 50—53 above."
>
> 22. The decision in *HA (Iraq)* does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what *KO (Nigeria)*, properly understood, requires."

38. I note further that the issue in this case the best interests of the children but the best interests of the children are simply a factor to be weighed when assessing proportionality.

Paragraph 399A

39. The First-tier Tribunal's findings that the appellant has lived most of his life lawfully in the United Kingdom and that he is socially and culturally integrated here are preserved, the sole issue under this paragraph being whether there are very significant obstacles to the appellant re-integrating into Bangladesh.

40. In considering that issue, I bear in mind the observation in Kamara v SSHD [2016] EWCA Civ 813 at [14]:

> "In my view, the concept of a foreign criminal's "integration" into the country to which it is proposed that he be deported, as set out in section 117C(4)(c) and paragraph 399A, is a broad one. It is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."

41. The starting point is the facts as preserved by the First-tier Tribunal. These are as follows:-

> "37. I found the appellant gave his evidence in a restrained and calm way and did not seek to exaggerate. I accept that he has uncles in Bangladesh. He has said that it is a difficult relationship and that they are somewhat estranged, following the death of his grandparents. He has also said that they look to his mother for financial support. My conclusion is that he does have some ties to Bangladesh, and he has uncles living there. I accept that they may be able to give him some support. However, given the length of time he has lived in the UK, and what he says about his very limited relationship with them, I find that this support would be extremely limited.

…

39. The evidence about his work in the UK is not comprehensive – he has had various jobs in retail and security and in construction. The UT judge in 2015 made findings at paragraphs 8 and 9 about employment after his release. He did not complete his school education in the UK but has studied for various NVQs and other IT qualifications.

40. I have adopted a balance sheet approach. The obstacles to integration I find are:

(a) He has lived in the United Kingdom since approximately the age of 2.

(b) He has grown up in this country, and gone through the education system.

(c) He has never lived beyond the age of 2 in Bangladesh, apart from 9 months when he was aged 14 and other occasional short visits. He has not visited since 2011 when he went for two weeks for his sister's wedding.

(d) He cannot read or write Sylheti, although I accept he could reasonably learn within a reasonable time scale.

(e) All his close family are in the United Kingdom

(f) While he has some uncles in Bangladesh, as above I find the likely support would be very limited.

(g) I have found that he is socially and culturally integrated in the UK.

(h) I find that his real knowledge of current culture and society in Bangladesh will be limited."

42. I bear in mind that he left Bangladesh at the age of 2 and has had limited exposure to that country. Nonetheless, he does have some connections in the form of relatives, albeit distant, but equally, there is no evidence from the witnesses from whom I have heard indicating that these relatives would now be able to support him. Nor is there evidence that they will be able to assist him in getting employment. I accept the evidence that there is little or no contact between the appellant and relatives in Bangladesh.

43. I bear in mind that the appellant speaks some Bengali, particularly the Sylheti dialect, but equally, there is no reason why his language skills would not improve after a relatively short time in the country. I accept, however, that he is not literate in Bengali and it would time to become so. This would, I accept, limit his ability to obtain employment at anything but the lowest level at least initially.

44. I accept that there may well be some support from relatives in Bangladesh, but I find that the consistent and reliable evidence of the witnesses, including his wife's family, is that over the years, contact has diminished, and is often initiated when those in Bangladesh want money. There is little indication of any reciprocity of support; if anything, it appears that relative get in contact from Bangladesh only when they want something. And there is little or no willingness shown that they would offer accommodation or assist in finding employment.

45. The appellant has, clearly, grown up in the British Bangladeshi community. But it does not necessarily follow that he would easily fit into Bangladeshi society. As became clear in cross-examination, several members of the family have, through getting divorced and in women becoming the main breadwinner, moved away from cultural traditions. The country that they or their parents left is no longer the same, and they have now lived in a different country effectively the whole of their lives.

46. The respondent takes issue with the expert report from Dr Amundsen, submitting that it cannot be relied upon. Contrary to what is averred by the respondent, it is the case that he has no *professional* skills or lengthy professional experience. The conclusions are properly explained at page 19 but it is an exaggeration to say that he has no formal education (report, page 18). Equally, the observations that he would find it difficult to support his children and wife are not relevant here, given the concession that it would be unduly harsh for them to relocate to Bangladesh.

47. That said, the conclusions regarding a huge rise in unemployment in Bangladesh as a result of COVID are properly sourced (page 19) as is the observation that those at the bottom end of the employment scale are worse affected.

48. I consider that, in reality, the report is not authority for the proposition that the appellant's criminal record will be a problem, given that it is unlikely that employers of the low-skilled would undertake checks (page 20, fn 10). But, I accept that the appellant's lack of language skills will put him at a serious disadvantage in getting a job, even with family support. I accept the evidence in Dr Amundsen's report that in a society like Bangladesh, it is hard to get a job (or accommodation) without family support and contacts. Equally, I accept that without that, there is no real safety net in terms of social support.

49. That then leads back to the extent to which family will be able to support the appellant. I bear in mind the findings made by the First-tier Tribunal at [48] but the situation has changed since then. I accept that the witnesses have an interest in the appellant being able to remain in the United Kingdom, and emotional attachments to him but, taking all of the evidence into account, I am satisfied that they have told the truth about the extent of ties to Bangladesh. I am satisfied also that, were the appellant to go to Bangladesh, it would be difficult for his wife to maintain her employment with a consequent reduction in available funds. Some support for her and the children would I find be forthcoming from the family, but that would in turn make less available for the appellant.

50. Accordingly, viewing all of these factors and taking them into account, I am satisfied that the appellant would face very significant obstacles to integration into Bangladesh and I find that he meets the requirements of paragraph 399A of the Immigration Rules.

Family life exception

51. Given the changes in circumstances since the decision of the First-tier Tribunal, and the clarifications set out in HA (Iraq), I consider that it is necessary to revisit the

findings on this issue, as set out in my error of law decision. The findings at [49] are, in consequence, not sustainable.

52. In assessing the effects of deportation on the children, I have had regard to the report from a social worker. However, I note the Secretary of State's submissions that in terms of the family law the best interests consideration is on a different basis in that it is the primary consideration rather than a primary consideration. That does not, however, for the reasons set out above materially affect the import of the report insofar as it sets out the consequences to the children. In doing so I note and I accept the evidence that during lockdown the appellant has become in effect the sole carer from Monday to Friday as his wife has said (see witness statement at [8]). I accept that they have become more reliant than previously, which is perhaps inevitable, and have become particularly dependent on him. I accept that Miss Boshir has been suffering from chronic back pain and migraines due to increased screen time, which has also aggravated her sciatica.

53. It is evident from her evidence that Miss Boshir said that she would have to give up employment as there was no-one to look after the children. This was not the subject of any cross-examination by the respondent, still less is there any room for the submission that she could go to live in Cardiff. This was simply not put to her. I accept also that the appellant's departure would have an adverse impact on her wellbeing, given that she is and has been reliant on him significantly.

54. In terms of the social work report, the report is recent, dated 7 April 2021. Owing to current restrictions that it was carried out by videolink. That is not ideal but I do note also that the social worker had previously prepared a report on the family. I note also that the majority of the session was spent in the boys' bedrooms. The social worker observed that the older child could not think of any adult other than his parents looking after him and that clearly his primary caregiver since Miss Boshir returned to teaching is the appellant. She stated:-

> "Any assumption that (the older boy) will not be significantly impacted upon if his father was not present and could not look after him is evident in how perplexed he was when I asked about alternative care. I also my session in reliance on Mr Ali. The children did not interrupt me nearly as much as when I spoke with mum, however would seek Mr Ali out of choice or try and follow even when Mrs Begum endeavoured to distract/entertain both children."

55. In respect of the younger child she said:-

> "Like his older brother his attachment to his father was evidenced much more demonstratively than to his mother. However, like his brother they responded to request some boundary setting for mum."

56. She noted also that the children have a strong and affectionate bond with their father and a behaviour which fell to deteriorate when he is not present.

> "The children insist on Mr Ali reading books and putting them to bed at night. Mrs Begum is really open about how she felt about having a second child so soon after the first and her experience of postnatal depression. There is significant evidence that poor

> parental mental health has a deleterious effect on child development, however, a protective factor of a second available parent can negate some of the negative outcome. Mr Ali clearly has been that protective factor."

57. Asked how the children would cope or not in the absence of their father, she said that it would be difficult to predict but that the impact of separation being an ongoing life event and not something that can be contained to a single period, particularly where, as here, the children are currently unaware that there is a possibility of separation.

58. With regard to deportation of the appellant and that effect on Miss Boshir the social worker said:-

> "Mrs Begum is clear that she would have no other option but to leave her current employment in order to provide full-time care to the children. This would clearly be a significant change for both Mrs Begum and her financially independence and impact on the children as I have previously referred to. Mr Ali is a proactive parent, he has a warmth when in his children's presence and when he is speaking about his role as a parent which having met Mr Ali previously has not changed since the children were much younger."

59. It is noted that the family's quality of life would change, given that there would be a drop in income. I accept that there is little evidence to show that the rest of the family would be able to make that up. I note also the observation that there is no-one else available in the family to help with the childcare during Mrs Boshir's working hours as communication between the children and their grandmother is extremely limited and requests are often lost in translation as they do not understand each other.

60. The social worker observed also that there would be a significant impact on Mrs Boshir's mental health were she to be separated from her husband and that in his absence, the appellant's actions as a father could not be equalled or replicated by alternative childcare either practically or financially.

61. The social worker also noted that the children are reluctant to be cared for by anyone but their father, who was their full-time carer.

62. I conclude that the particular factors in this case with respect to the relationship between the appellant and his children have changed as a result of them being in effect in his sole care in the unusual situations of the COVID lockdown.

63. As required, I must undertake a detailed analysis of the likely effect on the children. In this case, on the basis of the evidence, I am satisfied that the children live as part of a close knit family group encompassing them and their parents at its core. It is not possible or correct to treat the children in isolation from their mother; the effects of deportation on her would impact on her ability to parent, and their distress would affect her.

64. I am satisfied also that, as a result of him being their main carer, in terms of time spent with them, that the children have a very close bond with their father. The effect of his removal from them would, I find, have a serious and traumatic effect. They are clearly very dependant and orientated to him. They are simply too young to understand why their father has been taken from them. He is a major factor in their life, more so (and unusually) than their mother who has had to work very long hours in the past year. That is a long time for such young children. Further, it cannot be said that telephone calls or video calls could in any way make up for hugs, cuddles and tactile interaction with a parent.

65. I consider that it is unlikely that there could be many visits to the father, given the cost of travel to Bangladesh which, for a family during school holiday would, I accept be high. I accept the evidence from the family which is consistent that they have not been able to travel, owing to the cost, for many years and contact with extended or remaining family Bangladesh is limited and has, understandably, diminished over years.

66. There would, I accept, be emotional support from the mother, but she is I accept, equally likely to be affected by the removal of her husband. She has overcome many difficulties to build a career as a teacher, and has a number of health difficulties which, although not serious in themselves, make it less likely that she would be able to make up the deficit and emotional upset that would flow from the appellant's removal. I consider that there would be an effect on her mental health making it difficult even to start making up for the removal of the father.

67. That removal is, I find, likely to be at least very long lasting and not of finite duration. The children have not experienced that, and I accept the evidence from the social worker that they would find it difficult, if not impossible, to understand. His absence and daily presence is not something which can be replicated by relatives. Indeed, there are difficulties with them interacting with their grandmother owing to language barriers.

68. As regards the financial effect of removal, I am satisfied from the evidence of the relatives that they would not be able to help. The appellant's family is fortunate in that they do not have to meet the costs of accommodation, but the appellant's wife works full time. There is no evidential basis for suggesting that she could reduce her hours or work part-time as a teacher; that was not put to her nor was the submission that she could return to Cardiff to live with her family there and get a job. That submission is speculative and does not take into account that she would then have to find a job and accommodation such that she may well be financially in a worse position.

69. If the appellant's wife gave up work, that would have an impact on her mentally, given the extent to which I accept from her evidence she had strived and overcome many difficulties to train as a teacher, a job she loves and to which she is dedicated. This would, I find, impact on her emotional ability to be a strong parent. I find that, in effect, she would be compelled to give up her job, at least for some years, to look

after the children given their ages and the effect on them of the appellant being deported.

70. Having heard evidence from the family members, I am satisfied that they do not have the spare funds to support the appellant in Bangladesh and to make up for what would happen when the wife were to give up employment.

71. Taking all of these factors into account, and while no single one of them is determinative, I am satisfied that on the particular facts of this case, that the impact on the children, given their age and significant dependence on their father as their full-time carer, would be unduly harsh and is, on the basis of the report of the social worker, likely to impact significantly on their development as children. and taking all these factors into account, I am satisfied that it would be unduly harsh for them to be separated from him. Accordingly, I am satisfied that Exception 2 is made out.

72. Having found that Exception 2 is made out, it is unnecessary for me to consider whether Exception 1 is made out; and, in any event, that is not part of the appeal to be remade.

73. Accordingly, for these reasons, I am satisfied that the appellant meets the requirements of the Immigration Rules and Exceptions 1 and 2 as set out in Section 117 of the 2002 Act. Accordingly, I am satisfied on the particular facts of this case that deportation would be disproportionate and therefore I allow his appeal.

74. The appellant should, however, be under no illusions that should he offend again there is a real likelihood of him being deported.

Notice of Decision

1 The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2 I remake the decision by allowing the appeal on human rights grounds.

There is no anonymity order in place.

Signed Date 18 May 2021

Jeremy K H Rintoul
Upper Tribunal Judge Rintoul

IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09393/2018

THE IMMIGRATION ACTS

Heard at Field House
On 7 December 2020
Extempore

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

and

MR KADIR ALI
(ANONYMITY DIRECTION NOT MADE)

Appellant

Representation:
For the Respondent: Mrs R Pettersen, Home Office Presenting Officer
For the Appellant: Ms T Srindran, Counsel instructed by Paramount Chambers

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Roots promulgated on 23 April 2020. The judge allowed Mr Kadir Ali's appeal against a decision of the Secretary of State not to revoke a deportation order against him, the judge finding that he met the requirements of paragraph 399A of the Immigration Rules and thus fell within Exception 1 within Section 117C of the 2002 Act.

2. With respect to Mr Ali, it is evident that he has a long immigration history in this country and has a poor record of convictions, albeit that it is now seven years since his last conviction.

3. I refer to Mr Ali as the appellant as he was below for ease, although he is the respondent to the Secretary of State's application. His case is that it would not be proportionate to deport him, given that he has been lawfully resident in the United Kingdom for most of his life, is socially and culturally integrated into the United Kingdom and that there would be very significant obstacles to his integration into Bangladesh where it is proposed to deport him. It was also his case that he was in a genuine and subsisting relationship with a qualified person and children and that the effect of deportation on them would be unduly harsh.

4. The Secretary of State did not accept that although did not dispute that he had been lawfully resident for most of his life and was culturally and socially integrated into the United Kingdom, the remaining issue being whether there would be very significant obstacles to his integration into Bangladesh where he was to be deported.

5. The judge heard evidence and directed himself as to the case law from paragraphs 14 to 18. In particular, he directed himself in line with Kamara [2016] EWCA Civ 813, Treebhawon and Others [2017] UKUT and Parveen v The Secretary of State for the Home Department [2018] EWCA Civ 932, citing in his decision [9] passages from the latter commenting on Treebhawon.

6. The judge heard evidence from the appellant, took account of the previous findings of the Upper Tribunal and the First-tier Tribunal, applying Devaseelan, then went on to consider Exception 1. The judge addressed whether there were very significant obstacles to integration from paragraphs 29 onwards, setting out a balance sheet approach in paragraphs 40 to 41. The judge then found that there would be very significant obstacles to integration at paragraph 42. The judge did, however, find that Exception 2 was not made out but allowed the appeal on human rights grounds.

7. The Secretary of State sought permission to appeal, stating it was not disputed that the appellant had lived lawfully in the United Kingdom for more than half his life nor that he was socially and culturally integrated into the United Kingdom but it is submitted first that the judge had diluted the requisite test and whilst having rehearsed case law on matter failed to have regard to established case law, second, that the appellant's circumstances were akin to those of Bossade (ss.117A-D-interrelationship with Rules) [2015] UKUT 415 (IAC) and that there were in short inadequate findings as to why he would not be able to integrate into Bangladesh. The grounds also make reference to his long history of offending and also to OH (Serbia) [2008] EWCA Civ 694. On 6 May 2020 First-tier Tribunal Judge Boyes granted permission.

8. As I outlined at the beginning of the hearing, there are a number of difficulties with the grounds. What I have to say about them is in no way a criticism of Mrs Pettersen, who has been put into a difficult position by poorly drafted grounds. The first

problem is that the case law cited at paragraph 4 is not identified. It is in fact extracted from Treebhawon, at least as regards the first six lines. The second part of what appears to be a quotation refers to a "cultural nexus to Zambia", which is not a phrase which appears in Treebhawon, nor have I been taken to any case in which the phrase "cultural nexus" appears. As I explained to Mrs Pettersen, having prepared for this case beforehand, I was unable to find any other deportation appeal as to which Zambia is raised certainly as regards reported decisions other than **JZ**, a Court of Appeal decision, which is entirely different on its fact and which in any event, JZ's case was upheld..

9. A further problem arises from what is said at paragraphs 7 and 8. It is, as Mrs Pettersen rightly said, established since KO (Nigeria) that in a case where, as here, the sentencing falls in the middle range, that is between twelve months and four years, the test of the public interest is satisfied by the unduly harsh or in this case the very significant obstacles to integration part of the test. There is no further consideration over and above the public interest in removal proportionate to the seriousness of offending. That makes paragraph 7 of the grounds problematic and indeed the reference to OH (Serbia) is of little relevance in this case as a result.

10. I note also that the passage pleaded in aid in paragraph 4 from **Treebhawon** refers to very significant obstacles as a "self-evidently elevated threshold". That test was expressly rejected in **Parveen** as the judge noted. I appreciate that this puts Mrs Pettersen in a difficult position and it is perhaps surprising that the grounds do not refer to the decision of **Kamara**, which is a decision of the Court of Appeal which deals at some length with the issue of integration.

11. That said, I do consider that the grounds sufficiently raise the issue that the judge erred in his assessment as to what the obstacles to integration would be and what integration would be, that is what the appellant would have to do to integrate into Bangladesh in the sense that is meant in **Kamara** and that this was not adequately resasoned.

12. I therefore turn what the judge has said in terms of integration. The judge noted at paragraph 40 that the appellant had lived in the United Kingdom since at the age of 2, had grown up here, gone through the education system and has made only a nine month visit to Bangladesh at the age of 14 and other short visits, not having visited since 2011 when he went for a wedding. The judge also sets out at 41 the factors suggesting that he would be able to integrate but these are relatively limited. But what the judge does not do is factor in that the uncles would be providing *some* limited support. It does not make sense as to why that is an obstacle to integration when equally of course some limited support would be a factor in favour of integration.

13. Further, as regards employment and accommodation there are simply no findings at all. The judge does not make findings as to the possibility of finding work in Bangladesh, stating at 38 only that, "I accept that the appellant has produced no evidence of this. However he has never worked in Bangladesh. I find he has no

knowledge or experience of working in Bangladesh". He does not make any findings as to whether he would be able to find work with or without the assistance for example of uncles or other relatives.

14. I appreciate the points made by Ms Srindran that he would have difficulty in getting a job because of the market there but the judge makes no mention of that nor is there evidence regarding that. Similarly, when it comes to the issue of integration the judge sets out a balance sheet, but does not really properly explain what weight is attached to those factors. He does, however, and fairly say that coming to the United Kingdom at the age of 2 is a very significant factor and he note that the visits had been short; but he does not, in my view, properly answer the question what would be needed to integrate and what are the obstacles to doing so. A large part of the factors said to be in favour of the appellant are not necessarily obstacles to integration without further explanation. One can be socially and culturally integrated into the United Kingdom, that does not mean that one cannot also be integrated into Bangladesh, nor is it clear why having all close family in the United Kingdom is an obstacle to integration or one to which weight can be attached, particularly in light of the findings with regard to family life, Exception 2.

15. For these reasons, taking all these factors into account, I consider that the Secretary of State has satisfied me that the judge has erred in his approach to the "very significant obstacles to integration" test in this case for the reasons given above and accordingly, I set the decision aside as I am satisfied that those errors are material. Whilst I note Ms Srindran's submission that another Tribunal could have come to the decision, I consider that no other judge could in reality have come to the decision that this judge came to on the basis of the factors as identified in paragraphs 40 and 41 and for these reasons I consider that the decision should be set aside and should be remade in the Upper Tribunal.

16. The findings of fact at [35] to [37 are preserved. The issue of the appellant's ability to find work requires findings to be made, as does the level of support he could receive in Bangladesh as will the conclusion reached at [42].

17. I am satisfied also that, in the light of HA(Iraq) [2020] EWCA Civ 1176 and AA(Nigeria) [2020] EWCA Civ 1296, that it will be necessary to consider again whether or not exception 2 applies and thus the finding that exception 2 is not met will need to be reconsidered at a fresh hearing.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. The appeal will be remade in the Upper Tribunal on a date to be fixed.

3. Any additional material upon which the parties wish to rely must be served at least 21 days before the hearing.

4. The appellant must, within 14 days of the issue of this decision inform the Upper Tribunal how many witnesses are to be called, and whether an interpreter is needed.

No anonymity direction is made.

Signed Date 18 December 2020

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul