Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/00456/2020**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 November 2021	**On 03 December 2021**

Before

MR. JUSTICE BOURNE
(Sitting as a Judge of the Upper Tribunal)

UPPER TRIBUNAL JUDGE O'CALLAGHAN

Between

SE CRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

-and-

STALIN RAJARATNAM

Respondent

Representation:
For the Appellant: Mr. T Lindsay, Senior Presenting Officer
For the Respondent: Mr. N Paramjorthy, Counsel, instructed by ABN Solicitors

DECISION AND REASONS

Introduction

The appellant in this matter is referred to as the 'Secretary of State' in the body of this decision, the respondent as the 'claimant'.

The Secretary of State appeals against the decision of Judge of the First-tier Tribunal Adio ('the Judge') to allow the claimant's human rights (article 8) appeal. The Judge's decision was sent to the parties on 3 March 2021.

The Judge refused the claimant's appeal on (1) Refugee Convention, (2) human rights (article 3), and (3) humanitarian protections grounds. The claimant has not cross-appealed in respect of these adverse decisions.

Judge of the First-tier Tribunal Boyes granted the Secretary of State permission to appeal on all grounds by a decision dated 28 June 2021.

We allowed the Secretary of State's appeal at the conclusion of the hearing, to the extent that we set aside the decision of the First-tier Tribunal in respect of the human rights (article 8) appeal, and now give our reasons.

Anonymity

The Judge did not issue an anonymity order and one was not sought before us.

Background

The claimant is a national of Sri Lanka. He arrived in the United Kingdom in or around 2002 and unsuccessfully claimed asylum in 2003. In 2009 he applied for a certificate of approval for marriage. The certificate was granted, and the marriage took place in 2009. His wife is a British citizen and the couple have three British citizen children.

In May 2010 the claimant was convicted on a count of conspiracy to rob, for which a sentence of three years' imprisonment was imposed. Deportation proceedings were initiated by the Secretary of State and a deportation order signed on 20 May 2011. The claimant was eventually unsuccessful on appeal before the Upper Tribunal and subsequently before the Court of Appeal: [2014] EWCA Civ 8.

Further representations were served by the claimant. The Secretary of State accepted that they satisfied the fresh claim requirements of paragraph 353 of the Immigration Rules ('the Rules'), though ultimately she concluded that the extant deportation order was not to be revoked and the claimant was not to be granted leave to remain.

The Judge allowed the appeal on human rights (article 8) grounds. He noted that the claimant was sentenced to a term of imprisonment of less than four years and so was permitted to seek the benefit of paragraph 399 of the Rules: para. 56 of the decision.

He found that the claimant has a genuine and subsisting parental relationship with the children: para. 57.

As to the consideration of undue harshness under section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ('the 2002 Act') and paragraph 399(a) of the Rules, the Judge concluded, at paras. 57 to 59:

> '57. … None of the children have lived in the country to which the [claimant] is to be deported. None of the children have lived in Sri Lanka, they were all born in the UK. They are relatively young however they are entitled to remain in the UK. In terms of the issue of whether it would be unduly harsh for the children to live in Sri Lanka or to remain in the UK without the [claimant], there is an independent social work assessment by Dawn Griffiths dated 7 November 2020. Miss Griffiths states that in her opinion if the [claimant] left the UK it would have a significantly negative impact on the children and on their emotional health and wellbeing, growth and educational development. Just as the [claimant's] wife stated in evidence the social worker stated that the [claimant] assists with parental responsibilities for the children by setting boundaries and promoting positive behaviour.
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> 58. The assessment by Dawn Griffiths included conversations with the [claimant], his wife, the [claimant's] father-in-law and mother-in-law and the [claimant's] other son. It was noted the [claimant] has a good bond with his children. He shares parental responsibility with his wife. One of the children […] has been diagnosed […] The social worker noted that a child with […] needs can find it difficult to develop a relationship with other people, whereas [the child] has a positive relationship with [their] father. If the father was no longer around this would be distressful [for the child] and [they] could be disorientated if [their] routine changes and there is a likelihood that [they] would struggle and find it difficult to cope.
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> 59. … The social worker noted that even via video link [the child] was reluctant to talk and had to sit with [their] father for comfort and reassurance … With regards to the impact of the separation of the family unit, the social worker noted that children are most likely going to experience a feeling of loss if their contact or relationship with the father was severed resulting in a risk to their emotional wellbeing and they will likely develop feelings of abandonment. And [sic] that this resulting in the loss of opportunities that are important for having a successful outcome in adulthood. The social worker concludes that removing the [claimant] would be unduly harsh and have a substantial risk to the children's educational opportunities, health and emotional material wellbeing and chances for independence in adulthood for the children. The social worker does not attempt to give any expertise on the country of Sri Lanka and notes that at paragraph 24.21. She therefore stays within her area of competence in giving her opinion. I accept the opinion of Dawn Griffiths. It is based on evidence of what she observed. The [claimant] therefore meets the requirement of paragraph 399a of the Immigration Rules.'

The Judge proceeded to consider paragraph 398 of the Rules and section 117C(6) of the 2002 Act, which establish that 'very compelling circumstances'

can outweigh the public interest in deportation. He identified the relevant test as being 'compelling circumstances' at para. 60 of his decision and thereafter applied a 'compassionate circumstances' test, which he found at paras. 61 to 63 to have been met by the claimant.

Grounds of Appeal

Mr. Lindsay succinctly identified the Secretary of State's grounds as follows:

1) The Judge addressed the 'unduly harsh' exception established by section 117C(5) of the 2002 Act and paragraph 399(a) of the Rules in terms that were too broad and failed to lawfully engage with the 'go' element of the test: see *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC).

2) In considering whether the 'unduly harsh' requirement was established, the Judge failed to lawfully consider the 'stay' element: see paragraph 399(a)(ii)(b) of the Rules.

3) The Judge applied the wrong test when considering section 117C(6) of the 2002 Act and paragraph 398 of the Rules.

Decision on Error of Law

'Unduly harsh'

The Judge was required to consider two differently worded tests:

(a) Would it be unduly harsh for the children to live in Sri Lanka, and would it be unduly harsh for the children to remain in the United Kingdom without their father?

(b) If the answer to (a) above is No, then are there very compelling circumstances outweighing the public interest in deportation beyond those considered at (a) above.

'Unduly harsh'

We are satisfied that the Judge erred as to his consideration of the 'unduly harsh' assessment established by section 117C(5) of the 2002 Act.

Section 117C of the 2002 states, as relevant to this appeal:

> '(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.
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> ...

> (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.'

Exception 2 is mirrored in paragraph 399(a) of the Rules:

> 399. This paragraph applies where paragraph 398 (b) or (c) applies if –
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> ...
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> (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
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> (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
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> (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; ...'

Paragraph 399(a) is an elaboration on Exception 2; its clear intention is that Exception 2 is only satisfied if it would be unduly harsh both if the child relocated to the country to which the deportee would be deported (the 'go' scenario) and if the child remained in the UK without the deportee (the 'stay' scenario).

The Upper Tribunal held in *Patel (British citizen child – deportation)* [2020] UKUT 00045 (IAC) that in its application to a 'qualifying child' within the meaning of section 117D of the 2002 Act, section 117C(5) imposes the same two requirements as are specified in paragraph 399(a)(ii) of the Rules; namely, that it would be unduly harsh for the child to leave the United Kingdom and for the child to remain. What judicial decision-makers are required to assess is a hypothetical question, namely whether going or staying would be unduly harsh. They are not being asked to undertake a predictive factual analysis as to whether the qualifying child would in fact go or stay.

Popplewell LJ confirmed in *AA (Nigeria) v. Secretary of State for the Home Department* [2020] EWCA Civ 1296, [2021] Imm. A.R. 114, at [9], that appellate tribunals should assume in respect of the unduly harsh assessment that experienced judges in specialised tribunals correctly apply relevant principles, without the need for extensive citation, unless it is clear from what they said that they have not done so.

He further confirmed at [9] that there is an expectation that a judge will reference the guidance provided to the unduly harsh assessment by the

Supreme Court in *KO (Nigeria) v. Secretary of State of the Home Department* [2018] UKSC 53, [2018] 1 W.L.R. 5273 and *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 W.L.R. 1327.

In *KO (Nigeria)* the Supreme Court confirmed that the criterion of undue harshness in section 117C(5) sets an elevated bar which carries a much stronger emphasis than mere undesirability.

In *HA (Iraq)* the Court of Appeal held that the question for tribunals under section 117C(5) is whether the harshness which the deportation will cause for the offender's partner and/or child is of a sufficiently elevated degree to outweigh the public interest in deportation. The statutory intention is that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the low level that applies in the case of a person who was liable to ordinary immigration removal - where, by section 117B(6) of the 2002 Act, the test is whether it will not be reasonable to expect the child to leave the United Kingdom - and the very high level that applies to an offender who has been sentenced to a period of imprisonment of four years or more, namely very compelling circumstances over and above those described in Exceptions 1 and 2: section 117C(6).

We are mindful of Popplewell LJ’s observation in respect of experienced judges and the application of relevant principles but having read the decision of the Judge with care we are satisfied that in the absence of any express reference to the guidance detailed above, it is not possible to identify at paras. 57 to 59 of the decision the correct application of the unduly harsh assessment. Beyond reciting that he was required to consider whether it would be unduly harsh for the children to live in Sri Lanka or to remain in this country without their father, there is no clear reference by the Judge to the elevated nature of the harshness required nor has it proven possible to read an implicit application of such elevation into the decision. Having been silent as to the guidance of the Supreme Court and the Court of Appeal, recited relevant personal facts and noted the opinion of Ms. Griffiths, the Judge simply concludes, without more, that “The [claimant] therefore meets the requirements of Paragraph 399a of the Immigration Rules”. We conclude that the Judge's lack of reasoning fails to demonstrate that he applied the elevated threshold that has to be met for undue harshness.

We agree upon reading paragraphs 57 to 59 of the decision that the Judge’s focus was primarily upon the ‘stay’ scenario. We note that the Secretary of State’s representative submitted before the Judge that it was not unduly harsh for the claimant’s wife and children to accompany him to Sri Lanka (the ‘go’ scenario) and the Judge accepted that he was required to consider this issue. There is brief reference to the ‘go’ scenario at para. 57. The Judge notes that the children were not born in Sri Lanka, are entitled to remain in this country and are relatively young. These facts are not contentious. The Judge then proceeds to engage with the ‘stay’ scenario, without making any express findings as to whether these facts establish undue harshness in respect of the ‘go’ scenario. The Court of Appeal confirmed in *Reid v. Secretary of State for*

the Home Department [2021] EWCA Civ 1158, at [52], that a tribunal will materially err if there is no concentration on the harshness to the qualifying child of an offender's deportation, and whether the degree of harshness which would be caused to them would be 'undue'.

In *Patel* the Upper Tribunal held that in respect of a child who possesses British citizenship, it has to be unduly harsh for them both to leave the country with their parent who is subject to a deportation order, or to stay in this country without their parent; not just harsh. Thus, some substantial interference with the rights and expectations that come with being British is possible, without the position becoming one of undue harshness to the child. We find that there was no engagement by the Judge with the question of whether substantial interference arose in this matter if the children accompanied their father to Sri Lanka. There is an absence of any analysis of positive features favourable to the Secretary of State, including the youth and adaptability of the children, and additionally no engagement with the Secretary of State's case that the concerns of one of the children could be addressed by the family unit remaining together upon relocation to Sri Lanka.

We are satisfied that there is inadequate reasoning as to why it would be unduly harsh for the claimant's children to accompany him to Sri Lanka and such failure is a material error of law.

Turning to the judicial consideration of the 'stay' scenario, we observe that the Judge identified the claimant's close relationship with his children and the adverse impact that separation would have upon an identified child. However, there is no explicit explanation as to why the disadvantages and hardships involved meet the unduly harsh threshold. There is no express reference to placing the public interest in the balancing exercise. We conclude that the Judge failed to carry out a careful and balanced evaluation of all the important factors and failed to reach a rational conclusion in respect of the 'stay' scenario. Such failure amounts to a material error of law.

We allow the Secretary of State's appeal on grounds 1 and 2.

'Very compelling circumstances'

Having found Exception 2 to be established, the Judge undertook, in the alternative, an article 8 proportionality assessment as to whether there were very compelling circumstances, over and above those described in Exceptions 1 and 2 in section 117C of the 2002 Act and paragraphs 399 and 399A of the Rules. Section 117C(6) of the 2002 Act prescribes the weight that is to be given to the public interest in deportation when carrying out that assessment:

> '(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.'

This statutory provision is mirrored at paragraph 398 of the Rules:

> ‘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
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> …
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> (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.’

The Court of Appeal clarified in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662; [2017] 1 WLR 20 that section 117C(6) can be relied upon by offenders who received a sentence of imprisonment of less than four years and cannot meet Exceptions 1 and 2. The Court confirmed that the test established in section 117C(6) is a very stringent one. Jackson LJ explained, at [32]-[33], that in the case of a medium offender – sentenced to less than four years imprisonment - if all he could advance in support of his article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare.

We find that the decision is confused as to what is being weighed against the public interest. At para. 60 it is identified as ‘compelling circumstances’. The failure to observe that they be ‘very compelling circumstances’ in this paragraph is not by itself determinative of our consideration as we can properly give weight to the substance of the subsequent assessment. However, in both paras. 61 and 62 a ‘compassionate circumstances’ assessment is applied. We find that this assessment is lower than the required very compelling circumstances test. In *OH (Algeria) v. Secretary of State for the Home Department* [2019] EWCA Civ 1763, [2020] Imm. A.R. 350, Irwin LJ confirmed at [63] that as a matter of language and logic, very compelling circumstances outweighing the public interest in deportation is a ‘very high bar’ indeed. To go beyond that requires a close analysis by a judge of the claimant’s criminality, a recognition of the degree to which that elevates the public interest in the specific deportation, and then a clear consideration of whether the impact on family life would represent very compelling reasons that tip the balance. We

find that this requirement cannot be satisfied by an assessment conducted through the prism of compassionate circumstances alone and so the Judge erred in law.

Mr. Paramjorthy accepted that the Judge did not specifically refer to 'very compelling circumstances' but asked us to find that when taken cumulatively the findings of fact made at paras. 57 to 62 of the decision can meet the required threshold. Whilst Mr. Paramjorthy requested that we consider such failure not to be material, we conclude that it cannot properly be said on the evidence presented to us that no judge properly directing themselves could find against the appellant as to very compelling circumstances.

We are satisfied that the Judge's decision falls foul of the requirement that when approaching the statutory test in section 117C(6) a tribunal has an obligation to be more than usually clear as to why such a conclusion was justified: *OH (Algeria)*, at [63]. The error of law is material, and we allow the Secretary of State's appeal on ground 3.

Remaking the Decision

The representatives agreed that the hearing of the human rights (article 8) appeal be remitted to the First-tier Tribunal. We are satisfied that the nature or extent of any judicial fact finding which is necessary in order for the decision in the appeal to be re-made is such that, having regard to the overriding objective in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008, it is appropriate to remit the case to the First-tier Tribunal.

The sole issue at the remitted hearing is the claimant's human rights (article 8) appeal.

We preserve the following findings of fact made by the First-tier Tribunal: [30]-[48].

Notice of Decision

The decision of the First-tier Tribunal, dated 3 March 2021, involved the making of a material error on a point of law. We set aside the Judge's decision pursuant to section 12(2)(a) of the Tribunals, Courts and Enforcement Act 2007 in respect of the following:

i) The claimant's human rights (article 8) appeal.

The decision of the First-tier Tribunal is confirmed as standing in respect of:

i) The claimant rebutting the presumption raised under section 72(2) of the 2002 Act.

ii) The dismissal of the claimant's appeal on Refugee Convention grounds.

iii) The dismissal of the claimant's human rights (article 3) appeal.

iv) The dismissal of the claimant's humanitarian protection appeal.

The following findings of fact made by the First-tier Tribunal are preserved: [30]-[48]

The matter is remitted to the First-tier Tribunal for a hearing before any judge other than Judge of the First-tier Tribunal Adio.

Signed: D O'Callaghan
Upper Tribunal Judge O'Callaghan

Date: 29 November 2021