Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/03928/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 06 January 2022	**On the 28 February 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE MAILER

Between

MM
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Heybroek, Counsel instructed by Nasim & Co Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 we make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the appellant. Breach of this order can be punished as a contempt of court. We make this order because the case turns primarily on the rights of children and there is no legitimate public interest in their identities being known

2. This appeal has been determined by a two-member Tribunal but an error of law was established before me and I gave my reasons in a decision promulgated on 27 September 2021. That decision has already been served on the parties but we append it to this decision and invite the reader to begin by considering it

because it sets the context of the present appeal. We have corrected an obvious typographical error in paragraph 11 and paragraph 15.

3. As is explained there, this is an appeal by a citizen of India born in 1990 against the decision of the First-tier Tribunal dismissing her appeal against a decision of the respondent on 19 February 2019 refusing her leave to remain on human rights grounds.

4. It is for the appellant to prove on the balance of probabilities any facts on which she relies to support her claim that refusing her leave to remain interferes disproportionately with the private and family life of the appellant and her immediate family. Once the facts are proved it is for the respondent to show that any interference is justified.

5. There are several distinctive features in this case. The appellant is a foreign criminal. In November 2013 she was sentenced to twelve months' imprisonment for a document offence and ordered to pay financial penalties. Although little is said in the sentencing remarks about the reasons for the offence it is her case that she was using another person's passport in an attempt to facilitate her entry to Germany and it was a decision made without much forethought because she wanted to get away from an abusive marriage.

6. The appellant was sentenced by H.H. Judge Williams and we have seen her sentencing remarks. Although Judge Williams was careful to "take into account everything said on your behalf" she did not indicate what was said.

7. Notwithstanding that the appellant was made the subject of a deportation order on 23 September 2014 she has remained in the United Kingdom.

8. The First-tier Tribunal dismissed the appeal against the decision but, I was persuaded, did not give lawful reasons for rejecting the contention first that the effect of deportation on the partner or child would be unduly harsh, and second for finding that there were no insurmountable obstacles in the way of the appellant establishing herself in India.

9. Given my observations on the areas of my concern we anticipated that the appellant would have asked to call further evidence but she did not. Ms Heybroek chose to rely on the findings that had already been made and invited us to re-make the decision but concluding and explaining that it would be unduly harsh for the children either to be required to live with their mother in India or to remain in the United Kingdom without their mother.

10. Ms Heybroek argued that the Secretary of State had accepted that the offence leading to the imprisonment and the deportation order had been committed by someone trying to get away from a violent husband.

11. Ms Heybroek submitted that Exception 2 (undue harshness) of Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 helps the appellant and, additionally, that the appellant could rely on Section 117C(6) of the Act because there were very compelling circumstances that justified a decision to allow the appeal.

12. We accept Ms Heybroek's suggested approach. We remind ourselves, for example, of **Jallow v SSHD** [2021] EWCA Civ 788 where Lewis LJ said at paragraph 6:

> "Furthermore, in cases involving foreign criminals sentenced to less than four years' imprisonment and where the exceptions in subsections (4) and (5) are not met, the court must still assess whether deportation is a proportionate interference with any person's rights under Article 8 of the Convention. In such circumstances, the public interest in deportation will only be outweighed by very compelling circumstances. See generally, *HA (Iraq) v Secretary of State for the Home Department* [2020] EWCA Civ 1176, [2021] 1 WLR 1327 at paragraphs 20 to 22 and 31."

13. Before we consider the case on undue harshness and very compelling circumstances we make clear that we reject any contention that the appellant should be somehow advantaged in the Article 8 balancing exercise by reason of getting into trouble because she was fleeing domestic violence. As far as this Tribunal is concerned our obligation is to apply statute law and there is no doubt that the appellant is a foreign criminal for the purposes of Section 117C. The qualifying provisions are her nationality and the sentence of twelve months' imprisonment.

14. We are entirely confident that the Crown Court can be relied upon to have considered carefully the sentence to be imposed and to have given proper regard to anything that might have been said about the circumstances of her committing the offence and, in the unlikely event of the Crown Court Judge erring, we are, if we may say so respectfully, equally confident that the Court of Appeal would have been keen to look at a sentence that might be wrong when such sensitive issues as domestic violence are involved. There is no point to be made about the circumstances of the offending that assists the appellant.

15. Section 117C(2) notes that the more serious the offence committed, the greater the public interest is in deporting a foreign criminal, but that is a reason to increase public interest in some circumstances, not to diminish it below the public interest that is established by operation of Section 117C(1).

16. We do not suggest that there are aggravating features here. The sentence is the lowest that qualifies under the definition of "foreign criminal" set out in Section 117D(2)(c)(i) but it does qualify and the appellant's deportation is in the public interest because Section 117C(1) so provides. Article 8 balancing exercises are in their nature intensely fact-specific and the range of relevant facts can sometimes be extremely wide. We fall short of saying that the circumstances of the offence can *never* be a "very compelling circumstance" for the purpose of 117C(6) but we are quite satisfied that the circumstances of the offence here are not such circumstances but it does not follow that there are no very compelling circumstances in this case. Ms Heybroek argued that there were.

17. We remind ourselves of the decision of the Court of Appeal in **MI (Pakistan) v SSHD [2021] EWCA Civ 1711**. There, Simler LJ gave the leading judgment and quoted with approval the decision of Underhill LJ in **HA (Iraq) v SSHD [2020] EWCA Civ 117**. This decision, obviously, is made after and in the light of the decision of the Supreme Court in **KO (Nigeria) v SSHD [2018] UKSC 53**. At paragraph 21 Simler LJ said how Underhill LJ had pointed out that Lord Carnwath's reference to "a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent" could not be read entirely literally because, although a likely consequence,

"harshness" is not *necessarily* a consequence of deportation even when there are qualifying relationships. In some cases there will be indifference and no doubt in some cases positive relief that the person has been removed. With respect, Lord Carnwath is perfectly aware of that. The point is that his remark should be construed carefully with proper regard to context and not given statutory authority that they were not intended to have.

18. Lady Justice Simler explained at paragraph 23 that some harshness is acceptable because of the strong public interest in deporting foreign criminals but she said:

> "The question for the fact-finding Tribunal is whether the harshness which deportation will cause for the children is of a sufficiently enhanced degree to outweigh that public interest – the essential point being that '*the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability*".

19. Lady Justice Simler explained that the bar should not be set in a case such as this, where a person has been sent to prison for twelve months, at the very high level applying to a serious offender who had been sentenced to prison for four years or more. She also pointed out how Underhill LJ had explained that there is no reason in principle why undue harshness cannot be a common occurrence.

20. We remind ourselves of the decision of this Tribunal in **Patel (British citizen child – deportation) [2020] UKUT 45 (IAC)**. We remind ourselves of the extract there at paragraph 78 and particularly from the **Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213**. There Baker LJ observed that the interpretation required by parliament is "not a comfortable interpretation to apply" to people practising in a family jurisdiction. There is an abhorrence of breaking up families but we must give effect to what Parliament has decided and Parliament has decided there has to be undue harshness.

21. We have taken into consideration all of these things.

22. However, the evidence provided by the appellant is, given the apparent significance of this decision in her life and the lives of her children and partner, surprisingly thin. There is not, for example, any independent evidence in the form of a social worker's report or at all to comment on the relationship between the appellant and the children and the likely effects of removal. We are, of course, aware that a mother of young children is usually an important person in their lives and that removing that person would almost certainly be a very strong interference with the private and family life of the children concerned. However, we have to look for "undue harshness".

23. The appellant's witness statement is dated 3 December 2019. She introduces herself there and says that she was born in 1990 and entered the United Kingdom in 2011. She married one R K who entered the United Kingdom as her dependent spouse. She described their marriage as a love match that outraged their respective families because they rejected the convention that marriages should be arranged. Sadly the marriage became unhappy because her husband took drugs. He was abusive and the appellant was too ashamed to get proper help.

24. The appellant then described at some length how she and her husband separated, how she had found a passport at the roadside and how she irrationally decided to use the passport to leave the United Kingdom via Dover to visit a friend who would help her, and how she was caught and was sent to prison.

25. The relationship with her present partner, R C, developed even though she was told on 17 December 2013 that she was subject to "automatic" deportation and the deportation order was made on 23 September 2014.

26. The appellant married RC in March 2016, her marriage to RK having been terminated by divorce in October 2015. They have two children, S, a daughter, was born in March 2015 and D, a son, was born in May 2017. Her husband and children are British citizens. S is now nearly 7 years old and D is 5 years old.

27. The appellant then explained the steps that had been taken to remain lawfully in the United Kingdom. She referred to her "genuine and subsisting parental relationship with my spouse and children" and asserted that the children required both parents and particularly because their domestic arrangements worked by her husband providing the money and her providing the care. She asserted that it was an early stage in their children's lives and that "I will be deprived in carrying out my parental responsibility towards my children, with no satisfying significant reason, if I was deported".

28. She explained that her eldest child had started school and asserting how family life would be "seriously compromised" and her husband and children would suffer endlessly.

29. She also described in a passage beginning "more significantly" (paragraph 15) that her husband owns the property where they are living and could not continue to pay the mortgage on the property if she was not there to look after the children.

30. She described herself as extremely remorseful. She said she was frightened of being deported and "I don't want to return to India and have severed ties with my parents since I came to the UK".

31. She was supported by a witness statement from her husband, RC, dated 3 December 2019. He confirmed that they lived together as a family unit and described both of the children as dependent on their mother although the language he used was "dependent on my spouse". He suggested that he and the children would suffer endlessly if she was deported. He confirmed that he relied on the appellant to run their home and look after the children and did not see how he could manage if she was not available to take them to school.

32. He then said that he "cannot go to India as I have no friends or family there", his father having died some time ago and his mother lived in Europe. He regarded it as an "unjust decision" to deport the appellant. He said that their children's integration into India would be undesirable and it was best to allow them to stay in the United Kingdom.

33. In substance, this is the extent of the evidence that is before us.

34. Like the First-tier Tribunal, we accept that the appellant has a relevant genuine and subsisting relationship with the children and with her husband but, as

indicated above, the appellant must show that separation would be "unduly harsh".

35. We accept too that it is in the best interests of the children that the appellant remains in the United Kingdom where they are settled and benefit from close and frequent contact with the mother and father. We have little evidence about their likely circumstances in the event of their removal to India and, because we have to make findings about their best interests, assume that it is best for them to remain in the United Kingdom because there is no contrary evidence. This finding does not determine the appeal.

36. Ordinary common humanity reminds us of the deep undesirability of breaking up a nuclear family by sending the mother away from small children who in the ordinary course of events can be expected to be a very important carer and guardian for many years to come.

37. Further, although there are, no doubt, many examples of lone fathers doing an excellent job, we take the view that generally the immediate care of the mother in the case of small children is something that is very desirable and needs no special academic report or expert evidence to justify.

38. However, there is no evidence here that the children have any particular needs such as might arise, for example, from poor health or special education needs. There is no expert evidence to indicate that there would be any *particular* disadvantage to these children other than that which can be assumed as obvious but this does not trivialise its significance.

39. We accept too that the appellant's departure would cause financial problems for their father who, one way or another, will have to make good the contribution to running the home that she will not be able to carry out.

40. Parliament has laid down strict criteria and although all the things that are identified here are real and significant we cannot conclude that the consequences would be *unduly* harsh. They are the natural consequence of deporting a mother and it is not the law that mothers of small children cannot be deported.

41. In saying this we do not imply that consequences can only be unduly harsh if they are, amongst other things, unusual but something is needed to elevate the ordinarily consequential harshness to something that is undue and we cannot find that here.

42. At paragraph 21 of my "Reasons for Finding Error of Law" I criticised the First-tier Tribunal for failing to show consideration of the impact on the children of being separated from their mother who has been their primary carer all of their lives. The difficulty the First-tier Tribunal Judge had, which we fully appreciate now, is the dearth of evidence. We have reflected very hard on this but it is for the appellant to prove her case. The evidence before the First-tier Tribunal was thin and it has not been improved before us. It can be summarised as predictable generalisations that do little, and nothing effective, to establish the unduly harsh threshold.

43. We have to consider too the likely consequences of the family removing to India. There is no reason in principle why children cannot be expected to

remove. It is plain for all to see that many children are taken by their parents to different countries to settle for the rest of their lives or some years and in many cases the experience is exciting and enriching. It all depends on the facts.

44. Nevertheless, even though the children are young the oldest child has started school. The eldest child is not yet 7 years old and her own private and family life outside the home will be minimal but it is starting to form and some weight must be given to it.

45. Clearly they would lose the rights as British citizens to access state education and the National Health Service but other than a blanket insistence that the appellant and her husband could not or would not be able to establish themselves in India there is nothing to help us gauge the kind of life that they might enjoy there. India is a diverse country and it not self-evident that it is better to grow up in the United Kingdom than in India. We do not accept that the appellant and her husband and their children could not establish themselves in India. They have the advantage of living the United Kingdom for some years. We do not accept that they could not find suitable work. Certainly there is no independent evidence, and very little subjective evidence, to support their assertion that they are unemployable or nearly so.

46. We do not accept that they are unemployable and could not settle in India. The adults in the family have lived there before and would return with the advantage of experience of life in the United Kingdom. There is no independent evidence to substantiate their barely explained assertions.

47. We do not accept that there is anything unduly harsh about the consequences of deportation for RC. He decided to marry the appellant when she was the subject of a deportation order and he has lived in India. He has provided no persuasive evidence to show that he cannot establish himself there or live without her in the United Kingdom although we accept that is not what he wants to do.

48. Neither do we accept that the appellant would face difficulties on her own that amounted to “very compelling circumstances. We reject her contention that she would be socially isolated and unemployed. Again there is no meaningful supporting evidence to substantiate her expressed fears. We find that she could obtain work and would have the capacity to find and make friends.

49. Having expressed my concern to the extent of saying the First-tier Tribunal erred in law I find we are not able to do very much better. The appellant does have to prove her case in the sense she has to establish the facts on which she seeks to rely and bare assertions that are not explained will not do. It may well be her sincere opinion that she cannot manage to establish herself in India or that it would be very difficult for the children but that is not explained at all adequately. By finding an error of law and adjourning it for further evidence we gave the appellant a golden opportunity to better prepare her case but she did not take it.

50. We accept that, one conviction aside, the appellant has established herself in the United Kingdom and is willing and able to support herself and speaks

English but these things, even cumulatively, do not outweigh the public interest that Parliament says there is in her deportation.

Notice of Decision

51. We dismiss this appeal.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 31 January 2022

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU 03928 2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 17 September 2021	.....

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

M M
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Heybroek, Counsel instructed by Nasim & Co Solicitors
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

REASONS FOR FINDING ERROR OF LAW

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 I make an order prohibiting the disclosure or publication of any matter likely to lead members of the public to identify the Appellant. Breach of this order can be punished as a contempt of court. An anonymity order was made by the First-tier Tribunal and I extend it in the Upper Tribunal because the case turns primarily on the rights of children and there is no legitimate public interest in their identities being known.
2. This is an appeal by a citizen of India born in 1990 against the decision of the First-tier Tribunal on 4 March 2021 dismissing her appeal against the decision of the respondent on 19 February 2019 refusing her leave to remain on human rights grounds.
3. The appellant is a foreign criminal. In November 2013 at the Crown Court sitting in Canterbury she was sentenced to twelve months' imprisonment for a document offence and ordered to pay some financial penalties. The essence of

her criminality is that she was using another person's passport in an attempt to facilitate her entry to Germany. At the material time she had leave to be in the United Kingdom but it was her case that she was, literally, escaping from an abusive marriage.

4. The appellant was made the subject of a deportation order on 23 September 2014.

5. The respondent had refused an application for further leave to remain on human rights grounds but that decision was withdrawn following the decision of the Supreme Court in **Kiarie and Byndloss v SSHD [2017] UKSC 42**.

6. Various attempts were made to legitimise her position. On 22 June 2017 her representatives asked that her case be reconsidered following the birth of her second child and that led to the decision complained of on 19 February2019.

7. Although Ms Heybroek has represented the appellant throughout the grounds of appeal against the decision of the First-tier Tribunal were drawn by Mr A L Youssefian of Counsel and permission was granted on those grounds by Upper Tribunal Judge Allen.

8. Judge Allen was particularly interested in grounds 1 and 2. Each of those grounds bares on the regard for the rights of the appellant's children. The thrust of the criticism is the judge failed to have proper regard to the best interests of the children and failed to have proper regard to their being British citizens.

9. An appeal against the decision has been allowed previously. That decision set aside by Upper Tribunal Judge Lane on 13 July 2020.

10. I have looked at that decision primarily to make quite sure that I do not repeat the mistakes that have been criticised earlier. The decision that was overturned by Judge Lane was criticised essentially for two reasons. First, the judge had unlawfully diminished the public interest in deportation by suggesting that the sentence of twelve months' imprisonment was excessive and second the judge had not explained the conclusion that deportation would be unduly harsh for the appellant's children.

11. The decision that I have to consider contains several appropriate and correct directions in law but concludes at paragraph 37:

> "SC and DC [the appellant's children] are both British citizens and it is their best interest to remain in the UK. By remaining in the UK, they can continue to benefit from there being their British citizenship and the many advantages that come with it. British citizenship is a relevant but not necessarily a weighty factor and I direct myself accordingly."

12. The judge decided, uncontroversially, that the appellant's circumstances did not come within the scope of Exception 1 in Section 117C(4) of the Nationality, Immigration and Asylum Act 2002.

13. The judge then decided, again uncontroversially, that the appellant is in a genuine and subsisting parental relationship with her two children and that she had been with them since they were born.

14. The judge concluded, again uncontroversially, at paragraph 53

> "that the children would not be able to maintain a genuine and subsisting relationship with their mother using social media or other internet-based platforms due to their ages."

15. At paragraph 57 the First-tier Tribunal Judge considered the likely consequences of the appellant's removal and the children remaining with their father in the United Kingdom. The judge found that the appellant's husband's earning capacity would be much diminished as he took on more childcare responsibilities. The judge found that the appellant's husband would only be able to work part-time and the family home would be at risk because money was already tight. The judge said at paragraph 57:

> "I find that the circumstances outlined above, where RC [the husband] would be left to care for the children on his own would involve such a deterioration. On balance I also find that if necessary, the house could be sold to alleviate debt and RC would always be able to rent a home if required. RC is a British citizen and would be able to obtain assistance in the same way as any other citizen in the form of childcare support and benefits if that were necessary. I find that it is unlikely that RC would be able to somehow fund the appellant to help her become established in India. However, on balance I find that the appellant would be able to take steps to find employment and support herself in India. There is no evidence to the contrary. I also make a finding that the option of travelling to India to visit the appellant there and maintain a relationship would be subject to the same financial realities that are likely to follow the breakup of the family by any deportation of the appellant."

16. The judge then went on to find in paragraph 65 that the effect of deportation would not be unduly harsh.

17. The judge's made findings concerning the appellant's relationship with her husband. According to the Decision and Reasons the respondent accepted that the relationship with her husband "was formed when she was in the UK lawfully and her immigration status was not precarious". The judge, however, found that the marriage was formed after the deportation order was signed when the appellant clearly had no right to be in the United Kingdom and the judge did not accept the relationship was formed when her status was other than precarious.

18. At paragraph 64 the judge explained that he did not accept that the effect of deportation on the appellant's husband would be unduly harsh. The reasoning for this was that he was aware of the situation when he married and he can cope without her in the United Kingdom. He could also keep in touch by the internet and by visits. He could also remove to India.

19. Ms Isherwood's case was entirely clear. She said that the judge directed himself correctly. He identified the issues and applied a correct test. The judge did not err in law simply by reason of reaching a conclusion that not everyone would have reached. The decision was open to the judge and the reasons given were adequate.

20. With respect to Ms Isherwood she put her case clearly and forcefully. If I am to set aside the decision I must be satisfied that there is a clear error of law.

21. Ms Heybroek relied on the grounds, as well as making oral submissions and both the grounds and the oral submissions are helpful. A key point, as far as

the children are concerned, is that the Decision and Reasons shows no consideration at all for the impact on the children if they were separated from their mother who has been their primary carer all their lives. It is not a question of whether the father could cope, as he might have to do in the unhappy event, for example of the appellant's death. There has been no consideration in the Decision and Reasons of what it might be expected to do to the children to have their mother snatched out of their lives and how they might cope with their whole family life being restructured and their home quite likely changing because of financial difficulties.

22. I also agree with the second ground that the benefits of British citizenship being lost by the children in the event of removal have not been considered at all adequately. There is no analysis of what they would not be able to do and losing their British citizenship or how they might access in India comparable education or health facilities provided by the state. That is just not there.

23. I also agree that there has been no proper consideration about how the appellant could cope in India. If she went on her own she would be returned as a single woman on her case rejected by her family and that could be very difficult.

24. I see no point in saying more. I am not merely disagreeing. I find that there is no reasoning whatsoever to support the conclusion.

25. I have asked myself if this decision is perverse and I should simply allow the appeal. I have decided that would not be appropriate. I should not conclude without at least giving the respondent an opportunity of directly addressing me on the point that the evidence could not support the conclusion, but I am entirely satisfied that the reasons given do not support the conclusion and I set aside the decision of the First-tier Tribunal.

26. Given the history of the case the matter will be determined again in the Upper Tribunal before me if reasonably practicable.

Notice of Decision

27. The First-tier Tribunal erred in law and I set aside this decision.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal Dated 24 September 2021