Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001181
HU/07266/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 8 September 2022	**On 3 November 2022**

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE STOUT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA (PAKISTAN)
(ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:
For the Appellant: Mr D. Clarke, Senior Home Office Presenting Officer
For the Respondent: The Respondent did not appear and was not represented

DECISION AND REASONS

1. We maintain the anonymity order already in force in these proceedings so as to ensure the continued anonymity of the claimant's wife (who holds refugee status) and his children whose anonymity has previously been ordered by the Family Court.

Introduction: procedural history

2. By a decision dated 25 November 2021, First-tier Tribunal Judge G. Clarke ("the judge" or "Judge Clarke") allowed an appeal brought by the respondent to these proceedings, whom we shall call "the claimant", against a decision of the Secretary of State dated 17 June 2020 to refuse his human rights claim. That appeal was brought under section 82(1) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). The Secretary of State appealed against the judge's decision to this tribunal and, by a decision dated 27 May 2022, Upper Tribunal Judge Stephen Smith found that the decision of the judge involved the making of an error of law and set it aside, giving directions for the appeal to be reheard in this tribunal, pursuant to section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007. We refer to Judge Stephen Smith's decision as "the error of law decision", and a copy may be found in the **Annex**.

3. Judge Clarke also heard the claimant's appeal against a decision of the Secretary of State dated 30 September 2021 to refuse a protection claim that he made. The judge dismissed the claimant's appeal against that decision, and there has been no challenge to that part of his decision. Accordingly, the error of law decision preserved the judge's findings in relation to that issue.

4. It is against that background that this appeal has resumed before us, sitting as a panel, to remake the claimant's appeal.

Factual background

5. The factual background to these proceedings was set out in the following terms at paragraphs 9 to 13 of the error of law decision:

> "9. The appellant was born on 16 September 1991. His immigration history is lengthy, and it is not necessary to summarise it fully here; it is set out in detail at [4] to [18] of the judge's decision. For present purposes, it will be sufficient to state that he arrived in January 2010 with leave valid until 31 August 2010. He last held leave to remain on 11 March 2016, which had been granted to him on 2 October 2013 in respect of his relationship with his British wife, F, and their British daughters, A and B, who were born in February 2013 and June 2014 respectively. F is of Pakistani origin. Prior to her naturalisation, she was recognised as a refugee by the Secretary of State on account of her well-founded fear of being persecuted in Pakistan.
>
> 10. The appellant has a long history of domestic violence against F. He has been convicted on two occasions of common assault against her. On 19 December 2019, he was sentenced by the Crown Court sitting at Snaresbrook to 13 months' imprisonment for assault occasioning actual bodily harm against her, having been convicted following a trial before the magistrates' court. That conviction triggered the automatic deportation provisions in the UK Borders Act 2007 ("the 2007 Act").
>
> 11. The appellant made a human rights claim in an attempt to resist his deportation on 30 March 2020. He relied on his relationship with

> his daughters and his wife, and the length of his residence here. His wife and daughters visited him in prison and spoke to him regularly. His wife, the victim of his offending, provided a letter of support.
>
> 12. The Secretary of State refused the human rights claim. She did not consider the appellant to enjoy a genuine and subsisting relationship with F, in light of his licence conditions which prohibited contact between them. The relevant social services department had significant concerns about the prospect of the appellant returning to the family home, in light of the risk he posed, both to his wife, and also to his daughters. The decision accepted that it would be unduly harsh for F to live in Pakistan with the appellant, in light of her former grant of asylum. But it would not be unduly harsh for her to remain, with their children, in the United Kingdom without the appellant. The Secretary of State also concluded that the appellant did not satisfy any of the private life provisions of the rules, and nor that there were very compelling circumstances militating against the otherwise very strong public interest in his deportation. The Secretary of State relied on the circumstances of the appellant's offence; the appellant had beaten his wife in their home, when their daughters were present elsewhere in the building (having referred to them as "bitches"). He hit F using a wooden stick, punched her hard in the back, and pulled her hair, pushing her to the floor. He kicked her in the stomach. The attack caused extensive bruising. The appellant forced his wife to agree not to go to college again, as that was what had apparently triggered his offending conduct in the first place.
>
> 13. The Secretary of State concluded that there were no compelling circumstances capable of defeating the otherwise very significant public interest in the appellant's deportation."

Procedural issue: absence of the claimant

6. The claimant did not attend the hearing before us on 8 September 2022. This was in addition to his non-attendance at the error of law hearing on 26 May 2022, which was dealt with at paragraph 3 to 8 of the error of law decision. We should observe that, upon being sent the error of law decision, the claimant's former solicitors informed the tribunal that they had no instructions to represent him before this tribunal and requested that they come off the record.

7. The Tribunal Procedure (Upper Tribunal) Rules 2008 make provision for the tribunal to proceed in the absence of a party, in the following terms:

> "38. Hearings in a party's absence
>
> If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and

> (b) considers that it is in the interests of justice to proceed with the hearing."

8. As to (a), we were satisfied claimant had been notified of the hearing. The notice of hearing had been sent to him, by post, to the address held on file by the tribunal. The error of law decision had also been sent to him by post, to the same address.

9. In relation to paragraph (b), our assessment of the "interests of justice" must be conducted by reference to the tribunal's overriding objective. The overriding objective may be found at rule 2(1): it is to deal with cases fairly and justly. That includes, pursuant to the indicative examples at paragraph (2), the following relevant considerations: sub-paragraph (c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings"; sub-paragraph (d), "using any special expertise of the Upper Tribunal effectively"; and sub-paragraph (e), "avoiding delay, so far as compatible with the proper consideration of the issues."

10. We considered whether to proceed in the absence of the claimant. We took into account the following factors:

a. There had been no adjournment request or other attempt by the claimant to engage with the proceedings;

b. The Notice of Hearing dated 4 August 2022 stated:

> "If a party (or their representative) does not attend the Hearing the Upper Tribunal may proceed in their absence."

The claimant would have been aware of the need to engage with the proceedings, and the risks of not doing so. The claimant is familiar with the courts, through his criminal trials before the magistrates' court and the Crown Court, the Family Court proceedings, and through his participation in the hearing before the First-tier Tribunal. The need to attend, and engage with, proceedings has been impressed upon the claimant through these proceedings by the notices issued in the course of these proceedings and will be familiar to him through his experience of the process;

c. The issues to be determined at the hearing were clear from the error of law decision, such that the claimant would have been on notice of the likely issues for resolution at the hearing. Despite being aware of those issues, the claimant nevertheless chose not to attend, or otherwise engage with the proceedings;

d. Had we adjourned of our own motion, there was no basis to conclude that the claimant would engage with the tribunal on a future occasion;

e. We would be able to put to Mr Clarke for the Secretary of State the points we would have expected to have assisted the claimant with, had he attended before us as a litigant in person;

f. Resolution of immigration proceedings is in the public interest, and those with no right to remain in the United Kingdom should not be able to evade the consequences of that status simply by not engaging with these proceedings.

11. Set against these considerations is the significance to the claimant of these proceedings. His non-participation could potentially expose him to serious consequences, in that he faces removal from the United Kingdom. However, looking to the nature of the case advanced by the claimant before the First-tier Tribunal, we observe that the claimant has had every opportunity to demonstrate that the relationship with his children and his spouse has continued to develop, or that there are other reasons relating to his private life or other ECHR rights that militate in favour of him being allowed to remain in the United Kingdom. Procedural rigour is important in public law proceedings. If the claimant later contends that the relationships he enjoys with his family, or features of his private life, are such that he should be permitted to remain in the United Kingdom, the possibility of making a fresh claim to the Secretary of State would, in principle, be available to him.

12. Drawing these considerations together, therefore, we concluded that it was in the interests of justice, and consistent with the overriding objective, to proceed in the claimant's absence. In the absence of the claimant, we pressed Mr Clarke to address points telling in the claimant's favour, so as to ensure the greatest procedural fairness to him in his absence.

Issues

13. The substantive issues for our consideration are those set out in section 117C of the 2002 Act:

a. Whether the claimant, who is a "foreign criminal" as defined in section 117D(2) of the 2002 Act, satisfies either of the statutory exceptions to deportation, contained in section 117C(4) and (5) of the 2002 Act;

b. Whether the claimant can demonstrate "very compelling circumstances over and above" those described Exceptions 1 and 2 in section 117C, or whether it would be otherwise unlawful under section 6 of the Human Rights Act 1998 for the claimant to deported.

Legal framework

14. Article 8 of the European Convention on Human Rights ("the ECHR") provides:

> "1. Everyone has the right to respect for his private and family life, his home and his correspondence.
>
> 2. There shall be no interference by a public authority with the exercise of this right except such as is in accordance with the law and is necessary in a democratic society in the interests of national security, public safety or the economic well-being of the country, for the prevention of disorder or crime, for the protection of health or morals, or for the protection of the rights and freedoms of others."

15. Part 5A of the 2002 Act makes provision for certain statutory considerations to which a court or tribunal must, in particular, have regard when considering the "public interest question" in proceedings concerning whether a decision such as that under consideration in these proceedings would breach a person's right to respect for private and family life under Article 8 ECHR. Section 117C is relevant in cases concerning "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.
>
> (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.
>
> (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."

16. "Foreign criminal" is defined for the purposes of section 117C in these terms:

> "(2) In this Part, "foreign criminal" means a person—
>
> (a) who is not a British citizen,
>
> (b) who has been convicted in the United Kingdom of an offence, and
>
> (c) who—
>
> (i) has been sentenced to a period of imprisonment of at least 12 months,
>
> (ii) has been convicted of an offence that has caused serious harm, or
>
> (iii) is a persistent offender."

17. It is for the claimant to demonstrate that his prospective removal would engage the protection of Article 8 ECHR. It is for the respondent to establish that any interference with the rights guaranteed by Article 8(1) is justified on grounds permitted by Article 8(2).

18. The standard of proof is the balance of probabilities standard.

The case for the claimant

19. We will analyse the claimant's case on the basis it was advanced before the First-tier Tribunal. He adopted his witness statement before the judge, and was supported by F, who gave evidence on his behalf. They were each cross-examined. Before Judge Clarke, the claimant contended that he enjoyed a genuine and subsisting relationship with his wife. He had been allowed to return to the family home in July 2021, and, by the time of the hearing before the First-tier Tribunal, had been living with the family for around four months. He claimed it would be "unduly harsh" on his children for him to be removed to Pakistan. He also claimed that he would face "very significant obstacles" to his integration upon his return to Pakistan; he had not lived there for some time and was without the necessary links and connections to integrate upon his return.

Discussion

20. We find that the claimant is a "foreign criminal" for the purposes of section 117C of the 2002 Act. That being so, the public interest requires his deportation, unless one of the statutory exceptions applies, or there are very compelling circumstances over the statutory exceptions.

21. We have reached our findings to the balance of probabilities standard having considered the entirety of the evidence in the case, in the round.

Exception 1

22. We commence with Exception 1 and will take each of the criteria in section 117C(4) in turn.

23. We find that the claimant has not been lawfully resident in the United Kingdom for most of his life (section 117C(4)(a)).

24. We also find that there is no evidence that the claimant is "socially and culturally integrated in the United Kingdom" (section 117C(4)(b)). We reach this conclusion for two reasons.

25. First, the claimant has a long history of domestic violence. In addition to his 2019 conviction for causing actual bodily harm to F through a sustained attack with a wooden stick, in 2017 he was convicted at Thames Magistrates' Court of common assault and battery, again in respect of F. He was sentenced to three months' imprisonment, suspended for 12 months. There has been a long history of domestic violence in the family home shared by the claimant with F, A and B. An OASys report dated 21 March 2021 summarises many of the extensive concerns arising from the claimant's history of domestic violence against his children and F.

26. Although Judge Clarke's findings on this issue were not expressly preserved, we accept Mr Clarke's submissions that there is no reason that we should not adopt the judge's analysis at paragraphs 87 to 92 for our own purposes. There is, of course, no evidence from the claimant to address this issue, or otherwise cause us to adopt a different approach to that set out by Judge Clarke. At paragraph 89 the judge said:

> "Secondly, I find that someone who perpetrates domestic violence is not socially integrated into the United Kingdom. The Sentencing Judge remarked that the Appellant thought he could treat his wife as his property which is not an attitude that is consistent with the British way of life. Domestic violence is an abhorrent crime that can leave scars on the victim/survivor – physical, mental, emotional – that can last a lifetime and such criminal activity – which is what it is – is not compatible with the British way of life. In my view, the Appellant cannot be said to be socially and culturally integrated into the United Kingdom. "

We adopt those findings.

27. Secondly, there is no evidence of positive integration.

28. We find that the claimant would not face very significant obstacles to his integration in Pakistan. We adopt the reasoning in the refusal letter at M11 of the Secretary of State's bundle, and the following reasoning given by the judge at paragraph 90:

> "…in my view, there are no very significant obstacles to the Appellant's reintegration to life in his own country. The Appellant was born and brought up in Pakistan and lived there until he was 18 years old. He will therefore be

> familiar with the culture and way of life there. He can speak the language and he will be able to work to support himself as a healthy individual of working age. He has family in Pakistan and while returning to his own country will inevitably require a period of adjustment, he will be enough of an insider to operate on a day to day basis in the society of which he is a national."

29. We find that Exception 1 is not satisfied.

Exception 2

30. Exception 2 requires an analysis of the claimant's relationships with F, and A and B.

31. Judge Clarke found that the claimant did not enjoy a genuine and subsisting relationship with F. While that finding was not expressly preserved, its reasoning was not impugned, and we see no basis to adopt a different approach. There is no new evidence militating in favour of a different conclusion. At the time of the hearing before Judge Clarke, the claimant had resumed living in the family home, but the judge still did not accept that their relationship was genuine and subsisting. The history of the relationship between the claimant and his wife is such that there is no reason for us to infer from the absence of evidence about what has happened since that the claimant has continued living in the family home and rebuilt his relationship with his wife. Indeed, quite the opposite. We find that the claimant is not in a genuine and subsisting relationship with F.

Best interests of A and B

32. We must first address the best interests of A and B. The offence for which the Secretary of State pursues the claimant's deportation was committed while the claimant's children were at home (albeit in a different room). The claimant used a weapon to cause actual bodily harm to F. According to the sentencing remarks of HHJ Gordon sitting in the Crown Court at Snaresbrook on 19 December 2019, the offence seems to have been catalysed by the claimant's anger that F had been attending college. He called the children "bitches". The OASys report dated 21 March 2021 states that there are indications that the children could suffer from long term emotional trauma through being brought up in a household where there is domestic abuse.

33. The claimant has been subject to varying degrees of restrictions on his ability to have contact with A and B. We accept that at the time of the hearing before Judge Clarke, the claimant had returned to the family home, and we take into account the fact that, from at least June to November 2021, the claimant had resumed some form of direct contact with his children to that extent. However, there is nothing before us demonstrating that the claimant continues to reside in the family home, that those arrangements have continued or, if they have, that they have passed without incident.

34. Had there been evidence that the claimant's living arrangements had subsisted from the time of the hearing before Judge Clake, it would have possible for such arrangements, if they existed, to have been made clear to the tribunal with relative ease. Further, the claimant would now have had the benefit of the time that has elapsed since the hearing before the First-tier Tribunal to have assembled detailed evidence concerning any developments in the relationship that he has with his children since then. There is, of course, no such further evidence.

35. The most detailed evidence that we are able to draw upon consists of the report of Dr Farooqi dated 1 April 2021. That report, however, predates the proceedings before us by a considerable period, and was drafted at a time before the claimant had resumed living in the family home. We accept that it records that A and Bs' views favoured their father being able to remain in the country and recorded a tentative picture of family life resuming in the future. However, it is of minimal assistance to our task to consider the position that obtains at the date of the resumed hearing, namely 9 September 2022. In any event, the core conclusions of the report were flawed, for the reasons set out at paragraphs 30 to 33 of the error of law decision.

36. Drawing the above analysis together, there is simply no evidence that the claimant enjoys a genuine and subsisting relationship with his British children. While ordinarily it is in the best interests of a child to live with, or at least in close proximity to, both parents (for example, in the case of a child whose parents are separated), different considerations apply where there have been safeguarding issues in the past. We accept that the relevant social services department appears to have been content for the claimant to resume living with the family: see the email dated 13 August 2021 at page 14 of the claimant's supplementary bundle from the claimant's social worker which records his return to the family home without comment. However, the email is unclear as to the basis upon which the claimant was permitted to return to the family home and does not include details of any supervision or accountability to which the claimant was subject at the time. Indeed, as Mr Clarke submits, it is not clear from that email whether the local authority has approved of the arrangements, or merely records the claimant's return to the property, with or without permission. Mr Clarke submitted that, had the claimant attended the hearing before us, he would have sought to cross-examine him on the arrangements and permissions at that stage, as well as the contemporary position.

37. In our judgment, there is no evidence that the claimant continues to enjoy a relationship of any sort with his children. We find there are no bases for us properly to conclude that the claimant's children's best interests are for the claimant to live in the same country as them, even if the claimant had been permitted to return to the family home. Much of the preceding decade of the lives of the claimant and his children has been characterised by domestic violence for which the claimant bears sole responsibility. There appears to have been an isolated improvement at the

time of the hearing before the First-tier Tribunal, but thereafter there is nothing to demonstrate that the quality of the relationship between the claimant and A and B has continued. We accept that the claimant's continued presence in the United Kingdom would give A and B the opportunity to develop a relationship with their father as they grow up, or to at least restore their relationship to its status as at the date of the hearing before the First-tier Tribunal. To that limited extent, the best interests of A and B are marginally in favour of the claimant remaining in the country, but their best interests primarily are to remain in this country, with and under the care of their British mother.

Unduly harsh

38. The term "unduly harsh" has been the subject of significant litigation in recent years. The Supreme Court has recently clarified the meaning of the term in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22: see, for example, at [41]:

> "… the best approach is to follow the guidance which was stated to be 'authoritative' in *KO (Nigeria)*, namely the *MK* self-direction:
>
> > '… "unduly harsh" does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher.'"

(*KO (Nigeria)* means *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53 and *MK* means *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC)).

39. We have no hesitation in concluding that the claimant has not demonstrated that the impact of his deportation on A and B would get even remotely close to the above threshold. Their best interests, as we find above, are to remain in the United Kingdom with their mother. There is no evidence that the claimant's removal would have an impact on them even approaching that level.

40. The claimant cannot, therefore, meet the requirements of Exception 2.

Very compelling circumstances

41. The remaining question is whether the claimant is able to rely on "very compelling circumstances over and above" the exceptions, for the purposes of section 117C(6) of the 2002 Act. While so-called "medium offenders" such as this claimant do not expressly benefit from the protection of the "very compelling circumstances" test, it was held in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at paragraph 25 that Parliament must have intended medium offenders to enjoy the benefit of it.

42. We will address whether there are “very compelling circumstances” by means of a balance sheet assessment.

43. Factors militating in favour of the claimant’s deportation include:

a. The deportation of foreign criminals is in the public interest (section 117C(1), 2002 Act).

b. The appellant does not meet either of the statutory exceptions to deportation. The appellant would not face very significant obstacles to his integration in Pakistan. There is no reason to conclude that he no longer has family there. His deportation would not be unduly harsh on either A or B and their best interests primarily lie in remaining in this country, with their British mother.

c. There is nothing to suggest that there are ongoing Family Court proceedings which require the claimant’s continued presence in the United Kingdom.

d. Any private life established by the claimant at a time his immigration status was precarious or unlawful attracts little weight.

e. The claimant has been assessed as presenting a high risk of serious harm to known adults. F has been the target of years of domestic abuse at his hands. If he is removed, the risk that he poses to her in this country will be minimised.

f. The claimant would not face very significant obstacles to his integration in Pakistan and does not have a well-founded fear of being persecuted there.

g. The claimant appears to have no other lawful basis of stay and the public interest in the maintenance of effective immigration controls is a weighty factor (section 117B(1), 2002 Act).

44. Factors mitigating against the claimant’s deportation include:

a. While the claimant does not presently enjoy a genuine and subsisting relationship with A and B, if he is not removed, he will have the opportunity to develop such a relationship with them in the future. To a limited extent, it is in the best interests of A and B for their father to remain here, so as to provide them with the opportunity to re-establish a genuine and subsisting relationship with him in the future.

b. The claimant has resided in the United Kingdom for most of the time since his initial arrival in January 2010. Some of his residence has been lawful. Returning to Pakistan will be a significant adjustment.

45. We find that the factors militating in favour of the claimant's deportation outweigh those mitigating against it. The claimant has been convicted of a criminal offence, the seriousness of which was reflected in a sentence of imprisonment of 13 months. The target of his offending was his wife, and he has been assessed as continuing to represent a serious risk of harm to known adults such as her. His conduct was not isolated and was the culmination of years of domestic abuse, committed in the presence of his children. While, to a limited extent, it is in the best interests of A and B for the claimant to remain in the UK, that does not establish that his deportation would be unduly harsh for either of them. To the extent that the best interests of A and B are for the claimant not to be deported, the cumulative force of the matters militating in favour of his deportation outweigh those best interests. The claimant's deportation would be consistent with the best interests of A and B, which lie primarily in remaining here, with their mother, in the absence of the claimant. The claimant does not satisfy either of the statutory exceptions to deportation and the factors on his side of the balance sheet are very thin, and certainly not capable of outweighing the cumulative force of the factors on the Secretary of State's side of the scales. We find that there are no "very compelling circumstances" over and above the statutory exceptions to deportation and that, therefore, the claimant's deportation is in the public interest. There are no factors demonstrating that his deportation would be disproportionate, even when accounting for the best interests of A and B as a primary consideration.

46. This appeal is dismissed.

Notice of Decision

The decision of Judge Clarke involved the making of an error of law and is set aside, subject to his findings dismissing the protection appeal brought by the respondent (referred to as the claimant in this decision).

We remake the appeal of the respondent (referred to as the claimant in this decision), dismissing it on human rights grounds.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the respondent (MA) is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 23 September 2022

Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001181

THE IMMIGRATION ACTS

Heard at Field House
On 26 May 2022

Decision & Reasons Promulgated

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Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MA (PAKISTAN)
(ANONYMITY DIRECTION IN FORCE)

Respondent

Representation:
For the Appellant: Mr T. Melvin, Senior Home Office Presenting Officer
For the Respondent: The Respondent did not appear and was not represented

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For convenience, I will refer to the appellant before the First-tier Tribunal as "the appellant".

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge G. Clarke ("the judge") promulgated on 25 November 2021 in which he allowed an appeal by the appellant, a citizen of Pakistan, against the refusal of his human rights claim dated 17 June 2020, taken in the context of a decision to deport him. The judge also heard the appellant's appeal against a separate decision of the Secretary of State dated 30 September

2021 to refuse his fresh asylum and humanitarian protection claim. That aspect of the appeal was dismissed; there has been no challenge to it, and I need say no more about it. It appears that the protection limb of the appellant's appeal was raised by the appellant as a "new matter" within the confines of the proceedings challenging the refusal of his human rights claim, thereby triggering the further decision of the Secretary of State. That may explain the time taken from the initial refusal of the appellant's human rights claim for the matter to be listed before the First-tier Tribunal. Of course, the pandemic will additionally have caused a delay to listing times.

Preliminary procedural issue

3. The appellant did not attend the hearing before me, which was listed for 2.30PM on 26 May 2022. I put the hearing back to 3.00PM, to allow for the possibility that the appellant was running late. He did not arrive.

4. The Tribunal Procedure (Upper Tribunal) Rules 2008 make provision for the tribunal to proceed in the absence of a party, in the following terms:

> "38. Hearings in a party's absence
>
> If a party fails to attend a hearing, the Upper Tribunal may proceed with the hearing if the Upper Tribunal—
>
> (a) is satisfied that the party has been notified of the hearing or that reasonable steps have been taken to notify the party of the hearing; and
>
> (b) considers that it is in the interests of justice to proceed with the hearing."

5. I was satisfied that the appellant had been notified of the hearing: see the email sent to his representatives on 9 May 2022 at 17:21. The appellant was also served by post to the address held on file for him.

6. When assessing "the interests of justice" for the purposes of rule 38(b), the tribunal's overriding objective must inform that assessment. The overriding objective may be found at rule 2(1): it is to deal with cases fairly and justly. That includes, pursuant to the indicative examples at paragraph (2) the following relevant considerations: sub-paragraph (c), "ensuring, so far as practicable, that the parties are able to participate fully in the proceedings"; sub-paragraph (d), "using any special expertise of the Upper Tribunal effectively"; and sub-paragraph (e), "avoiding delay, so far as compatible with the proper consideration of the issues."

7. I considered that it was in the interests of justice to proceed in the appellant's absence, for the following reasons:

   a. There had been no adjournment request, or other attempt by the appellant to engage with the proceedings;

b. The appellant is legally represented and his solicitors had not come off the record. They (and the appellant) should know the consequences of the appellant's non-attendance, which were made clear in the notice of hearing, namely that the tribunal may proceed in the absence of a party;

c. The issues to be determined at the hearing were clear from the grounds of appeal, and the grant of permission to appeal by First-tier Tribunal Judge Komorowski, meaning that the appellant would have been on notice of the likely issues for resolution at the hearing. Despite being aware of those issues, the appellant nevertheless chose not to attend, or otherwise engage with the proceedings;

d. Procedural rigour is important in public law cases;

e. Had I adjourned of my own motion, there was no basis to conclude that the appellant would engage with a future hearing, giving rise to the potential for delay to be injected into the proceedings, for no good reason, preventing the listing of other matters that would be ready to proceed;

f. I would be able to put to Mr Melvin the points I would have expected the appellant to have advanced, had he attended the hearing.

8. Drawing the above analysis together, I concluded that it would be in the interests of justice to proceed in the absence of the appellant.

Factual background

9. The appellant was born on 16 September 1991. His immigration history is lengthy, and it is not necessary to summarise it fully here; it is set out in detail at [4] to [18] of the judge's decision. For present purposes, it will be sufficient to state that he arrived in January 2010 with leave valid until 31 August 2010. He last held leave to remain on 11 March 2016, which had been granted to him on 2 October 2013 in respect of his relationship with his British wife, F, and their British daughters, A and B, who were born in February 2013 and June 2014 respectively. F is of Pakistani origin. Prior to her naturalisation, she was recognised as a refugee by the Secretary of State on account of her well-founded fear of being persecuted in Pakistan.

10. The appellant has a long history of domestic violence against F. He has been convicted on two occasions of common assault against her. On 19 December 2019, he was sentenced by the Crown Court sitting at Snaresbrook to 13 months' imprisonment for assault occasioning actual bodily harm against her, having been convicted following a trial before the magistrates' court. That conviction triggered the automatic deportation provisions in the UK Borders Act 2007 ("the 2007 Act").

11. The appellant made a human rights claim in an attempt to resist his deportation on 30 March 2020. He relied on his relationship with his daughters and his wife, and the length of his residence here. His wife and daughters visited him in prison and spoke to him regularly. His wife, the victim of his offending, provided a letter of support.

12. The Secretary of State refused the human rights claim. She did not consider the appellant to enjoy a genuine and subsisting relationship with F, in light of his licence conditions which prohibited contact between them. The relevant social services department had significant concerns about the prospect of the appellant returning to the family home, in light of the risk he posed, both to his wife, and also to his daughters. The decision accepted that it would be unduly harsh for F to live in Pakistan with the appellant, in light of her former grant of asylum. But it would not be unduly harsh for her to remain, with their children, in the United Kingdom without the appellant. The Secretary of State also concluded that the appellant did not satisfy any of the private life provisions of the rules, and nor that there were very compelling circumstances militating against the otherwise very strong public interest in his deportation. The Secretary of State relied on the circumstances of the appellant's offence; the appellant had beaten his wife in their home, when their daughters were present elsewhere in the building (having referred to them as "bitches"). He hit F using a wooden stick, punched her hard in the back, and pulled her hair, pushing her to the floor. He kicked her in the stomach. The attack caused extensive bruising. The appellant forced his wife to agree not to go to college again, as that was what had apparently triggered his offending conduct in the first place.

13. The Secretary of State concluded that there were no compelling circumstances capable of defeating the otherwise very significant public interest in the appellant's deportation.

The decision of the First-tier Tribunal

14. The judge considered the appellant's protection and human rights claim sequentially. There was a psychiatric report in respect of the appellant, which concluded that he was not presenting with features of a diagnosable mental illness. The judge addressed, and dismissed, the asylum limb of the appeal from [56] to [71].

15. At [72], the judge commenced his detailed recitation of the factual and procedural background concerning the appellant's human rights claim, and the Secretary of State's reasons for deporting him. He directed himself concerning the relevant legal framework contained in the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), including by reference to the "structured approach" to considering deportation appeals enunciated in *Binaku (s.11 TCEA; s.117C NIAA; para. 399D)* [2021] UKUT 34 (IAC) at (4) to (9) of the Headnote.

16. The judge found that the appellant could not avail himself of the exception to deportation contained in section 117C(4) of the 2002 Act, the so-called "private life exception." Again, there has been no cross-appeal against those findings, in the form of a rule 24 notice served by the appellant (as to which, see *Secretary of State for the Home Department v Devani* [2020] EWCA Civ 612 at [31]), or by any other means.

17. In relation to the so-called "family life" exceptions contained in section 117C(5) of the 2002 Act, the judge reached unchallenged findings that the appellant was not in a genuine and subsisting relationship with F. By the time of the hearing, the appellant had resumed living with F and their daughters. As to the significance of that, the judge said, at [100]:

> "… 4 months of living together against a five year history of domestic violence does not lead me to conclude that this relationship is genuine and subsisting. It has been marked by domestic abuse perpetrated by the appellant against his wife. In all the circumstances, I do not accept that the appellant has a genuine and subsisting relationship with his wife."

18. The appellant was asked in cross-examination whether his children were on the child protection register. The judge found his answers to be evasive and said that it was "extremely concerning" that the appellant "appears not to know if his children are on the child protection register." The judge essentially endorsed the findings of the OASys report prepared in relation to the appellant which concluded that his children had suffered trauma and "probable emotional abuse" as a result of being in a house where the relationships between the adults were marred by domestic violence. He then said at [107]:

> "…while the appellant's domestic abuse of his wife is utterly deplorable as is the likely adverse impact of the domestic violence on his children, it is still possible that the appellant has a genuine and subsisting parental relationship with his children."

19. The judge had before him a report by Dr R. Farooqi dated 1 April 2021. Dr Farooqi is an independent social work consultant who had met with F and the children on 21 March 2021. She interviewed the appellant by video call on 26 and 30 March 2021. At that stage, the appellant was not living with his wife and daughters and had limited face to face contact with them, but remote contact was permitted. Dr Farooqi noted that the relevant local authority had:

> "an extensive record of domestic abuse concerns that have been perpetrated by [the appellant] against [F] since 2016. It is noted that there have been concerning levels of domestic abuse and it is likely that some of the abuse has been reported. Social care were concerned that the children have witnessed this abuse and have been impacted by the abuse."

20. The conclusion of Dr Farooqi's report was that it would not be in the welfare and best interests of A and B if the appellant were to be "forced

back to Pakistan at this stage." That was based on the desire of both A and B for their father to be present in their lives, but the report noted that a range of steps would be required before it would be safe or appropriate for the appellant to be permitted to return to live with them: see [52] of her report. Such steps included a psychological risk assessment in relation to the appellant and a joint parenting assessment. "If the further assessments are positive", said Dr Farooqi, "it will mean [A] and [B] are given a chance to have a relationship with their father in the UK." The judge quoted [53] of Dr Farooqi's report at length, and it is necessary to do so here, for I shall return to it:

> "… F is very clear she would like [the appellant] to help parent their daughters and she would like him to move back to live with her. It appears there may be a deterioration in her mental health if he is forced back to Pakistan. On this basis the removal of [the appellant] is **is [sic] likely to have an exceptionally detrimental impact on this family due to the likelihood of it leading to the risk of a further deterioration in the mental health of [F] and [the appellant]. This will be affected both [sic] [A and B] as they will witness a deterioration in their mother's mental health. This will mean they will become Children in Need under section 17 of the Children's Act 1989 [sic]**." (Emphasis supplied by Dr Farooqi)

21. The judge's operative reasons for allowing the appeal begin at [119] onwards. The children are both British citizens and have lived here all their lives. They have experienced trauma as a result of their father's domestic abuse against their mother. Because they are British, "they cannot be expected to leave the United Kingdom." The judge placed "great weight" on Dr Farooqi's professional assessment, in particular her operative conclusion that, in light of a prospective deterioration in F's mental health, the appellant's deportation would have "an exceptionally detrimental impact on the family". The judge also ascribed significance to the fact that the local authority had, by the time of the hearing, approved the appellant's return to the family home. He added that, "if there is any suggestion of the appellant reverting to domestic violence, social services will have a statutory duty to intervene."

22. Those factors being so, the judge concluded that it would be unduly harsh on A and B for the appellant to be deported, thereby satisfying the exception to deportation contained in section 117C(5). The judge allowed the appeal.

Grounds of appeal

23. There is a single overall ground of appeal, which the Secretary of State advances with the permission of Judge Komorowski. The grounds contend is that there was a misdirection in law arising from the judge's reliance on Dr Farooqi's "pure speculation" relating to the claimed "exceptionally detrimental impact" on the appellant's children of his deportation. There was no medical evidence to that effect. Moreover, there was no evidence of the claimed likely trauma for the children if the appellant were to be

removed. The hypothetical impact on F's mental health of his deportation, and children being deprived of a relationship with their father "do not come close" to meeting the "unduly harsh" threshold.

Legal framework

24. The essential statutory provision is section 117C of the 2002 Act, which sets out statutory exceptions to the principle that the deportation of foreign criminals – such as this appellant – is in the public interest. Exception 2 is relevant in these proceedings:

> "(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."

25. Parliament has legislated to the effect that, if the above exception is met, the public interest does not require the deportation of a foreign criminal.

Challenges to findings of fact: essential principles

26. In *R (Iran) v Secretary of State for the Home Department* [2005] EWCA Civ 982 at [9] the Court of Appeal summarised the bases most frequently encountered in this jurisdiction when a finding of fact may amount to an error of law:

> "i) Making perverse or irrational findings on a matter or matters that were material to the outcome ("material matters");
>
> ii) Failing to give reasons or any adequate reasons for findings on material matters;
>
> iii) Failing to take into account and/or resolve conflicts of fact or opinion on material matters;
>
> iv) Giving weight to immaterial matters;
>
> v) Making a material misdirection of law on any material matter;
>
> vi) Committing or permitting a procedural or other irregularity capable of making a material difference to the outcome or the fairness of the proceedings;
>
> vii) Making a mistake as to a material fact which could be established by objective and uncontentious evidence, where the appellant and/or his advisers were not responsible for the mistake, and where unfairness resulted from the fact that a mistake was made."

27. There are many authorities on the approach of an appellate tribunal or court to reviewing a first instance judge's findings of fact. They were recently (re)summarised by the Court of Appeal in *Volpi v Volpi* [2022] EWCA Civ 464 in these terms, per Lewison LJ:

> "2. The approach of an appeal court to that kind of appeal is a well-trodden path. It is unnecessary to refer in detail to the many cases that have discussed it; but the following principles are well-settled:
>
> i) An appeal court should not interfere with the trial judge's conclusions on primary facts unless it is satisfied that he was plainly wrong.
>
> ii) The adverb 'plainly' does not refer to the degree of confidence felt by the appeal court that it would not have reached the same conclusion as the trial judge. It does not matter, with whatever degree of certainty, that the appeal court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached.
>
> iii) An appeal court is bound, unless there is compelling reason to the contrary, to assume that the trial judge has taken the whole of the evidence into his consideration. The mere fact that a judge does not mention a specific piece of evidence does not mean that he overlooked it.
>
> iv) The validity of the findings of fact made by a trial judge is not aptly tested by considering whether the judgment presents a balanced account of the evidence. The trial judge must of course consider all the material evidence (although it need not all be discussed in his judgment). The weight which he gives to it is however pre-eminently a matter for him.
>
> v) An appeal court can therefore set aside a judgment on the basis that the judge failed to give the evidence a balanced consideration only if the judge's conclusion was rationally insupportable.
>
> vi) Reasons for judgment will always be capable of having been better expressed. An appeal court should not subject a judgment to narrow textual analysis. Nor should it be picked over or construed as though it was a piece of legislation or a contract.
>
> 3. If authority for all these propositions is needed, it may be found in *Piglowska v Piglowski* [1999] 1 WLR 1360; *McGraddie v McGraddie* [2013] UKSC 58, [2013] 1 WLR 2477; *Fage UK Ltd v Chobani UK Ltd* [2014] EWCA Civ 5, [2014] FSR 29; *Henderson v Foxworth Investments Ltd* [2014] UKSC 41, [2014] 1 WLR 2600; *Elliston v Glencore Services (UK) Ltd* [2016] EWCA Civ 407; *JSC BTA Bank v Ablyazov* [2018] EWCA Civ 1176, [2019] BCC 96; *Staechelin v ACLBDD Holdings Ltd* [2019] EWCA Civ 817, [2019] 3 All ER 429 and *Perry v Raleys Solicitors* [2019] UKSC 5, [2020] AC 352."

Discussion

28. The judge's conclusion that it would be "unduly harsh" for A and B to remain in the United Kingdom in the absence of the appellant lies at the heart of the Secretary of State's appeal. That was a finding of fact

reached by a first instance judge, having considered the whole sea of evidence in the case. As such, appellate restraint is required when reviewing that finding. I should only interfere with that finding if I am satisfied that it is plainly wrong, or, as it was put in *Perry v Raleys Solicitors* [2019] UKSC 5 at [52], if I find:

> "… that there was no evidence to support a challenged finding of fact, or that the trial judge's finding was one that no reasonable judge could have reached."

29. In my judgment, the evidence relied upon by the judge to reach the finding that it would be "unduly harsh" on A and B was not rationally capable of leading to that conclusion.

30. Although the judge was entitled to regard Dr Farooqi as an expert in the field of child protection and related social work issues, I consider that Dr Farooqi strayed considerably beyond her expertise when, at [53] of her report, she concluded that the appellant's deportation would result in the "further deterioration" of F's mental health, and that of the appellant. With respect to Dr Farooqi, she was not qualified to make that assessment yet, as demonstrated by the emphasis she added to that paragraph, it formed a central part of her operative conclusion that the appellant's deportation would not only have an "exceptionally detrimental" impact on the family, but that the children "will" become children in need under section 17 of the Children Act 1989.

31. Not only was the purported mental health assessment outside Dr Farooqi's expertise, even when adopting the most benevolent approach to her expertise as a social worker, the reasons she gives for reaching that conclusion do not withstand scrutiny. At [50], Dr Farooqi had observed that, before the appellant could return to live with F and the children, a local authority assessment would have to take place, and that as part of that process, the mental health of F and the appellant should be explored. Yet at [53], Dr Farooqi took it upon herself to conclude that, if the appellant were *not* permitted to return to live with F and the children, there would be a detrimental impact on F's mental health. Plainly, both propositions cannot be correct. It cannot be the case that the appellant's return to live with F and the children could only be appropriate in the light of a full assessment, including a mental health assessment of F and the appellant, on the one hand, while simultaneously concluding that the mental health condition of F was such that it was imperative for the appellant to be allowed to remain in the country in order to return to live with her, on the other.

32. Further, having approached the prospective impact of the appellant's deportation on F's mental health in tentative terms ("there *may* be a deterioration in her mental health…"), Dr Farooqi proceeded to conclude that the appellant's deportation would be "likely" to have an exceptionally detrimental affect on the family as a result. But it does not logically follow that a possibility ("may") would lead to a probability ("likely"). Still less

does reasoning founded on the language of possibility (or even probability) merit a conclusion expressed in terms of certainty: "[A and B] *will witness* a deterioration in their mother's mental health. This *will mean* they *will become* Children in Need under s17 of the Children's Act 1989 [sic]." Even if Dr Farooqi were medically qualified to diagnose F's prospective mental health conditions, the reasoning she adopted when doing so was plainly deficient. It did not justify her conclusions.

33. Drawing this analysis together, therefore, I consider that the judge was not entitled to place the weight that he did on Dr Farooqi's report. It is clear from his reasoning at [120] that her report performed an operative role in his reasoning: "I therefore rely on [Dr Farooqi's] opinion that the appellant's deportation will… have 'an exceptionally detrimental impact on this family' and [F's] mental health is likely to deteriorate." With respect to the judge and the evident care with which he approached writing this careful and thoughtful decision, I consider that he reached a conclusion that no reasonable judge was entitled to reach by placing operative weight on that passage in the report of Dr Farooqi. That aspect of his reasoning was "plainly wrong".

34. In light of the above analysis, it is not necessary for me to engage in detail with the second reason provided by the judge for his conclusion that the appellant's deportation would be unduly harsh on the children, namely that the relevant local authority and social services would have a duty to intervene if the appellant were to revert to the violence that had characterised many years of his life with F and the children. It is difficult to see how the fact that the local authority had permitted the appellant to return to live with F and the children as being anything other than a neutral factor, at best. The fact that the appropriate authorities could intervene after the event were the appellant to resume his violent and controlling conduct in the family home is hardly a reason to conclude that it would be "unduly harsh" for the appellant to be deported. However, in light of my analysis concerning Dr Farooqi's report, it is not necessary for me to reach a conclusion in relation to this aspect of the judge's reasoning. The entirety of the judge's analysis concerning the question of whether the appellant's deportation would be "unduly harsh" was tainted by his near-complete reliance on the flawed operative reasoning of the operative conclusion of Dr Farooqi's report, such that the judge's analysis of the appellant's human rights appeal must be set aside in its entirety.

35. I allow this appeal. I set aside the decision of the First-tier Tribunal insofar as it concerned the appeal against the refusal of the appellant's human rights claim with no findings of fact preserved.

36. There has been no challenge to the judge's analysis of the appellant's protection claim. I preserve that aspect of the judge's decision.

37. The appeal will be remade in this tribunal on the first available date 56 days after this decision is sent to the parties, with a **time estimate of three hours**, on a **face to face basis**. I give the following directions:

a. within **28 days of being sent this decision**, the appellant must file serve any evidence upon which he seeks to rely at the resumed hearing;

b. within **56 days of being sent this decision**, both parties must file and serve a skeleton argument.

38. If any further directions are required, for example if an interpreter is required, an application must be made by the party seeking those directions as soon as possible.

Anonymity

39. The judge granted the appellant anonymity. I will maintain that direction for the time being at least until the resumed hearing, at which point I will consider whether it is necessary to maintain the order, or whether it is necessary to do so by reason of any order made elsewhere, for example in the Family Court.

Notice of Decision

The appeal is allowed.

The decision of Judge G. Clarke involved the making of an error of law and is set aside.

All findings reached by the judge concerning the appellant's protection claim are preserved.

The appeal will be remade in this tribunal, in accordance with the directions given at paragraph 37, above.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Stephen H Smith Date 27 May 2022

Upper Tribunal Judge Stephen Smith