IAC-AH-SAR-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/09163/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 13 September 2022	**On the 24 October 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

SA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms L Longhurst-Woods, Counsel (Direct Access)
For the Respondent: Mr D Clarke, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant is a citizen of Pakistan. His date of birth is 13 March 1975. The SSHD made a deportation order against the Appellant on 15 May 2017. He made an application for leave to remain (LTR) which was refused by the SSHD on 8 May 2019.

2. The Appellant came to the UK on 8 July 1999 having been granted a visit visa on 10 June 1999. On 19 January 2000 he made an application for asylum. His application was refused on 12 February 2001. On 8 January 2003 he made an application for leave as the spouse of a settled

person, having married a British citizen on 10 February 2003. The application was refused on 31 October 2012. On 14 December 2016 he was convicted of an offence of making false representations for gain or causing loss to another and of failing to surrender to the court at the appointed time. He was sentenced to twelve months' imprisonment on 2 February 2017.

3. On 14 February 2017 the Appellant was issued with a notice of deportation (a stage 1 decision letter). He provided a response on 19 April 2017. He was made the subject of a signed deportation order on 15 May 2017. He was issued with an amended stage 2 decision on 2 August 2017 refusing his human rights claim. He appealed against this decision. His appeal was dismissed by the First-tier Tribunal on 5 March 2018. The judge at the hearing found that the evidence established that the Appellant's children were no longer residing in the UK and that they were currently living in Pakistan with their mother. Permission to appeal against that decision was refused by the First-tier Tribunal and the Upper Tribunal. The Appellant became "appeal rights exhausted" on 9 August 2018. On 18 October 2018 he made a further application for LTR. He submitted copies of his sons' passports. His application was refused by the SSHD on 8 May 2019. The Appellant appealed.

4. In a decision of 1 March 2020 Upper Tribunal Judge C Lane granted the SSHD permission to appeal against the decision of the First-tier Tribunal (Judge P J M Hollingworth) to allow the Appellant's appeal against the decision of the SSHD of 8 May 2019.

5. The Appellant has three British citizen children who reside with his ex-partner in the UK. They are twin boys MSC and MC (date of birth 1 June 2008) and daughter, M, (date of birth 3 March 2014).

6. The matter came before me to determine whether the error of law issue could be determined on the papers pursuant to Rule 34 of the Tribunal Procedure (Upper Tribunal) Rules 2008 ("the Rules"), Upper Tribunal Judge Kekic having given her provisional view that it could be. Covid-19 directions were issued to the Appellant on 22 June 2020 giving the parties the opportunity to make representations. Both the SSHD and the Appellant's representative made written submissions. The Appellant's representative did not address whether or not the error of law matter could fairly, in his view, be determined on the papers.

7. In my decision of 16 November 2020 I decided that the matter could be fairly determined on the papers. I found an error of law in the decision of the First-tier Tribunal in relation to the decision that the Appellant met the exception under s.117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") in the context of the Appellant returning to Pakistan and his children remaining here. The First-tier Tribunal said that the relationship that the Appellant had with his children as identified by the social worker was "pivotal" which is "the heart of the matter in terms of whether the effect of separation would

be unduly harsh in contradistinction to harshness". The First-tier Tribunal stated as follows:-

> "... the emotional dependency of the children upon the Appellant has gone substantially beyond normal emotional dependency as a result and that the pivotal relationship between the Appellant and the children has come about as a result of the overall circumstances to which I refer. I find that the ordinary consequences of separation which are to be fully anticipated in the event of deportation as described and explained in **PG (Jamaica)** are substantially exceeded. In short those ordinary consequences which would flow from separation which constitute harshness and such consequences also embrace the type of difficulties referred to in **PG (Jamaica)**. The distinction which exists between those circumstances and that to which I refer in this case rests upon the clear correlation between the especial strength of the relationship between parent and child and the consequences of effectively dissolving that bond. In this case if the pivot is to be removed all balance and equilibrium will be lost in contradistinction to the position where the fulcrum of family life is constituted by a relationship between the children and parents where the normal ties of emotional dependency and the spectrum of difficulty experienced by a family coping with everyday life and the development of the children is that which is to be anticipated ...".

8. I found that the judge had materially erred in law. My reasons are contained in my error of law decision and read as follows:-

> "11. The judge directed himself in respect of KO and made repeated reference to the case of PG (Jamaica) v SSHD [2019] EWCA Civ 1213; however, it is not clear from his findings what test he applied to the assessment of unduly harsh. I accept the Appellant's submission that there was no misdirection. The judge properly directed himself. However, his decision does not disclose that he applied the correct test. If he applied the correct test (according to KO and PG) it is not clear why he decided that it had been met. The decision is inadequately reasoned. In any event, the test applied cannot be said to comply with KO read with the clarification given by the Court of Appeal in HA (Iraq) [2020] EWCA Civ 1176.
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> 12. While the judge attached weight to the Appellant playing a pivotal role in his children's lives, it is not entirely clear what he meant by this. It was not in dispute that the children live with their mother. She did not give live evidence. Her statement of evidence was brief and does not support the Appellant having a pivotal role in the sense that he has a primary role in their care, if that is what the judge meant. The judge at [12] said that he accepted the evidence of the witnesses because it was not undermined, it was consistent with their evidence 'constitutes the broad foundation for the observations and conclusions set out in the expert report which I have also accepted'. I accept that there was no issue taken by the Secretary of State to the report prior to the hearing, but it was still incumbent on the judge to properly scrutinise the

evidence and explain how and why the evidence of the independent social worker supported a finding of unduly harsh applying the appropriate legal test. He did not adequately do this.

13. The judge at [15] said that it is necessary to consider whether there would be a breach of Article 8 outside of the Rules; however, this was not necessary having found that the Appellant's appeal succeeded under s.117(5)(c) of the 2002 Act. I do not need to engage with the grounds so far as this is concerned. The error of law infects the whole decision.

14. For the above reasons the Secretary of State's grounds are made out insofar as the judge's decision is inadequately reasoned (grounds 1 and 2), the judge did not apply the correct test/or explain why it was met (ground 3). For these reasons, I set aside the decision of the judge to allow the appeal.

15. I am mindful that the judge found that the Appellant and other witnesses were credible. Despite one of the reasons being the unquestioning acceptance of the evidence of the social worker's report, he had the benefit of hearing oral evidence. I accept that it is not clear what he meant when concluding that the Appellant's role was pivotal and that the evidence before him as identified by the judge did not support a conclusion that the Appellant's role was a primary carer for his three children. However, there is no reason to go behind the credibility findings of the Appellant and the witnesses as regards the evidence they gave to the First-tier Tribunal and which is set out in the decision at [2]–[8]. In addition, the judge considered the children's best interests at [13]. He accepted that it is in the children's best interests to continue to see their father. This finding is maintained.

16. Mr Kotas in his written submissions raises a new ground relating to a previous decision of the First-tier Tribunal. I conclude that the judge correctly considered the evidence at the date of the hearing before him. He was not bound by the earlier decision. The facts and the evidence were very different to that before the first judge. However, when considering the relationship between the Appellant and his children and rehearing the case, it is open to the parties to argue that the earlier decision has some relevance to the quality of the relationship and the impact of separation".

9. I made the following directions:-

"(a) My provisional view (having taken account of paragraphs 7.2 and 7.3 of the Practice Direction of the Senior President of Tribunals of 25 September 2012 is that this matter should be listed for a resumed hearing in the Upper Tribunal to be decided following oral submissions. There is a degree of fact-finding to be undertaken as regards the social worker's report. No further evidence has been filed or served from the Appellant, as far as I am aware.

(b) The parties have fourteen days from the sending of this decision to make submissions as regards venue and the nature of the resumed hearing. In default the matter will be listed in accordance with my provisional view".

10. Following my directions nothing was received from the parties.

11. Following the litigation concerning R (JCWI) v President of UT [2020] EWHC 3103 and EP (Albania) & Ors (rule 34 decision; setting aside) [2021] UKUT 233 the Appellant made an application to set aside my decision under Rule 34 to set aside the decision of the First-tier Tribunal. Following the Appellant's application on 30 November 2021 directions were issued giving the parties the opportunity to make further submissions addressing EP (Albania) & Ors. The directions gave the parties fourteen days from the sending of the directions to make submissions stating that at the expiry of that time period a decision on the application may be made without further reference to the parties. The parties did not make any written submissions. I dealt with the application in a decision of 23 March 2022. I refused the application under Rule 43. The reasons for my decision are as follows:-

> "5. The application is scant and fails to address the decision in EP. It assumes that R (JCWI) v President of UT [2020] EWHC 3103 supports that all error of law appeals determined without a hearing should be set aside. This is not correct. No reasons have been identified by the Appellant why the Rule 34 decision should be set aside.
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> 6. The represented Appellant has not identified any unfairness in my decision. The parties were given the opportunity to respond to the provisional view of the UT that the error of law matter could be fairly determined on the papers. The represented Appellant made written submissions addressing the substantive error of law issue but not giving a view as to whether the matter could be determined fairly on the papers.
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> 7. I properly considered fairness and whether the interests of justice demanded an oral hearing. The process was unarguably fair to the parties. The Appellant was given the opportunity to participate in the proceedings at every stage. It is not in the interests of justice to set aside my decision in the absence of a properly identified reason".

12. The appeal was re-listed for a resumed face to face hearing on 5 May 2022. On this occasion the Appellant was represented by Ms Longhurst-Wood by way of Direct Access. She made an application for an adjournment on the basis that she had recently been instructed by the Appellant. I adjourned the appeal and made a number of directions which were communicated orally to the parties at the hearing.

The Legal Framework

13. It is not challenged that the Appellant is a foreign criminal as defined by s.32(1) of the UK Borders Act 2007 ("the 2007 Act") and that his removal is conducive to the public good with reference to s.32(4) of the 2007 Act and s.3(5)(a) of the Immigration Act 1971. Therefore, the SSHD must make a deportation order (s.32(5) of the 2007 Act) subject

to certain exception (s.33). One of those exceptions is that deportation would breach the Appellant's rights under Article 8 ECHR.

14. On 28 July 2014 the Immigration Act 2014 ("the 2014 Act") came into force. It applies to all decisions taken by the Secretary of State or a Tribunal on or after that date. The 2014 Act provided that a new Part 5A should be inserted into the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). That Part provides, so far as material:-

"**PART 5A**

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard –

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), 'the public interest question' means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to –

(a) a private life, or

(b) a relationship formed with a qualifying partner,

that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where –

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ('C') who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where –

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(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.

117D Interpretation of this Part

(1) In this Part –

'Article 8' means Article 8 of the European Convention on Human Rights;

'qualifying child' means a person who is under the age of 18 and who –

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

'qualifying partner' means a partner who –

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(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.

(3) For the purposes of subsection (2)(b), a person subject to an order under –

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time –

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it".

13. The Appellant is a medium offender, having been sentenced to twelve months' imprisonment. He advanced his case on the basis that deportation would breach his rights under Article 8 because the impact of deportation would be unduly harsh on his children (s.117C(5)) and /or there are very compelling circumstances in the context of s.117C (6).

15. There has been a significant amount of case law concerning the unduly harsh test. In HA (Iraq) v SSHD (Rev 1) [2020] EWCA Civ 1176 the court gave further guidance on KO (Nigeria) & Ors v SSHD [2018] UKSC 53. The is has now been endorsed by the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22

16. The Court of Appeal in HA stated as follows:-

51. The essential point is that the criterion of undue harshness sets a bar which is 'elevated' and carries a 'much stronger emphasis' than mere undesirability: see para. 27 of Lord Carnwath's judgment, approving the UT's self-direction in *MK (Sierra Leone)*, and para. 35. The UT's self-direction uses a battery of synonyms and antonyms: although these should not be allowed to become a substitute for the statutory language, tribunals may find them of some assistance as a reminder of the elevated nature of the test. The reason why some degree of harshness is acceptable is that there is a strong public interest in the deportation of foreign criminals (including medium offenders): see para. 23. The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or child is of a sufficiently elevated degree to outweigh that public interest.

52. However, while recognising the 'elevated' nature of the statutory test, it is important not to lose sight of the fact that the hurdle which it sets is not as high as that set by the test of 'very compelling circumstances' in section 117C (6). As Lord Carnwath points out in the second part of para. 23 of his judgment, disapproving *IT (Jamaica)*, if that were so the position of medium offenders and their families would be no better than that of serious offenders. It follows that the observations in the case-law to the effect that it will be rare for the test of 'very compelling circumstances' to be satisfied have no application in this context (I have already made this point – see para. 34 above). The

statutory intention is evidently that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the (low) level applying in the case of persons who are liable to ordinary immigration removal (see Lord Carnwath's reference to section 117B (6) at the start of para. 23) and the (very high) level applying to serious offenders.

53. Observations of that kind are, I hope, helpful, but they cannot identify an objectively measurable standard. It is inherent in the nature of an exercise of the kind required by section 117C (5) that Parliament intended that tribunals should in each case make an informed evaluative assessment of whether the effect of the deportation of the parent or partner on their child or partner would be 'unduly harsh' in the context of the strong public interest in the deportation of foreign criminals; and further exposition of that phrase will never be of more than limited value.

54. The Appellants of course accept that Lord Carnwath said what he said in the passages to which I have referred. But they contend that it is not a complete statement of the relevant law and/or that it is capable of being misunderstood. In their joint skeleton argument they refer to the statement in para. 23 of Lord Carnwath's judgment that 'one is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent' and continue:

> 'This statement, taken in isolation, creates the opportunity for a court or tribunal to reach a conclusion on undue harshness without due regard to the section 55 duty or the best interests of the child and without careful analysis of all relevant factors specific to the child in any particular case. Instead, such considerations risk being 'swept up' under the general conclusion that the emotional and psychological impact on the child would not be anything other than that which is ordinarily expected by the deportation of a parent ... that cannot have been the intention of the Supreme Court in *KO (Nigeria)*, which would otherwise create an unreasonably high threshold'.

Mr de Mello and Mr Bazini developed that submission in their oral arguments. In fact it comprises two distinct, though possibly related, points. I take them in turn.

55. The first is that what Lord Carnwath says in the relevant parts of his judgment in *KO* makes no reference to the requirements of section 55 of the 2009 Act and is likely to lead tribunals to fail to treat the best interests of any affected child as a primary consideration. As to that, it is plainly not the case that Lord Carnwath was unaware of the relevance of section 55: see para. 15 of his judgment, quoted at para. 41 above. The reason why it was unnecessary for him to refer explicitly to section 55 specifically in the context of his discussion of Exception 2 is that the very purpose of the Exception, to the extent that it is concerned with the effect of deportation on a child, is to ensure that the best interests of that child are treated as a primary consideration. It does so by providing that those interests should,

in the case of a medium offender, prevail over the public interest in deportation where the effect on the child would be unduly harsh. In other words, consideration of the best interests of the child is built into the statutory test. It was not necessary for Lord Carnwath to spell out that in the application of Exception 2 in any particular case there will need to be 'a careful analysis of all relevant factors specific to the child'; but I am happy to confirm that that is so, as Lord Hodge makes clear in his sixth proposition in *Zoumbas*.

56. The second point focuses on what are said to be the risks of treating *KO* as establishing a touchstone of whether the degree of harshness goes beyond 'that which is ordinarily expected by the deportation of a parent'. Lord Carnwath does not in fact use that phrase, but a reference to 'nothing out of the ordinary appears in UTJ Southern's decision. I see rather more force in this submission. As explained above, the test under section 117C (5) does indeed require an appellant to establish a degree of harshness going beyond a threshold 'acceptable' level. It is not necessarily wrong to describe that as an 'ordinary' level of harshness, and I note that Lord Carnwath did not jib at UTJ Southern's use of that term. However, I think the Appellants are right to point out that it may be misleading if used incautiously. There seem to me to be two (related) risks. First, 'ordinary' is capable of being understood as meaning anything which is not exceptional, or in any event rare. That is not the correct approach: see para. 52 above. There is no reason in principle why cases of 'undue' harshness may not occur quite commonly. Secondly, if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child.

57. I make those points in response to the Appellants' submissions. But I am anxious to avoid setting off a further chain of exposition. Tribunals considering the parent case under Exception 2 should not err in law if in each case they carefully evaluate the likely effect of the parent's deportation on the particular child and then decide whether that effect is not merely harsh but unduly harsh applying *KO (Nigeria)* in accordance with the guidance at paras. 50-53 above".

17. The SSHD appealed HA (Iraq) v Secretary of State [2020] EWCA Civ 1176. The Supreme Court, in HA (Iraq) v Secretary of State [2022] UKSC 22 endorsed the approach of Underhill J and rejected the SSHD's contention that Lord Carnwath was contemplating a notional comparator test in KO (Nigeria). Giving the lead judgement Lord Hamblen stated:

> 32. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "… '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."
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> 33. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - ie it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).
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> 34. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.
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> 35. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.
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> 36. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

18. If the Appellant is able to establish that the impact of deportation would be unduly harsh on his children his appeal falls to be allowed under Article 8. If he is not able to establish this he sought to rely on

s.117C(6). I have taken into account what was said in NA (Pakistan) v SSHD & Ors [2016] EWCA Civ 662:-

> "32. Similarly, in the case of a medium offender, 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. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a Tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.
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> 33. 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. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
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> 34. The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in *Secretary of State for the Home Department v CT (Vietnam)* [2016] EWCA Civ 488 at [38]:
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> > 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation'".

The Appellant's evidence

19. The Appellant gave oral evidence. He adopted his witness statements as his evidence-in-chief. His evidence can be summarised. The Appellant has three British citizen children. He is separated from their mother who is also a British citizen.

20. The Appellant was arrested on 6 August 2016 and sentenced to a period of twelve months' imprisonment for making false representations. He was released from prison on 21 June 2017. His sentence expired on 27 May 2018. He regrets his criminal conduct and is ashamed of himself. It was the first time and the last time that he broke the law. He has been assessed as being at low risk of reoffending having complied with all his licence conditions. While he was in prison his ex-partner and their children would visit him every weekend.

21. Following his release from prison he has lived with his sister (US), her husband (RS) and their three children. They have been extremely supportive of the Appellant and have maintained him. He has a close relationship with them. The Appellant's sister's house is about ten miles away from the Appellant's ex-partner's home. Their children have a close bond with the Appellant's children and see each other regularly.

22. The Appellant has an older brother (RA) who is settled here. He lives about eight miles away from the Appellant's ex-partner's home. The Appellant often sees him and his wife (NC). He has supported the Appellant.

23. The Appellant described his childcare responsibilities. He arrived at his ex-partner's house at 8 a.m. to look after the children. The twins are able to travel independently to school. He takes M to school and collects her. He looked after her after school and prepared dinner for all the children. He helped them with their homework and/or watched television with them. If the weather is good they played together in the garden. Their mother usually arrived home at 5 p.m. and he left their house at 6 pm in order to comply with a curfew. He saw the children on Saturday when their mother went to work. Their mother has no family here. It would not be worth her going to work if she had to pay for childcare. She worked irregular days. Both parents are both supportive of the children and the children need both of them in their lives.

24. His ex-partner's work hours were erratic. He did not know if she had looked for alternative employment. The twins were in year 10. They needed extra tuition. The cost of a tutor was £40 to £45 per session.

25. The Appellant was supported by his family in the United Kingdom. He received about £100 a week from them in total. In cross-examination he stated that the support that he now received would not continue should he return to Pakistan and nor would funds be redirected to his children in the UK. His evidence was that his family could not support him forever. If he were permitted to remain in the UK he would work, maybe as a taxi driver or he would open a takeaway.

26. The Appellant said that he had searched on the internet about jobs in Pakistan and over the age of 45 people would not employ you. Moreover, 33 million people had been affected by floods and are now homeless.

27. The Appellant during cross-examination produced documentation that he had printed from the internet. Mr Clarke was taken by surprise and had not had the opportunity to consider this. I decided that it was not appropriate for the documents to be admitted on the basis at such a late stage in the proceedings. There was no reason provided by the represented Appellant to explain why they had not produced earlier and served on the SSHD.

28. The Appellant's parents died many years ago. He had two other siblings in Italy and Dubai. He had no family members in Pakistan apart from one sister who is married with four children. He had not seen her for many years and they had not maintained contact. Her husband was a motor mechanic. They would not be able to support him. They were supported by the Appellant's other brother in Dubai who sent money to them.

29. The Appellant confirmed that his children are progressing well at school in the UK and they had not had medical treatment from for mental health issues.

30. The Appellant's ex-partner had family in Pakistan. Her father was a retired army officer in receipt of a pension. When she travelled to Pakistan in 2018 he said in evidence-in-chief that she funded the visit, however when re-examined on this point he said that he was not sure that his ex-wife paid for her own flights and maybe she had received money from friends. The purpose of the visit was to attend her sister's wedding. The family had not been overseas before or since. His ex-partner earned less than £10,000 a year.

31. The Appellant was from Jhelum. His sister lived about 22 kilometres from Jhelum. His ex-partner's parents were in Gujarat was about an hour's drive away

The Evidence of RS

32. RS, the Appellant's brother-in-law gave evidence and adopted his witness statements as evidence-in-chief. He confirmed that the Appellant lived with him and his wife and that he gave him £30 or £40 once or twice a week depending on his needs.

33. He was asked whether he would continue to support the Appellant in the short term if he were to return to Pakistan. He said "possibly" but explained this would be dependent on his own circumstances. He pointed out that it was very difficult to live on £30 or £40 in Pakistan. He had a good relationship with the Appellant's children and that would continue should the Appellant return to Pakistan. He confirmed that he was helping the Appellant now but he would not divert those funds to his children should he be removed to Pakistan. It would be difficult for him to fund tuition for the twins. He would not commit to helping the Appellant's children or the Appellant in the long term.

34. The witness stated that he had a sister in Karachi which was miles away from where the Appellant was from. His relatives in Pakistan were not well settled and did not have good jobs. They were retired or worked on stalls in the local market. He confirmed in re-examination that the Appellant's ex-partner visited with the children if she was not working.

The Evidence of NC

35. NC, the Appellant's sister-in-law gave evidence and adopted her witness statements. She was married to RA, the Appellant's brother. She stated that the Appellant "makes every effort to be there mentally and physically in the life of his children". In her opinion the children had been through enough and his deportation would have a detrimental effect on the family. The Appellant was being helped out financially by his brother so that he was able to maintain relationships with his family. She was not sure that help would continue if the Appellant was in Pakistan. Her husband made those sorts of decisions. She was not able to say whether he would redirect those funds to support the Appellant's children if the Appellant had to return to Pakistan.

The Evidence of RA

36. RA is the Appellant's brother. He provided an updated statement of 25 May 2022. His evidence can be summarised. The Appellant was supported financially and mentally by RS and his family. The Appellant had "a wonderful relationship with his children". His children loved to do activities with him. He was a dedicated father who regularly looked after them. He cooked for his children and helped them with their homework. Separation would be a "great loss to the wellbeing and upbringing of the children". The Appellant helped his ex-partner while she went to work. The Appellant would not have anyone back in Pakistan to support him.

The Evidence of IS

37. IS, the Appellant's ex-partner and the mother of their three children provided a witness statement. She stated that she was is unable to attend court because of work obligations and that she needed to be there for her daughter M.

38. The Appellant separated from the Appellant in early 2015. He was a great father and had a "good and strong relationship" with the children. They loved him and because she loved her children she did not want them to be affected by him not being a part of their lives. They were distressed and destabilised when they separated and when the Appellant was arrested and imprisoned. They now had stability and felt reassured because he is was them almost every day. This has been the situation for about five years and since he was released from prison.

39. The children needed the Appellant. She could not cope with what she described as the "fallout and emotional devastation they would each suffer if he were taken from their lives". When he was in prison she would take the children to visit him almost every weekend. They would become extremely upset when they had to leave. The children were doing well at school.

40. She did not know what she would do if the Appellant was not there to share parental responsibility. She would not be able to cope. He had always been a hands-on father and had never been separated from them apart from when he was in prison and in detention. Even then he saw them every week. It was really important for her to know that if and when something went wrong or a problem arose there was someone she could count on and turn to. It also enabled her to leave the house and go to work.

41. She worked as a shop assistant. She earned £9,792 per annum. She received child tax credit and working tax credit. She could not afford to pay a childminder and in any event M would not like that. She needed the Appellant's support. She was reliant on him.

42. In 2017 she went to Pakistan, however when she tried to return a month later the twins were denied exit as there was a problem with their passports. She and M returned to the UK on 10 February 2018. The twins remained in Pakistan while the paperwork was sorted out and they succeeded in getting new British passports. They were in Pakistan for around a year until 5 February 2019. They were unwell. They were at risk of being abducted or kidnapped. They hated it in Pakistan. They were miserable and unhappy. They missed their parents and wider family.

The Evidence of Independent Social Worker ("ISW") - Gary Crisp

43. Mr Crisp prepared a report dated 13 June 2022 concerning the impact of deportation on the Appellant and his family following a meeting with the family. Mr Crisp's evidence can be summarised.

44. It is in the children's best interests for the Appellant to remain in the UK. Mr Crisp is of the opinion that it would be unduly harsh for the children to leave the UK with their father or to remain here without him. In the former scenario they would have to be separated from their mother who is like them a British citizen and who would remain here. It would be disruptive to their education and have a "lasting effect" on their life choices and employment opportunities.

45. Mr Crisp was of the opinion that to remove to Pakistan would be detrimental on the children's mental health and general wellbeing and that to remove them from their mother would have the same effect.

46. Mr Crisp also considered the prospect of them remaining in the UK without their father and in his opinion this also would be detrimental to the children's mental health and wellbeing. The twins were at a key stage in their education and development. They had a strong bond with their father and saw him as a role model. He encouraged them with their education and spent quality time with them. He also modelled religious practices that they follow as a family and it was extremely important to them as young men to have a male role model in their lives.

47. Their youngest child M expected both her parents to be near to her. She did not have the same concerns that her brothers have because she was not aware of her father's circumstances and earlier incarceration. In Mr Crisp's opinion it would "devastate" her to learn that one of her parents would no longer be near to her and it could cause feelings of rejection.

48. Aside from the very important physical assistance that the Appellant provided the children told Mr Crisp that playing together and exercising together made them happy. The children told Mr Crisp that their mother and father did "different things" with them.

49. Mr Crisp recorded that the Appellant told him about the importance of physical touch and physically being present for religious occasions such as Ramadan and Eid and if he were to return to Pakistan it would be unlikely he would be able to remain in contact with his sons. He would not gain employment there due to his age. He had no connections and is likely to have to live on the streets. He would have no means to use a telephone or the internet.

50. Mr Crisp concluded that remaining in the UK without the Appellant would be unduly harsh on the children because he would be living on the streets and unable to gain employment.

The Respondent's submissions

51. I heard submissions from the representatives. Mr Clarke relied on the reasons for refusal although conceded that certain issues had since crystallised. He relied on Mr Melvin's written submissions. It was accepted that the Appellant was integrated, however since the expiry of his visit visa he has not had leave to remain. It was not accepted that there are very significant obstacles to integration. The elevated test in relation to the unduly harsh test was not met. There were significant extended family within the United Kingdom in close proximity of the children. He relied on HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 approved by the Supreme Court.

52. Mr Clarke referred me to the report of the ISW. The ISW sought to make legal findings about which he has no expertise. He commented on country conditions about which he had no expertise. Furthermore, he made findings in relation to mental health, again about which he had no

expertise. He did not explain why he concluded that the impact of deportation would be unduly harsh. Moreover, what the ISW stated was as a result of an interview with the Appellant. He took what was said to him at face value. Mr Clarke referred me to the case of JL (medical reports-credibility) China [2013] UKUT 00145 and HA (expert evidence; mental health) Sri Lanka[2022] UKUT 00111.

53. The social worker did not have sight of medical records. What he said was generic and taken from an interview with the Appellant. What he said at paragraph 5.12, namely that the children would not be able to afford to visit the Appellant and the consequences of this are not predicated on medical evidence. He referred me to paragraphs 5.8, 5.12, 5.17 and 5.21 of the report. It is clear that the children were doing well at school and did not do badly when the Appellant was in prison. He referred me to paragraph 7.4 of the report where the expert concluded that there would be a detrimental effect on the children's mental health and wellbeing. That was a finding that was outside the expertise of the ISW. The ISW made general findings at 7.5. He submitted that paragraphs 7.9 and 7.10 are very problematic and predicated on the Appellant being destitute which is not supported. From the evidence it is clear that there was an extended family unit in the United Kingdom and a good relationship between the family unit and the Appellant's children.

54. The evidence supported that the Appellant received maybe £100 a week from relatives here. It was submitted that his children would not be left without support and that the Appellant would not be destitute. Moreover, he would be able to receive £750 by way of facilitated return.

55. It was not credible that the Appellant would not be able to find work in Pakistan. He has submitted no evidence that he has made an effort to find employment there. He was healthy and has work experience and financial support. He had spent the majority of his life in Pakistan where he had family and connections. It was difficult to know how his ex-wife afforded to go to Pakistan and her income stream is not clear.

56. Mr Clarke referred me to the case of NA (Pakistan), specifically para 33, and he urged me to dismiss the appeal.

The Appellant's submissions

57. Ms Longhurst-Woods relied on her skeleton argument. She submitted that it was perverse for the SSHD to attack the evidence of the ISW on the basis that it is speculative. He was assessing the effect of deportation. He was professionally trained and qualified and had experience of children who suffered loss. Social workers were in the best position to make that assessment. The children's mother was estranged from the Appellant and would not have supported his Appellant's appeal if what was said by the ISW was not correct. It is not

necessary to be a medical expert to describe loss of a parent and the impact on the Appellant.

58. The Appellant had been present in his children's life since they were born. The eldest two now needed extra tuition because they had missed school because they were stuck in Pakistan for about a year in 2018 due to unforeseen problems with their passports. The Appellant looked after his daughter M when his ex-partner returned to Pakistan to collect the twins and to sort out the problems.

59. The family had a weekly routine which had been in place since the Appellant was released in June 2017. This routine was designed to fit around the children's mother's working hours. The damage caused by the Appellant's deportation would be far- reaching placing the children's mother in serious difficulties coping with the emotional fallout and the practical consequences. The Appellant was reliable and both parents placed great value on being present in their children's lives. If the Appellant was returned the children's mother will be "thrown back on benefits and unable to work". A tutor for the children would be out of the question and funding of a childminder beyond her means. The Appellant would not be able to secure employment on return to Pakistan as a result of the economic crisis and his age. There would be no support system and he would not be able to access accommodation. He had been in the UK for 23 years. The children would not be able to afford to visit the Appellant in Pakistan.

60. The Appellant was assessed as presenting a low risk of reoffending and had expressed remorse and shame.

61. The ISW spoke directly to the children individually and emphasised that the twins were at an age when boys need their fathers for guidance and support. The father was a hands-on father who was willing and able to fulfil the role of nurturing and caring. He was a responsible person whose role was essential to family life. Without their father the children's lives would be miserable, impoverished and extremely bleak. Maintaining contact would be impracticable since the Appellant had no support system in Pakistan and no means. The children's mother did not participate in family get-togethers and she would not feel comfortable being forced to go to the family in the UK should a problem arise.

Conclusions

62. I find that the Appellant and witnesses were credible witnesses. Their evidence was straight forward. It was broadly speaking internally and externally consistent. I attach weight to their evidence. I am mindful that the First-tier Tribunal found the Appellant and witnesses to be credible. There was no challenge to the relationship that the Appellant has with his children.

63. The Appellant shared responsibility for his children with his ex-partner. He was an integral part of the family and is currently enabling the family to function. He helped the children to get to school and their mother to work so that she can provide for them. I accepted that his absence would significantly interfere with the status quo. While I do not attach significant weight to the practical difficulties that would ensure from his deportation (childcare requirements, juggling work and the funding of private tuition outside school), I must consider the emotional impact that these practical realities may have on the children.

64. What was clear to me is the wider family was supportive of the Appellant and it was reasonably likely that they would attempt to offer some level of support to him should he return to Pakistan. He also has family in Pakistan. Like his family here, I find that family in Pakistan who are supported by another brother in Dubai would offer the Appellant what support they could. I do accept, however, that the families means were limited. It was easier to support someone by way of accommodating and feeding them than it is to support someone to live independently in another country. I accept that the Appellant's relatives in Pakistan were poor and that his brother in Dubai helped to support them. I accept that it may be more difficult for this Appellant to find a job in Pakistan than it would a younger man; however, he is was a stranger to Pakistan. He was healthy. He would have some support from his family. I do not underestimate the chaos and economic fallout following the recent floods, but I do not accept that the picture for this Appellant was quite as bleak as he may genuinely fear. I do not accept that the evidence established that the Appellant would be destitute on return to Pakistan although that is what he told the ISW and what he may genuinely fear. While I accept that the Appellant's fears were subjective and that he was not trying to mislead the court, I find that the family would pull together as best as they could to try to prevent him being destitute. While I accept that it is not reasonably likely that the Appellant would be able to give meaningful financial support to his children (even if he is able to eventually secure employment), I find that his family would try to assist him in so far as they are able. However, I accept that their ability to do so is reasonably likely to be affected by the cost of living crisis. It is clear from the evidence of RS that he was not envisaging offering long term support to the Appellant or his family.

65. The focus of the unduly harsh test was not on the Appellant but on his three young children. I accept that to a certain extent they were interlinked. Some of the criticism levelled by Mr Clarke at the ISW report is justified. The ISW used the wording of the legal test ("unduly harsh") which was not helpful. It is the role of the Tribunal to apply the legal test. I also accept that the ISW has taken at face value the account given by the Appellant. However, in this case that does not cause me too much concern because I do not find any significant credibility issues arising from the Appellant's evidence before me or what he told the ISW.

66. In respect of the prediction of mental health problems and consequences for the children's education, I approach this evidence with some caution. There is no psychological or psychiatric evidence before the Tribunal. However, I accept that a social worker is able to give an opinion on the likely emotional impact of separation from a parent on a child. I have no doubt that it was in these children's best interests for their father to remain with the family in the United Kingdom. I accept Mr Crisp's opinion that M would be devastated by her father's deportation. Moreover, I accept that it was reasonably likely that these children will be psychologically adversely impacted by long term separation from their father. However, I agree that in respect of what consequences may ensue, Mr Crisp has engaged in a degree of speculation.

67. Mr Crisp's report alone was not sufficient to justify a finding of unduly harsh. However, I heard evidence from the Appellant and two members of his family. There was evidence from his ex-partner. She supported the Appellant's appeal. Their three children are young. They are now accustomed to their father being very much present in their lives. I realise that there was a period of separation when the Appellant was incarcerated and when the twins had to remain in Pakistan. I accept that the twins were effectively unable to leave Pakistan for a year (February 2018-February 2019) which I accept was very stressful for them and their parents. I take into account that the Appellant was released from prison on June 2017. I accept that he has stayed in the United Kingdom and cared for M when his wife travelled to Pakistan in an attempt to resolve the problem preventing the twins from returning. I accept that the family arrangement and the level of care that the Appellant gave to his children, particularly M, had been in place for a period of time which in the life of a child was not insignificant and which would make a further change of circumstances potentially more challenging for the children. I am satisfied that the children were now very much used to what has become the status quo for this family. I accept that there was a high level of emotional and practical dependency on the Appellant, especially as far as M is concerned. I accept the evidence that the Appellant and M had a particularly close relationship.

68. It was not unusual for parents to be unable to afford the cost of childcare. I accept that the Appellant's ex-wife was on a low salary. These factors are not significant insolation, but considered holistically, I accept that there would be significant disruption to the lives of the children, as a result of deportation including a real prospect of poverty. There are other family members both here and in Pakistan. I accept the evidence and find that it was unlikely that they would be able or willing to support the Appellant's children in his absence to any meaningful extent. The Appellant's brother and brother-in -law are cab drivers. I reasonably infer that this kind of employment does not provide the level disposal income which would allow for the support of another family. The Appellant's sister and brother-in-law with whom he lives have their own children. I have also taken into account that the Appellant's children who presently see him most days would not be able to maintain regular

face to face contact with him. I am satisfied that the family did not have the means to travel with any degree of regularity Pakistan.

69. This is not a case where there is one factor that stood out above all others which reached the elevated threshold. I find that factors considered cumulatively reached the threshold of unduly harsh. I allow the appeal on the basis that separation of the family in the context of the Appellant retuning to Pakistan and the children remaining with their mother in the United Kingdom would meet the elevated test of unduly harsh. I have carefully evaluated the likely effect of deportation on the Appellant's children and have concluded that is would not be merely harsh but unduly harsh applying KO (Nigeria) and the guidance given by the Court of Appeal and Supreme Court.

Notice of Decision

The appeal is allowed under Article 8.

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 *Joanna McWilliam* Date 17 October 2022
Upper Tribunal Judge McWilliam