**Upper Tribunal**
**(Immigration and Asylum Chamber)** **Appeal Number: PA/13511/2016**

**THE IMMIGRATION ACTS**

**Heard at Birmingham Combined Courts**
**On the 11 January 2022**
**Prepared on the 12 January 2022**

**Decision & Reasons Promulgated**
**On the 16 May 2022**

**Before**

**DEPUTY UPPER TRIBUNAL JUDGE DAVEY**

**Between**

**MIRKHAKILLAH HASHMI**
**(ANONYMITY ORDER NOT MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

Appearances
Mr Asmi Counsel for the Appellant
Mr Barret Senior Presenting Officer

**DECISION AND REASONS**

1. The Appellant, a national of Afghanistan, date of birth 1 January 1981, appealed against the Respondent's decisions of 29 November 2016 and 26 February 2018. The history of the appeals is unfortunately protracted. After I remade and promulgated the decision on Human rights grounds, on the Respondents application Upper Tribunal

Keith found an error of law on the basis I had ignored a Court of Appeal decision, which had not been published when I signed off my decision, albeit prior to promulgation. The matter was remitted to me to remake the Article 8 ECHR. At the hearing on11 January 2022 the Court of Appeal had published other decisions and neither party relied upon the earlier decision before Upper Tribunal Keith.

2. The Appellant arrived in the UK in 2002. His asylum claims were refused on 16 December 2011 and he was granted discretionary leave to remain on the basis of his family life on 16 December 2011. At a date in 2016 the 2022 discretionary leave was extended until 15 February 2018. The Appellant's immigration history is more fully set out in the Appellant's statement (AB1-23). There are four statements made by the Appellant dated 13 March 2017, 2 July 2018, 14 October 2019, 10 June 2021 and 29 January 2018.

3. The Appellant in support of his appeal also relied upon the statements of his wife/partner (AB24-35) dated 3 July 2018 and 10 June 2021.

4. The Appellant and his partner are parents of a number of children Sahra (female), date of birth 12 December 2008, Sahar, date of birth 1 August 2012, Mirkhaillah (male), date of birth 25 May 2014, Sabrullah (male), date of birth 4 September 2015, Summaya (female), date of birth 10 September 2018, Suraya (female), date of birth 3 January 2020 and a fifth child, Hashimi, date of birth 18 December 2021.

5. The Appellant's wife's second statement, dated 3 July 2018, was followed by further statements of 14 October 2019 and 10 June 2021. In addition there was evidence relating to the Appellant's children, their progress at school and suchlike and the birth registration of the last child Hashimi (contained in AB487). Further relied upon by the Appellant in the totality of the evidence was a letter from the Appellant's uncle (AB45-49), probation report and documentation (AB365-398, 391, 397-398).

6. Of particular relevance was the independent social worker's Ms A Tyrell reports within the bundle (respectively AB256, 245 and 213), dated 18 May, 18 October and June 2021.

7. The background information relating to Afghan schools was not the subject of challenge and was within the EASO report September 2021 (AB392), the CPIN October 2021 (AB418-419, 427), the Gandhara reports dated 2021-2022 (AB450-458) and the EU Draft Action Plan September 2021 (AB461, 464 and 467).

8. The Appellant and his partner and the two eldest children made visits to Kabul in 2011 and in 2013 where they stayed with the Appellant's uncle. The purpose of the visits was to see the Appellant's mother who subsequently died in 2014 (AB33, 7). The case essentially turned, given that there had been a deportation order made on 24 November 2016 (AB434), that the Appellant was arguing that his wife, a British national, and children who are British nationals should not be expected to relocate to Afghanistan, nor was it reasonable for him to be separated from his wife and children because of the impacts upon such persons which were over and above that which might reasonably be expected to arise from the consequence of a person having been deported or the subject of a deportation order.

9. The Appellant's record of offending is to one offence but sufficiently serious that no suspended sentence was imposed and that whilst the underlying motive was dishonesty the Appellant had been involved in an allegation of arson upon which ultimately the CPS accepted a plea to simple arson. The Appellant may well have been fortunate in the disposal of that matter but it is not asserted that since conviction of that matter that he has reoffended and it was not substantively challenged that the Appellant had undergone rehabilitation, notwithstanding the fact the offence was committed when the Appellant was already with parental responsibilities albeit not to the same extent as he presently is.

10. I therefore, in considering the issues arising in this case, was fully aware of the significance of his offending, when it occurred and the absence of repetition or re-offending.

11. The Appellant, in his various statements, highlighted the difficulties of a return for his family to Afghanistan with him let alone for the difficulties his wife would face. On the face of it the Appellant's uncle, whose statement I have referred to, has left

Afghanistan due to his son being killed and now lives in Lahore, Pakistan. His mother has died, his father is deceased and there are no identified family supporters or network left for the Appellant in Afghanistan let alone in Kabul.

12. The case has ultimately turned on whether the consequences of removal upon either the partner or the children would be unduly harsh. Realistically it was not submitted that the Appellant's children should return as British nationals to a life which is completely unfamiliar to the children in Afghanistan, bearing in mind the age of the elder children, language, and the scope to which they are all integrated into cultural life, education and health care in the United Kingdom.

13. Reliance is placed unsurprisingly on the case of KO (Nigeria) [2018] UKSC 53 particularly paragraph 23 thereof, and AA (Nigeria) [2020] EWCA Civ 1296, as well as the cases of Byndloss [2017] 1 WLR 2380, NA (Pakistan) [2017] 1 WLR 207 and HA (Iraq) [2020] EWCA Civ 117. In addition the discussion of what constitutes or may constitute unduly harsh circumstances to meet the test provided by Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 was discussed within KB (Jamaica) [2020] EWCA Civ 1385. It has become clear that the meaning of unduly harsh in the test provided by Section 117C(5) has been shown that the unduly harsh test was to be determined without reference to the criminality of the parent or relevant offences and regard should be had in the judgment to all the circumstances including the criminal's immigration and criminal history. Unduly harsh requires a degree of harshness that goes beyond that which would necessarily be involved for any child faced with the deportation of a parent. The test requires or carries with it more emphasis on undesirability, being more than mere undesirability or uncomfortable or inconvenience but the threshold is not as high as the very compelling circumstances test in Section 117C(6), as referred to in KO (Nigeria) and HA. The formulation in KO paragraph 23 did not require objectively measurable standards of harshness which are acceptable or unacceptable but on the face of it where there is a variety of variable circumstances it is not possible to impose a base level of ordinariness and essentially it is a judgment made, applying not least the guidance in HA (Iraq) [53, 57] and the proper application of the statutory wording. The social worker's report helpfully

addresses in pragmatic terms issues such as accommodation and finances and the available lifestyle that would be there for the children and women in Afghanistan and the hazards faced particularly by adult women with or without children and the general risks faced by young children, both in terms of the availability of education, health care and the availability of appropriate social support as well as lifestyle issues.

14. I found of particular help from Ms Tyrell, the independent social worker, the difficulties she refers to in Afghanistan in terms of education, accommodation and finance and that the removal to Kabul is not to the Appellant's home area. The clear inference from a great deal of the background evidence is the difficulty of women finding paid employment and the absence of support from the state. I accept her points generally about the effects of separation of the children from their father and the likely impact upon the children and their wellbeing particularly in the circumstances of the Appellant if the children and his wife remain in the UK being unable to assist the significant number of young children in need of parental care. The issue of parenting by the Appellant's wife alone cannot be underestimated when it is for the care of so many children and the Appellant's wife's health is an issue that is addressed in the evidence. The strain upon any mother of looking after that number of children on her own cannot be understated and Ms Tyrell speaks to the availability of support from Social Services and the inevitable need if it arises through separation of the availability of outside help and its limitations.

15. Against that background, which was not substantially challenged, the highest the Respondent can put it is in essence that the Appellant's wife should cope in the United Kingdom. It was not seriously argued that they as a family should return to Afghanistan and it is self-evident that to do so would plainly disrupt the education of probably the eldest four children bearing in mind the Appellant's wife is coping with an age range of children from 13 to a few months.

16. The background evidence shows the difficulties and increasing violence around Afghanistan and there is nothing to indicate that for these British children somehow or other their nationality will confer any greater protection upon them. I therefore

taking full account of the Appellant's conduct in the United Kingdom, the asserted rehabilitation, the probation report and letters (AB365-398, particularly 391, 397-398) that suggest that the Appellant has seen the error of his ways and through not offending demonstrated that there is the reasonable prospect that his integration into the United Kingdom will continue to the benefit of both himself, his wife and their children as well as potentially society generally.

17. I take into account that the Appellant has lived here and had the benefit of life in the United Kingdom for some twenty years and there is an absence of family or network to return to in Afghanistan. In the circumstances I conclude with reference to Article 8 ECHR that clearly the issue of family and private life in the United Kingdom is engaged and in a consideration of proportionality I take the view that the interests of his wife as a British national and his children as British nationals is of significance and must be given weight in the overall consideration of this matter.

18. The Appellant, who speaks some English, has plainly understood the burdens that he has placed upon his wife and the considerable difficulties which may not be actually manageable that she would face as the single mother of several children.

19. I have taken into account the progress that the children have made at school, the various school reports contained within the Appellant's bundle and I conclude that their best interests remain being in a family in the United Kingdom with their mother and father present. The public interest in removal of foreign criminals is plainly an important one but in this case it is outweighed by the circumstances of theBritish natonal wife and children. The Appellant is self-employed as a builder and seeks to resume that occupation . In the circumstances I conclude in the context of Sections 117B and 117C that the removal of the Appellant is disproportionate to the objectives of Article 8 (2) ECHR.

**DECISION**

The Appeal is allowed under Article 8 ECHR.

**ANONYMITY ORDER**

No anonymity order was sought nor is one is required, notwithstanding the presence of children.

Signed Date 24 January 2022

Deputy Upper Tribunal Judge Davey

**FEE AWARD**

If a fee has been paid, the case has succeeded on the strength of after-arising information which was not before the Respondent and in the circumstances no fee award is appropriate.

Signed Date 24 January 2022

Deputy Upper Tribunal Judge Davey

I regret there has been delay in promulgation given the date I remade the decision.