IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-000281
First-tier Tribunal No:
HU/09094/2017

THE IMMIGRATION ACTS

Heard at Field House
On 21 November 2022

Decision & Reasons Promulgated
On the 01 February 2023

Before

UPPER TRIBUNAL JUDGE STEPHEN SMITH
DEPUTY UPPER TRIBUNAL JUDGE WOODCRAFT

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR ENGIN YALCIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr J. Acharya, Acharyas Solicitors

DECISION AND REASONS

1. The proceedings in this tribunal commenced as an appeal brought by the Secretary of State. Since in this decision we are remaking the decision of the First-tier Tribunal, we will use the term "the appellant" to refer to the appellant before the First-tier Tribunal, for ease of reference.

2. The appellant, Engin Yalcin, is a citizen of Turkey born on 15 January 1988. On 2 August 2016 in the Crown Court at Inner London he was sentenced to 5 years' and 4 months' imprisonment for the possession of a prohibited weapon, and the possession of a firearm without a firearm certificate, following his pleas of guilty.

3. In response to those convictions, the Secretary of State wrote to the appellant on 19 December 2016 to inform him that the automatic deportation provisions of the UK Borders Act 2007 ("the 2007 Act") were engaged, inviting his representations in response. Consequently, on 19 January 2017, the appellant made a human rights claim in an attempt to resist deportation. That claim was refused, and, following the procedural history we set out below, he now appeals against that decision in this tribunal. The appeal was brought under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"); we are remaking the decision acting under section 12(2)(b)(ii) of the Tribunals, Courts and Enforcement Act 2007.

Procedural background

4. Shortly after the refusal of his human rights claim, the appellant claimed asylum, and was interviewed. The Secretary of State issued a supplementary decision, dated 14 January 2021, refusing the asylum claim. The appellant appealed against both decisions to the First-tier Tribunal, where they were heard together by First-tier Tribunal Judge Cohen. By a decision promulgated on 19 October 2021, Judge Cohen dismissed the appellant's appeal against the refusal of his asylum claim but allowed the appeal against the refusal of his human rights claim. The Secretary of State appealed against that aspect of Judge Cohen's decision to this tribunal. By a decision promulgated on 23 August 2022 ("the Error of Law decision"), Upper Tribunal Judge Stephen Smith allowed the Secretary of State's appeal, and set aside the decision of Judge Cohen, preserving his findings concerning the appellant's asylum claim, which had not been challenged. A copy of the Error of Law decision may be found in the **Annex** to this decision.

5. The Error of Law decision directed that the appeal should be reheard in this tribunal, insofar as it related to the appeal against the refusal of the appellant's human rights claim. This approach was consistent with paragraph 7.2(b) of the *Practice Statements of the Immigration and Asylum Chambers of the First-tier Tribunal and the Upper Tribunal*, since there had been a partial preservation of findings of fact reached by Judge Cohen. The scope of the disputed factual issues is relatively narrow, when compared to the breadth of issues that were originally before the First-tier Tribunal. The approach was also consistent with the overriding objective of this tribunal, to deal with cases fairly and justly, in particular the need to avoid delay, so far as compatible with proper consideration of the issues. Listing the matter in the Upper Tribunal would enable the proceedings to be resolved without the potential additional delay arising from the matter being reheard *de novo* by the First-tier Tribunal, bearing in

mind the time that has already elapsed since the Secretary of State's original decision to refuse the appellant's human rights claim, which was over five years ago.

6. It was in those circumstances that the matter was listed before us sitting as a panel at Field House on 21 November 2022.

Factual background

7. The full factual background is summarised in the Error of Law decision. The appellant's immigration history was described in these terms, at paragraph 4:

> "The claimant arrived in the United Kingdom on 2 November 2003, presenting a passport that did not belong to him. He claimed asylum. The claim was refused and the claimant's appeal against that refusal was subsequently dismissed. In any event, the claimant was granted discretionary leave until 14 January 2006, but his application for further leave in that capacity, submitted in January 2006, was refused in April 2007. On 12 May 2010, the claimant was removed to Turkey. Shortly before his removal, he married YU, a British citizen of Turkish descent, pursuant to an Islamic ceremony. I shall refer to YU as 'the sponsor'. On 8 October 2013, the claimant submitted an application for settlement, having entered the UK with entry clearance as the spouse of the sponsor valid from 1 August 2011 to 1 November 2013. In January 2015, the claimant submitted an application for naturalisation. That application was refused on 3 August 2015."

8. The core of the appellant's human rights claim, and his case before this tribunal, concerns the impact of his deportation on his two children with the sponsor: K, who was born on 13 February 2013, and D, who was born on 2 February 2014. While the appellant's relationship with the sponsor ended in 2015, his case is that he has maintained a genuine and subsisting relationship with both K and D, and that the impact of his deportation upon them would be so significant that it would exceed the mere "unduly harsh" threshold, and would amount to "very compelling circumstances", for the purposes of the statutory regime contained in section 117C of the 2002 Act.

9. It is the appellant's case that D he hosts the children each weekend at his home, and that he collects them from school most days. The sponsor has a number of health conditions, including difficulties with her back, meaning she is often in pain. In those circumstances, the appellant is on hand to assist. The sponsor claims to be alienated from the rest of her family in the UK, and that, although she was born in Istanbul, maintains that she does not hold Turkish citizenship, and has no links in the country. His absence would be devastating for the children. The high point of the appellant's case relates to D's health conditions. D has recently been diagnosed with ADHD, and before that was displaying symptoms of impaired speech development, hearing problems, and suspected learning

difficulties. His needs are acute. His relationship with his father is very strong, the appellant claims; only he can provide him with he support that he needs.

10. The appellant also highlights that, save for a brief period in Turkey from 2010 to 2011, he has lived in the United Kingdom for the vast majority of his adult life, having arrived aged 15. His links with Turkey are minimal. His life, family and roots are in this country. He poses no risk of reoffending and his post-prison conduct has been exemplary.

11. The Secretary of State's case is that the impact of the appellant's deportation would not be "unduly harsh" on D or K, and still less are there "very compelling circumstances" over and above the statutory exceptions contained in section 117C of the 2002 Act.

Documentary evidence

12. The appellant relied on the bundles from the proceedings before the First-tier Tribunal, plus a supplementary bundle prepared pursuant to the directions given in the Error of Law decision. On the morning of the resumed hearing, he applied to rely on an additional letter from Dr Shakir, a consultant psychiatrist with D's local NHS CAMHS team, dated 16 November 2022, in which D was diagnosed with ADHD, and a corresponding prescription of the same date. There was no objection from Ms Ahmed, and we were content for the new documents to be admitted.

13. Mr Acharya also provided a skeleton argument.

The hearing

14. The appellant and sponsor gave evidence in English. They adopted their witness statements, answered brief updating questions during evidence in chief, and were cross-examined. It is not our intention to set out the entirety of the oral evidence and the submissions we heard, but we will do so to the extent necessary to reach and give reasons for our findings.

Legal framework

15. 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."

16. Section 32 of the 2007 Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as

a “foreign criminal”. Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, of which the only relevant exception is “Exception 1”, namely that “removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person’s [ECHR] rights…” (see section 33(2)(a)).

17. To determine whether Exception 1 in section 33 of the 2007 Act applies, it is necessary to have regard to the public interest considerations contained in Part 5A of the 2002 Act.

18. Section 117C(1) of the 2002 Act provides that the deportation of “foreign criminals” is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The appellant satisfies the definition of foreign criminal for the purposes of this section because he is not a British citizen and has been convicted of an offence which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act. Section 117C(2) provides:

> “The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.”

19. Section 117C makes provision for exceptions to the public interest in the deportation of foreign criminals in these terms:

> “(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.”

20. It is settled law that the best interests of any children involved are a primary factor in any assessment of Article 8.

21. It is for the appellant to demonstrate that his removal would engage Article 8(1) of the ECHR, to the balance of probabilities standard. Once he has done so, it is for the Secretary of State to justify any interferences with the rights guaranteed by Article 8(1), either in relation to him, the sponsor, or K and D, together or in isolation.

DISCUSSION

22. We did not reach our findings of fact until we had considered the entirety of the evidence, in the round, to the balance of probabilities standard.

23. We will adopt the following structure for our analysis: first, we will reach findings of fact based on our review of the evidence and submissions; secondly, in light of those findings, we will determine the best interests of K and D; thirdly, we will apply the statutory public interest considerations contained in Part 5A of the 2002 Act to those findings of fact.

24. We accept that the appellant enjoys a genuine and subsisting relationship with K and D. However, we do not accept that the relationship is characterised by the strength and breadth of support claimed by him and the sponsor, for the reasons set out below.

25. First, he appears to have a minimal role in their education. There is no contemporary correspondence from the children's school stating that the appellant is responsible for collecting, or otherwise involved. The only recent material from the children's school addressing this issue is a letter dated 8 December 2020, which states the following:

> "We do not have Mr Yalcin listed as a contact, although we have seen him when he collects the children from school."

26. That letter is almost two years old. It is surprising that the appellant is not listed as a contact on the school records, and, at its highest, the author of the letter (the school's deputy head and safeguarding lead) simply states that the school has "seen him when he collects the children". It would have been relatively straightforward to have obtained up to date confirmation from the school in relation to the appellant's claimed daily role with the children, and confirmation that, in contrast to the position in December 2020, the appellant is now listed as a contact for the children. If it were the case that he looks after the children to the extent that he claims – and certainly if he is responsible for collecting the children each day – we would have expected the children's school records to record him as a contact or next of kin.

27. Secondly, the appellant appears to have a minimal role in D's diagnosis and treatment, and has not attended his recent significant medical appointments. For example, he did not attend D's appointment with Dr Shakir on 8 June 2022 at which D's learning difficulties and memory

problems were discussed. We accept that in Dr Shakir's letter following the consultation, she refers to D seeing the appellant at "the weekend" (rather than, we observe, staying with him). The letter observes that the appellant is "keen to teach D things," which is consistent with our findings that the appellant has *a* role in the lives of his children, but not a role of the significance or extent claimed.

28. Similarly, the appellant did not attend the follow-up appointment with Dr Shakir on 16 November 2022. The appellant's explanation, and that of the sponsor, for not attending the latter appointment was that there had been a train strike and that, consequently, he experienced traffic problems with the result that he missed the appointment. We reject that explanation. We note that the appellant had not attended the previous appointment with Dr Shakir. Nor was there a suggestion in the detailed narrative in Dr Shakir's 16 November letter that the appellant had been unable to attend through traffic or transport problems. Significantly, there were no references to the steps that the appellant, as D's father and the person with whom the children spend every weekend, would have to take as a consequence of the diagnosis. This is particularly significant since the chosen medication would, according to the letter, be effective for 6 to 8 hours each day, lasting until D returned from school. Since on the appellant's case it is his role to bring the children home from school, one would expect there to be at least some reference to the father's role in ensuring that the impact of the medication was understood, and any consequential matters arising had been considered. Instead, the letter gives the impression that the sponsor deals in isolation with D's health conditions. It was the sponsor alone who decided which of the various clinical options presented by Dr Shakir would be appropriate; there was no reference to the sponsor having conferred with the appellant, for example by telephone, or having wanted to defer taking the decision until she could do so jointly with him. The only reference to the appellant's role in the 16 November letter is an indirect reference to a questionnaire having been completed "by parents and school". Again, this is consistent with the appellant having a lesser role than claimed.

29. Thirdly, in D's statutory Education, Health and Care Plan dated 31 December 2019, the appellant is recorded as seeing D once each week. The report also suggests that D was less than enthusiastic about seeing his father, and did not mention him as an important person in his life. We ascribe no significance to those remarks, given D's age at the time and the fact that those remarks were attributed to him some time ago. The significance of the report's contents lies in the suggestion that the appellant sees the children only once each week. That was at odds with his evidence, and that of the sponsor, that, following his release from prison, the contact was significant and frequent.

30. Fourthly, the appellant's evidence was that his brother, Suleyman Yalcin, helped to look after the children while he was in prison, but that following his release, he moved to Oxfordshire, and will now be unable to do so. The appellant said that his brother delayed moving to Oxfordshire until his

release from prison, so that he would be available to help with the children in the appellant's absence. It is not the appellant's case that he is alienated from his brother or other members of his family; his case is that he enjoys strong relationships with a large number of family members in this country. While Suleyman provided a witness statement dated 16 April 2018 ahead of the proceedings in the First-tier Tribunal, it merely states that he provided financial support for the sponsor and children while the appellant was in prison (see paragraphs 6 and 7) and says nothing of the claimed extensive practical support the appellant said he provided at the time. Indeed, Suleyman expressly stated that the sponsor struggled *on her own*, making no mention of the practical help that the appellant now claims that he, Suleyman, provided at the time. There is no updated evidence from Suleyman, and he did not attend the tribunal to give evidence before us. We find that the sponsor did not have the claimed significant practical and hands-on assistance that she and the appellant claimed Suleyman provided. This is material as it demonstrates that, during the appellant's absence, the sponsor was forced to cope alone with the children.

31. Fifthly, we found the sponsor to have exaggerated some aspects of her evidence. She claimed that the children only ever spoke English and could not speak Turkish, and that the children could not cope in Turkey. It appears from the documentary evidence that the contrary is true; the Education, Health and Care Plan states that the home language is English *and* Turkish; a document recording details of D's speech therapy treatments states that at home D speaks "mainly Turkish and some English": see page B37. There are observations to similar effect in a Pre-School Speech and Language Triage form at page B17 of the bundle. The sponsor gave evidence in Turkish through an interpreter before Judge Cohen. We find that the children's Turkish heritage is borne out through their use of the Turkish language at home, and that the sponsor's insistence that they speak only English undermines her credibility to an extent.

32. We accept that the sponsor's relationships with her own family are strained, although we do not accept that her relationship with them has completely broken down; her written evidence did not go that far, and there was no updated statement from her to that effect. The sponsor's mother provided a supporting statement for her appeal before the First-tier Tribunal, and in her statement dated as recently as 9 February 2021, the sponsor wrote that K and D are very good friends with her younger brother, himself a minor. That was at odds with her oral evidence which was that her younger brother has "blocked" her on social media.

33. We accept that the appellant provides financial support for his sons. His evidence in that respect was largely straightforward and, to his credit, he readily accepted that if he were deported to Turkey, he would be able to continue providing financial support on a remote basis. We do not, however, accept that he funded an operation D received in Turkey to have grommets fitted. There is minimal supporting evidence of the sort that

would readily be available if that level of logistical assistance had been provided by the appellant, not least some evidence of the provenance of the funds, and of their transfer or conveyance to the sponsor. Nor do the appellant or the sponsor address this claimed significant event in their witness statements, and their oral evidence concerning the trip to Turkey was inconsistent. The appellant said that he booked a hotel for the sponsor and D to stay at when they visited, whereas the sponsor said she stayed with her grandmother; this inconsistency undermines the credibility of the appellant's claim to have organised and funded the operation. We accept that D is likely to have received medical treatment in Turkey but reject the appellant's evidence that he funded and organised it.

34. We accept that the appellant provides a fatherly presence and performs a fatherly role in respect of both children. Although the extent to which he sees them on a regular basis is, on the evidence before us, limited, nevertheless when he sees them, he provides positive support, encouragement, love, and affection. We accept his evidence (which appeared to be conceded at the hearing by Ms Ahmed) that he has named his current business after his two children, thereby underlining his affection for them. We accept that the challenges presented by D, in particular, are likely to be met by the appellant in a way that other men will not be able to support him. The time spent by the appellant with his sons is positive. No safeguarding concerns have been raised. He provides a degree of respite care for the children, thereby relieving the sponsor (albeit on a less frequent basis than they both claimed in their evidence), providing her with rest and the opportunity to recharge before resuming her responsibilities as a single mother, and when her back causes her pain. The support the appellant provides in relation to the children presently stops short of attending medical appointments or taking decisions concerning their, in particular D's, treatment. He did not pay for or organise D's operation in Turkey. He has collected the children from school in the past, but there is no evidence that he does so regularly at this time, and he is not named as a contact for the children with the school. The children stay with him from time to time, at least, and see him regularly, although he lives 50 minutes away from the children, meaning his ability to 'pop round' to help is necessarily limited, and that he does so less frequently than he claims.

Best interests of the children

35. Ms Ahmed focused parts her cross-examination of the appellant and the sponsor on the issue of whether the children – and the sponsor – could relocate to Turkey with the appellant. In our judgment, that would be contrary to the best interests of the children. They are established in school here, and D is receiving specialist support, especially in light of his CAMHS referral and recent ADHD diagnosis. The sponsor's evidence, which we accept, is that she receives Disability Living Allowance in respect of the care she provides to D. In our judgment, that would be difficult to replicate in Turkey. The sponsor is a British citizen, and her evidence that she no longer holds Turkish citizenship was not challenged by Ms Ahmed.

Expecting her to relocate to Turkey, with the children, would be to impose such a considerable burden of upheaval upon her and the children as to be contrary to their best interests.

36. In light of the relationship between the children and the appellant, we consider that it is in their best interests for the appellant to remain in this country. Although the role he performs in their lives is not as significant as he claims, it is nevertheless a genuine and subsisting parental relationship, with some room for growth. His separation from the sponsor, and the fact he lives in a different part of London, necessarily places barriers of inconvenience in their daily lives. However, the fact that the relationship could be stronger and deeper does not negate the reality that the best interests of the children are for the appellant to remain in this country, so as to maintain the fatherly relationship that he currently enjoys with them.

37. These findings are a primary consideration in our analysis and application of the statutory regime.

The statutory criteria: very compelling circumstances

38. There was no suggestion by the Secretary of State that Article 8(1) of the ECHR would not be engaged by the appellant's deportation. We find that the appellant's Article 8(1) family life rights, and those of his children, would be engaged by the appellant's deportation. We also find that the appellant's Article 8(1) private life rights would be engaged by his removal, as would those of the sponsor. While the appellant does not perform the extensive role in her life, and those of the children, that he claims, his removal nevertheless would have a significant impact on the sponsor and the children, not least because it would be contrary to their best interests. The interference would, in principle, be in accordance with the law, and it would, in principle, be capable of being regarded as necessary in a democratic society for the purposes of Article 8(2) ECHR. The remaining question is whether the interference with the appellant's Article 8 rights, and those of his family, would be proportionate to the legitimate public end sought to be achieved. To address that question, we turn to the statutory considerations in section 117C of the 2002 Act.

39. The appellant's sentence of imprisonment for five years and four months renders him a "serious offender" for the purposes of section 117C of the 2002 Act. The statutory exceptions contained in section 117C(4) and (5) are not capable of being engaged, since the appellant's sentence exceeded four years. The public interest therefore requires the appellant's deportation *unless* there are very compelling circumstances over and above those described in Exceptions 1 and 2.

40. Analysis of whether there are "very compelling circumstances" requires a full proportionality analysis, weighing the interference with the Article 8 rights of the appellant and his family, with the public interest in the deportation of foreign criminals, bearing in mind the seriousness of the

offence and the correlation between seriousness and the public interest in section 117C(2). The relationship between the "very compelling circumstances" test and the statutory exceptions was described in the following terms by Jackson LJ in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662, at paragraph 30:

> "In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8."

41. See also paragraph 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."

42. Jackson LJ's observations in *NA (Pakistan)* were cited with approval by the Supreme Court in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 at paragraph 50.

Unduly harsh

43. It is necessary, therefore, to determine the extent to which the appellant is able to meet – or, in his case in relation to Exception 2, exceed – the requirements of the Exceptions, in order to inform the overall proportionality assessment.

44. There is no suggestion that the appellant meets the substance of Exception 1 in relation to facing "very significant obstacles" to his integration in Turkey. The appellant is a citizen of Turkey and is fluent in the language. He still has family there, namely his parents. No part of his case turns on difficulties he claims he will face upon his return, and, as we have observed already, he did not challenge Judge Cohen's dismissal of the asylum limb of his appeal. The appellant will not face very significant obstacles to his integration in Turkey. We accept that he has resided in this country for a lengthy period, starting when he was 15, with only a year spent living in Turkey since then, and that is a point to which we will return

in our overall proportionality assessment. We also accept that the appellant appears to have achieved a degree of integration in society, through his barbershop, his support and care for his children, and his musical activities within the Kurdish community. There is little positive evidence of broader integrative steps outside his own community, although we accept that, for the purposes of Exception 1, he is "integrated", and that that is a factor relevant to the overall proportionality assessment.

45. For present purposes, however, it is necessary to focus on the extent to which the appellant is able to meet Exception 2.

46. The term "unduly harsh", in the context of Exception 2, has been the subject of extensive judicial exposition. In *HA (Iraq)*, Lord Hamblen said at paragraph 41:

> "41. 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:
>
> > "… '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."
>
> 42. 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."

The reference to *KO (Nigeria)* was to *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53; *MK* meant *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC): see paragraphs 2 and 21 of Lord Hamblen's judgment.

47. The public interest in the deportation of foreign criminals gives rise to a notionally fixed level of "due" harshness, against which what is "due" (or acceptable or justifiable) is to be measured. However, there is no notional comparator child against which such assessments should be conducted: every "unduly harsh" assessment is an inherently fact-specific exercise.

48. We find that it would be unduly harsh for the children permanently to relocate to Turkey with the appellant, in light of the factors outlined above in our discussion of their best interests.

49. We turn now to the "stay without" scenario. In our judgment, the appellant's removal from the lives of his children would be unduly harsh. Although the role he performs in their lives is limited, it is nevertheless positive and of significance. The challenges presented by D, in particular, are acute, and although the evidence does not support the appellant's daily involvement in the lives of both children to the extent he claims, we nevertheless accept that the fatherly presence of the appellant in this country will be a significant and beneficial cornerstone in their lives. Genuine and subsisting relationships take many forms. The role performed by the appellant is, within its limited parameters, overwhelmingly positive. We accept the sponsor's evidence that, at the times he sees D, the appellant is one of the few people who is able to engage with him and care for him in a way which brings his behavioural challenges, and his mental health condition, under control. Removal of the appellant from the lives of both children altogether will have a significant detrimental impact on the children, augmented by D's health conditions, which, in turn, would undermine the entire family unit left in this country. The sponsor is a single mother and can turn to the appellant for emergency assistance, and the potential for him to support the family unit when called upon, in addition to those times he already usually sees the children. His presence less than an hour away from the sponsor and K and D is a residual and underlying foundation of assurance for the sponsor. We accept that in the total absence of the appellant, life will be bleak for the children and the sponsor, bearing in mind D's health conditions and the challenges that he presents to the sponsor.

50. Against that background, it is necessary to conduct a full proportionality assessment of the appellant's perspective deportation, in order to determine whether there are "very compelling circumstances".

51. Factors in favour of the appellant's deportation include:

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

b. The more serious the offence, the greater the public interest in the deportation of the criminal (section 117C(2)). The appellant committed a very serious offence. On the sentencing judge's findings, he wanted to acquire the Glock firearm for criminal purposes, either to be used by him, or another. The seriousness of that conduct is reflected primarily by the magnitude of the sentence the appellant received, namely 5 years and 4 months' imprisonment, which was represented a reduction of only 10% from the notional post-trial sentence. As the sentencing judge observed, firearms offences put public safety at risk: "I want you to understand that the acquisition of lethal weapons is treated with the utmost seriousness by the courts." There is a considerable public interest in the deportation of this appellant, in light of the seriousness of his offence.

c. The appellant does not satisfy either of the Exceptions to deportation, although we do accept that his deportation would be unduly harsh on the children, in particular in relation to D's health conditions.

d. The appellant would be able to provide financially for his family from Turkey.

e. The appellant is a citizen of Turkey. He would not face a well-founded fear of being persecuted upon his return, pursuant to the preserved findings of Judge Cohen. He still has family there who will be able to assist with his integration upon his return which, in turn, will assist the appellant to receive visits from his children.

f. The appellant's former partner and his children are of Turkish heritage, and D has received significant medical treatment in Turkey in the past. The family are well-placed to visit the appellant in Turkey. His deportation would not be the last time he would ever see them.

52. Factors militating against the appellant's deportation include:

a. The best interests of the appellant's children are for the appellant to remain in the UK. That there are two children increases the weight this factor attracts. Their best interests are a primary consideration.

b. The appellant's deportation would be unduly harsh for his children. The impact on D would be significant, since he has struggled throughout his childhood, and has recently been diagnosed with ADHD. The appellant's deportation would mean that the appellant would not be able to maintain the support he currently provides to D. The impact of his deportation would be felt by the sponsor in significant terms.

c. The appellant has not reoffended and was assessed as presenting a low risk of reoffending in an OASys assessment dated 23 May 2018. Although the offences to which he pleaded guilty were committed with the intention for further criminal offences to be committed, either by him or by others, there was no actual violence, and the purchase of a genuine firearm did not go ahead.

d. The appellant has held indefinite leave to remain since, it appears, 2013.

e. The appellant has resided in the UK since he was 15 years old, save for around a year in Turkey, and has thus spent most of his adult life in this country.

f. The appellant runs his own business and is financially independent.

g. The appellant is integrated within the Turkish community.

53. Drawing this analysis together, in our judgment the factors in favour of the appellant's deportation outweigh those militating against it. The appellant is a serious criminal and committed the crimes to which he pleaded guilty with the intention to fuel further serious criminality, on the sentencing judge's findings. The sentence of five years' and four months' is not merely "on the cusp" of the serious criminal threshold, but rather exceeds it by some margin, thereby demonstrating the seriousness with which the criminal courts approached his conduct. While his deportation would be contrary to the best interests of his children, and unduly harsh for them, the cumulative force of the factors militating in favour of deportation outweigh those best interests; as a serious offender, merely demonstrating that his deportation would be "unduly harsh" for K and D is insufficient.

54. The appellant has not lost all links to Turkey. He resided there for a year from 2010 to 2011. He still has family in Turkey, namely his parents, and will be able to look to them for support and assistance upon his return, at least initially. He does not face a well-founded fear of being persecuted upon his return. The fact he holds indefinite leave to remain is a weighty factor in his favour, but it is capable of being outweighed on account of the seriousness of the offences that he committed. While the appellant's criminal intentions were ultimately thwarted, had matters gone according to the appellant's plan, there could have been significant public harm. The fact that the appellant has not reoffended is a matter that attracts weight, but that weight is not sufficient to outweigh the cumulative force of the strong public interest factors in favour of his deportation. In our judgment, this is not a case where there are very compelling circumstances over and above the exceptions to deportation. By the seriousness of his offence, the appellant has deprived himself – and his children – of the ability to rely on Exception 2. Weighing all factors together, we find the appellant's deportation would be proportionate.

55. We therefore dismiss this appeal.

Notice of Decision

The decision of Judge Cohen involved the making of an error of law and is set aside, subject to the findings set out at paragraph 44 being preserved.

We remake the decision by dismissing the appeal on human rights grounds.

No anonymity direction is made.

Signed Stephen H Smith Date 25 November 2022
Upper Tribunal Judge Stephen Smith

Annex – Error of Law Decision

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2022-000281

THE IMMIGRATION ACTS

Heard at Field House
On 15 June 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

MR ENGIN YALCIN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Ms Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr J. Acharya, Acharyas Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State. For ease of reference, I will refer to the appellant before the First-tier Tribunal as "the claimant" in these proceedings.

2. This is the Secretary of State's appeal against a decision of First-tier Tribunal Judge Cohen ("the judge") who by a decision promulgated on 19 October 2021 allowed an appeal brought by the claimant, a citizen of Turkey born in 1988, against the refusal of his human rights and protection claims, dated 9 August 2017 and 14 January 2021 respectively. The

appeal was brought under section 82 of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act").

3. The hearing before the judge took place on 17 March 2021 at Taylor House.

Factual background

4. The claimant arrived in the United Kingdom on 2 November 2003, presenting a passport that did not belong to him. He claimed asylum. The claim was refused and the claimant's appeal against that refusal was subsequently dismissed. In any event, the claimant was granted discretionary leave until 14 January 2006, but his application for further leave in that capacity, submitted in January 2006, was refused in April 2007. On 12 May 2010, the claimant was removed to Turkey. Shortly before his removal, he married YU, a British citizen of Turkish descent, pursuant to an Islamic ceremony. I shall refer to YU as "the sponsor". On 8 October 2013, the claimant submitted an application for settlement, having entered the UK with entry clearance as the spouse of the sponsor valid from 1 August 2011 to 1 November 2013. In January 2015, the claimant submitted an application for naturalisation. That application was refused on 3 August 2015.

5. On 2 August 2016, the claimant was sentenced in the Crown Court at Inner London to five years and four months' imprisonment for the possession of a prohibited weapon, namely a Glock 17 firearm, and to the possession of a firearm without a firearms certificate, for which he was sentenced to eight months' imprisonment to run concurrently. The claimant had pleaded guilty to both offences, albeit on a factual basis disputed by the Crown in relation to the Glock 17 offence, necessitating a *Newton* hearing for the sentencing judge to determine the factual basis of sentence. As a result, the claimant's credit for his guilty plea was reduced to 10%. For the less serious offence, the claimant enjoyed a discount of 25% for his guilty plea, having pleaded guilty at the Plea and Trial Preparation Hearing.

6. The facts of the offence were as follows. The claimant had arranged to purchase the Glock 17 firearm online. Upon arriving at the pre-arranged meeting point, an Asda car park, the claimant took possession of the weapon, but was immediately surrounded by armed police officers and arrested. The sale of the weapon had been conducted pursuant to an undercover police operation, and the handgun had been deactivated. According to the sentencing judge who had conducted the *Newton* hearing, the claimant's intention was for the weapon to be used for criminal purposes, either by the respondent or by others.

7. Following the claimant's conviction, the Secretary of State informed him that the automatic deportation provisions in the UK Borders Act 2007 ("the 2007 Act") were engaged and sought his representations as to whether any of the exceptions to deportation contained in section 33 of that Act

were engaged. On 19 January 2017, the claimant made a human rights claim. It was refused on 9 August 2017 and the claimant appealed against that decision. On 26 June 2018, before the appeal was heard, the claimant claimed asylum, and he was interviewed in the usual way. On 14 January 2021 the Secretary of State refused his asylum claim.

8. On 15 January 2021 the claimant's appeal was heard before the First-tier Tribunal.

Decision of the First-tier Tribunal

9. The judge's operative reasoning commences at paragraph 31. At paragraph 35 the judge said that the public interest requires the claimant's deportation unless there were very compelling circumstances over and above paragraphs 399 and 399A of the Immigration Rules.

10. A central part of the claimant's human rights claim was that his deportation would be disproportionate in light of his relationship with his children, K, born on 13 February 2013, and D, born on 2 February 2014. The respondent had not accepted that the claimant was the father of the children, nor that he had a genuine and subsisting relationship with them. The judge found at paragraph 38 that the claimant was the father of both children, and that he had joint responsibility for raising them. D, who has speech and language conditions, and behavioural difficulties, was particularly close to the claimant, he found.

11. The judge found that the best interests of the children were for the claimant to remain in the United Kingdom. D's health conditions were such that the family had been awarded a disability living allowance, and D had been provided with one-to-one teaching support at school. D's behaviour deteriorated while the claimant had been in school. His relationship with his father was "particularly strong" and extended "beyond normal familial ties". See paragraph 40.

12. Also at paragraph 40, the judge also said that, although the claimant had been convicted of a "particularly serious offence", it was "apparently a one-off offence". The claimant had not reoffended. He was an industrious businessman, having established to businesses in the United Kingdom, and created employment. The judge found there were no other family members in the United Kingdom who could help to provide the support the claimant provides to his ex-partner, the children's mother, with their upbringing. The claimant had not lived with his wife since 2015.

13. At paragraph 41 the judge said:

> "I acknowledge the public interest in deporting the claimant. However, there is also a public interest in keeping the [claimant] in the UK in order to provide extremely valuable support both financially and emotionally is [sic] raising his children, particularly in respect of D noting his significant issues. If the [claimant] was

> deported from the UK, there would be a considerable additional drain on the public purse…"

14. The judge continued at paragraph 42:

> "Another issue in respect of the [claimant's] case is that there has been a delay on the part of the respondent in considering the [claimant's] human rights and refugee Convention applications. The application was made on 26 June 2018, but not decided until 14 January 2021. I find this to be indicative of the fact that the [claimant's] removal from the UK was not a priority for the respondent. His parole documentation and reports indicate that he poses a low risk of reoffending. He has been in the community for almost 3 years since his discharge from prison and during that time has cemented his family and private life in this country."

15. At paragraph 43, the judge said that, in light of the claimant's strong family life with his children in the UK, and the "compelling circumstances arising out of his relationship with D", including D's health conditions and behavioural issues, "the claimant's removal from the UK would be disproportionate in all circumstances."

16. At paragraph 44 the judge found that the claimant did not have a well-founded fear of being persecuted in Turkey. There has been no challenge to those findings by the claimant and I need say no more about them.

17. Having found that the claimant's private life alone would not render his deportation disproportionate at paragraph 45, the judge concluded the operative reasoning in the decision at paragraph 46 in these terms:

> "I note the public interest criteria. I have regard to appropriate case law in this respect, including *Binloss* [sic], *AA Nigeria*, *LC China (CA)* and *MA (Somalia)*. The [claimant] in this case, as in those, has a particularly strong family life in the UK. I note the strong public interest in maintaining law and order and public protection, but in the light of the fact that the [claimant] has been convicted of one serious offence is assessed as posing a low risk of reoffending and noting the significant length of time that he has spent in the UK and strong links he has a particularly the [sic] family life with his children and noting D's significant issues, I find that the [claimant's] deportation is neither justified nor proportionate the [claimant] has demonstrated a family life in the UK meeting the threshold for deeming his deportation disproportionate."

18. The judge allowed the appeal.

Grounds of appeal

19. There are three grounds of appeal. First, the judge gave inadequate reasons and failed to give weight to material matters in relation to the claimant's children. Secondly, that the judge gave weight to immaterial matters, particularly in relation to his findings concerning "the public

purse". Thirdly, that it was perverse, or alternatively a misdirection, for the judge to conclude that the claimant's removal was not a priority, and diminish the public interest in his deportation accordingly.

20. Permission to appeal was granted by Upper Tribunal Judge Pickup.

Submissions

21. Ms Ahmed opened her submissions by relying on *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662 at paragraph 33 to emphasise the high threshold required to demonstrate that there are "very compelling circumstances" over and above the stated exceptions to deportation:

> "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."

22. Ms Ahmed submitted that there were features of the evidence that the judge failed to address. The claimant had not lived with his wife, with whom the children live, since 2015. D's statutory Education, Health and Care Plan with the local authority records D as having said he sees his father but does not want to, and the claimant's role in D's life was "hardly mentioned" in that document. D, K and the sponsor speak a mixture of Turkish and English at home. D had travelled to Turkey for an operation in the past. In light of this evidence, the judge gave inadequate reasons for finding that there were "very compelling circumstances" over and above the exceptions to deportation.

23. Ms Ahmed also submitted that it was not open to the judge to find at paragraph 41 that there was a public interest in the claimant remaining in the UK on the grounds that it would result in a lesser burden on public funds. Finally, in respect of the purported delay on the part of the Secretary of State, there was no delay; the Secretary of State issued the initial deportation decision in a timely manner, after which the claimant made a claim for asylum. There is no systemic or even egregious delay on the part of the Secretary of State and the judge was not entitled to purport to reduce the public interest in the claimant's deportation in the way that he did.

24. Resisting the Secretary of State's appeal, Mr Acharya submitted that, as observed by both the First-tier Tribunal when refusing permission to appeal, and by Judge Pickup when granting permission to appeal, the grounds of appeal could be said to be little more than a disagreement with the findings of the judge. The judge quoted the correct Immigration Rules and took into account relevant factors when concluding that there were

"very compelling circumstances", having addressed the public interest in the claimant's deportation at the outset of his analysis, at paragraph 35.

25. Mr Acharya emphasised the findings reached by the judge at paragraph 39 in relation to D's health conditions; the judge had the benefit of the claimant's oral evidence, during which he had emphasised the extensive assistance he had provided to the sponsor, and his children, during the Covid-19 pandemic. D's school had noted his behavioural problems. The judge reached findings of fact that the sponsor would be unable to look after the children in the absence of the appellant. Overall, the judge viewed the entirety of the evidence he heard in the context of the "very compelling circumstances" threshold and performed an evaluation of that evidence pursuant to his discretion. The judge considered all relevant factors, including the strong public interest in deporting this claimant, and reached a decision that was open to him on the evidence.

Legal framework

26. 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."

27. Section 32 of the 2007 Act defines those, such as this appellant, who have been sentenced to a period of imprisonment of at least 12 months as a "foreign criminal". Pursuant to subsection (5), the Secretary of State must make a deportation order in respect of such a foreign criminal. There are a number of exceptions contained in section 33, of which the only relevant exception is "Exception 1", namely that "removal of the foreign criminal in pursuance of the deportation order would breach – (a) a person's [ECHR] rights…" (see section 33(2)(a)).

28. To determine whether Exception 1 in section 33 of the 2007 Act applies, it is necessary to have regard to the public interest considerations contained in Part 5A of the 2002 Act.

29. Section 117C(1) of the 2002 Act provides that the deportation of "foreign criminals" is in the public interest for the purposes of determining the proportionality of deportation under Article 8(2) ECHR. The appellant satisfies the definition of foreign criminal for the purposes of this section because he is not a British citizen and has been convicted of an offence

which led to a period of imprisonment of at least 12 months: see section 117D(2) of the 2002 Act.

30. Section 117C makes provision for exceptions to the public interest in the deportation of foreign criminals in these terms:

> "(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."

Discussion

31. To a limited extent, I accept Mr Archaya's submission that the Secretary of State's case is, at least partly, characterised by disagreement. For example, Ms Ahmed's submissions concerning the judge's analysis of D's social care plan was a disagreement of fact and weight and did not demonstrate that those findings were not open to the judge.

32. However, I find that the remaining grounds of appeal demonstrate that the judge fell into error.

33. By way of a preliminary observation, the judge did not expressly conduct his analysis pursuant to the structure and statutory considerations established by Part 5A of the 2002 Act. I accept that the judge identified some of the correct concepts, since they are largely replicated in the relevant provisions of the Immigration Rules, which the judge referred to at paragraph 32. He also recognised, at paragraph 35, that "very compelling circumstances" over and above the exceptions to deportation listed in paragraphs 399 and 399A of the rules would be required for the claimant to resist deportation.

34. In many cases, the above observation would be a criticism of form over substance, and may not amount to an error of law. However, in this case, I consider that the judge's failure to approach his reasoning expressly pursuant to the statutory framework established by section 117C meant that he omitted key considerations and failed to address material considerations. In turn, that led to the judge taking into account immaterial considerations, and impermissibly downgrading the public interest in the claimant's deportation, for the reasons set out below.

35. First, since the claimant had been sentenced to a term of imprisonment that exceeded four years, section 117C(6) of the 2002 Act was engaged, requiring the judge to determine whether there were any "very compelling circumstances" over and above the statutory Exceptions to deportation.

What amounts to "very compelling circumstances" is an assessment that must be informed by the extent to which the claimed very compelling circumstances exceed the factors set out in the statutory Exceptions to deportation. The judge did not address the substance of either statutory Exception. He simply stated at paragraph 36 that:

> "The exceptions to deportation do not apply to the [claimant]. He has been convicted of serious offences and sentenced to a term of 5+ years imprisonment in the UK including for firearms."

36. Since any assessment of "very compelling circumstances" must be conducted by reference to the extent to which the appellant meets the substance of Exception 1 or 2, even if neither exception was capable of engaged on account of the seriousness of the foreign criminal's offending, it was incumbent upon the judge expressly to consider those exceptions in any event, to address the extent to which they could be met. So much is clear from *NA (Pakistan)* at [37]:

> "In relation to a serious offender, it will often be sensible first to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made whether there are 'very compelling circumstances, over and above those described in Exceptions 1 and 2' as is required under section 117C(6). It will then be necessary to look to see whether any of the factors falling within Exceptions 1 and 2 are of such force, whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2, as to satisfy the test in section 117C(6)."

37. It follows that it was incumbent upon the judge to address the substance of the relevant Exception, namely Exception 2 (see section 117C(5)) and to determine whether the appellant's deportation would be "unduly harsh" on K and D. In turn, that assessment would inform the "very compelling circumstances" assessment, consistent with *NA*. The meaning of the term "unduly harsh" was considered in *KO (Nigeria) v Secretary of State for the Home Department* [2018] UKSC 53, in which the Supreme Court endorsed the judgment of this tribunal in *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] UKUT 223 (IAC). This tribunal held in *MK* at [46]:

> "By way of self-direction, we are mindful that '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."

I pause here to observe that, since the hearing in this tribunal took place, the Supreme Court has handed down judgment in *HA (Iraq) v Secretary of*

State for the Home Department [2020] EWCA Civ 1176, which once again addressed the term "unduly harsh". For present purposes, nothing turns on this, since the Supreme Court once again endorsed the exposition of the "unduly harsh" test by *MK*.

38. While the judge recorded the Secretary of State's case in relation to the unduly harsh test at paragraphs 8 and 10 of his decision, he did not in terms address it during his operative reasoning. The judge observed at paragraph 38 that the claimant had a calming and guiding influence on D. At paragraph 39 he observed that D had a number of behavioural and other conditions that had resulted in the family being awarded the Disability Living Allowance, and that D's relationship with the claimant "is particularly strong in [sic] extends beyond normal familial ties". However, what the judge did not do as part of this analysis was consider (i) whether those factors were "unduly harsh" and (ii) if they were, what the factors were of particular significance in that assessment that meant that they took the case into the territory of "very compelling circumstances", since this claimant was a serious offender.

39. I do not consider that the judge's passing remark that the relationship between the claimant and D "extends beyond normal familial ties" is capable of casting the judge's analysis in a redemptive light. This is the language of adult dependency, rather than parent/child relationships. If the judge meant that the ties between the claimant and D were stronger than those ordinarily found between a father and a son, that would have meant, presumably, that the judge had in mind some form of notional father/son comparator, by which to calibrate such an assessment. The test the judge should have applied was the unduly harsh test, which he failed to do.

40. Secondly, while the judge correctly noted that the claimant's deportation was in the public interest at paragraphs 35 and 46, at paragraph 41 he impermissibly held that there was "a public interest in keeping the [claimant] in the UK" due to the impact on public funds that the judge thought there would be if the claimant were deported. The public interest factors to which the judge should have had regard are those set out in Part 5A of the 2002 Act, in particular, section 117C. Section 117C(1) provides that "[t]he deportation of foreign criminals is in the public interest." Since the claimant had been sentenced to a term of imprisonment greater than four years, "the public interest requires deportation" unless there are very compelling circumstances over and above the exceptions to deportation (section 117C(6)). The potential burden on public funds through an individual being deported is not a factor to which Parliament has ascribed any significance. It was an error for the judge to seek to redefine the public interest in that way.

41. As I conclude, it is necessary to address the judge's remarks that claimant's "removal from the UK was not a priority" for the Secretary of State, at paragraph 42. I consider this criticism to be inappropriate,

especially in light of the timing of the asylum claim and the time taken to process such claims.

42. These errors are such that it is necessary for the judge's decision to be set aside; they go to the heart of the assessment of the proportionality of the claimant's deportation.

Conclusion

43. The decision of the judge involved the making of an error of law and is set aside. There was no challenge by the claimant to the judge's dismissal of his asylum claim, at paragraph 44. I therefore set aside the judge's decision, preserving the findings of fact at paragraph 44. The decision will be remade in this tribunal, to redetermine the claimant's appeal against the refusal of his human rights claim.

Notice of Decision

The decision of Judge Cohen involved the making of an error of law and is set aside, with no findings of fact preserved save for those at paragraph 44 of the decision.

The decision will be remade in this tribunal, with a **time estimate of three hours**, to be heard on a **face to face basis**.

I give the following directions:

1. Within **21 days of being sent this decision**, the **claimant**:

    a. May file and serve an application to rely on additional evidence to be considered at the resumed hearing, together with the additional evidence;

    b. Must file and serve a skeleton argument; and

    c. Must advise the tribunal if an interpreter is required and, if so, in what language.

2. Within **35 days of being sent this decision**, the Secretary of State must file and serve a skeleton argument (responding, if appropriate, to the further evidence provided by the claimant pursuant to paragraph (1)).

No anonymity direction is made.

Signed Stephen H Smith Date 2 August 2022
Upper Tribunal Judge Stephen Smith