Upper Tribunal
(Immigration and Asylum Chamber) **First-tier Tribunal No: HU/09428/2017**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 24 November 2022	**On the 31 January 2023**

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR KEON DELONA BENNETT
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms J Heybroek, Counsel instructed by Gaffrey Brown Solicitors LLP
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This decision is a remaking of the appellant's appeal against the respondent's decision of 14 August 2017 which refused a human rights application brought in the context of deportation.

Background

2. The appellant is a citizen of the USA born on 2 January 1990. He came to the UK on 11 August 2003 as a visitor to see his mother. He was aged 13 years old at that time. On 7 January 2004 he applied for indefinite leave to remain (ILR) as a dependent relative of his mother. The application was initially refused but he was subsequently granted ILR on 10 May 2004.

3. Between 29 May 2013 and 17 March 2015 the appellant received four convictions for sixteen offences, including making false representations, possessing controlled drug – class B cannabis, using a vehicle whilst uninsured, burglary and theft, and breach of a conditional discharge. On 14 April 2015 he was convicted of the index offence, a theft, and was sentenced to a total of two years and ten months' imprisonment.

4. On 26 May 2015 the respondent made a decision to deport the appellant. In response the appellant made written representations on human rights grounds on 15 June 2015. He made further representations on 8 January 2016, 8 March 2016 and 15 February 2017. In brief, his claim was based on the fact that he had a strong family life in the UK with his partner and daughter and that he had left the USA at a young age. The appellant's wife, Tiffany Bennett, was born on 3 March 1990. She is a British citizen. The couple have three children. Their daughter Kh'mahni was born on 8 May 2011 and is currently aged 11 years old. Their son Kh'ane was born on 10 June 2017 and is now aged 5 years old. The couple also have a daughter Kh'liyah born on 9 June 2021 who is currently aged 1 year old.

5. On 27 November 2017 the respondent signed a deportation order against the appellant under Section 32(5) of the UK Borders Act 2007 and on 30 November 2017 made a decision to deport him and to refuse his human rights claim and certify his human rights claims under Section 94B of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). Following the judgment of the Supreme Court in Kiarie and Byndloss [2017] UKSC 42 the respondent withdrew the certified decision and made a fresh decision refusing the appellant's human rights claim on 14 August 2017. These proceedings arise from that decision.

6. In the decision of 14 August 2017 the respondent noted that the appellant and his wife had two children and accepted that the appellant had a genuine and subsisting relationship with them and his British wife. The respondent did not accept that it would be unduly harsh for the appellant's partner or the children for them all to relocate to the USA with him or for them to remain in the UK without the appellant. The respondent also did not find that the appellant would face very significant obstacles to reintegration in the UK and also did not accept that the appellant had been in the UK lawfully for most of his life or that he was socially and culturally integrated here. The respondent noted the medical problems of the appellant's mother and his involvement in the care for his half-sister and for his children but did not find that his overall circumstances amounted to very compelling circumstances capable of outweighing the public interest in his deportation.

7. The appellant appealed to the First-tier Tribunal and the case was heard by First-tier Tribunal Judge Davey on 17 December 2019. The judge accepted that the appellant could not make out the statutory criteria relating to private life as he had not lived in the UK for most of his life, there was little evidence of his integration in the UK and no very significant obstacles to his integration in the USA.

8. The First-tier Tribunal had an independent social work report before it from Ms Charlotte Opie-Greer. The report was dated 24 July 2019. The First-tier Tribunal Judge found that the evidence of the appellant, his family and the report of the independent social worker indicated that it would be unduly harsh for the appellant's wife and children to remain in the UK if he were to be deported. The appeal was not allowed on that basis, as, inexplicably, the judge went on to state that the appellant did not succeed under the Immigration Rules and went on to find that his deportation would be disproportionate as there were very compelling circumstances that outweighed the public interest.

9. The respondent appealed to the Upper Tribunal and permission was granted on 28 April 2020. In a decision issued on 7 September 2020 Upper Tribunal Judge Kebede found an error of law in the decision of the First-tier Tribunal and re-made the appeal as refused. Upper Tribunal Judge Kebede found that the judge had erred in his assessment of very compelling circumstances. When re-making the appeal she found that there was nothing in the evidence that approached the "very compelling circumstances" threshold capable of outweighing the public interest in deportation. The First-tier Tribunal Judge had also stated that the appellant did not meet the requirements of the Immigration Rules and there was nothing in the independent social work report that went beyond the difficulties that would normally be expected in the case of deportation of a parent. The appeal was therefore re-made as dismissed.

10. The appellant appealed to the Court of Appeal. The Upper Tribunal refused permission on 5 October 2020. On 14 April 2021 Andrews LJ granted permission to appeal on the papers. On 13 July 2021 Nicola Davies LJ found an error in the decision of the Upper Tribunal and remitted the appeal to be re-made, the parties consenting.

11. The decision of the Court of Appeal dated 13 July 2021 upheld the error of law decision of Upper Tribunal Judge Kebede which set aside the decision of First-tier Tribunal Judge Davey. The finding by First-tier Tribunal Judge Davey that it would be unduly harsh for the appellant's partner and children to leave the UK and relocate with the appellant in the USA was preserved. The conclusion of the Upper Tribunal that it would not be unduly harsh for the appellant's children to remain in the UK without him was set aside to be re-made. The conclusion of the Upper Tribunal that there were no very compelling circumstances was also set aside to be re-made. The findings in respect of the report of the independent social worker made by the Upper Tribunal were set aside. The Court of Appeal

order also indicated that other than where stated, all findings of the First-tier Tribunal were preserved.

12. The parties were in agreement that, following the order made by the Court of Appeal, the Upper Tribunal had to assess whether it would be unduly harsh for the appellant's children to remain in the UK without the appellant as provided in Section 117C(6) of the Nationality and Immigration Act 2020. If s.117C(6) was not met, a very compelling circumstances assessment as provided by s.117C(6) would be required.

15. When assessing undue harshness for family members in the event of deportation, the description of the elevated test set out in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) has been approved by the higher courts:

> "... 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 additional adverb "unduly" raises an already elevated standard still higher."

13. In [52] of HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176, the Court of Appeal cautioned against conflating "undue harshness" with the still higher test of "very compelling circumstances"; [52]. The underlying concept is of an "enhanced degree of harshness sufficient to outweigh the public interest in the medium offender category"; see [44] of HA (Iraq).

14. HA (Iraq) also provided additional guidance on the correct approach to the assessment of whether deportation would be unduly harsh for a child. Underhill LJ explained at [56]:

> "... 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".

Discussion

15. In addition to the oral evidence of the appellant and his wife, I heard from the appellant's mother, Mrs Hyacinth Tingling-Graham and his mother-in-law, Mrs Veronica Wallace. Mr Tufan and Ms Heybroek provided oral submissions and I reserved the decision. As above, the evidence and submissions focused on the appellant's family life and the circumstances his family would face if he were to be deported.

16. The evidence on the appellant's family circumstances was not, in the main, disputed. The appellant has been in a relationship with his wife since approximately 2006. Their first child, Kh'mahni, was born in 2011. The couple's son, Kh'ane, was born in 2017 and their second daughter, Kh'liyah was born in 2021. The appellant and his wife have brought their children up together other than when the appellant was in prison from 2015 to 2016. The appellant was no longer allowed to work after he came out of prison in 2016 and so his wife worked to support the family and the appellant remained at home caring for the children.

17. The appellant maintained that his deportation would be unduly harsh for his children. He relied on evidence from an independent social worker, Ms Opie-Greer, which he maintained showed that his deportation would result in very serious difficulties for his children. There was no challenge to Ms Opie-Greer's status as an independent social worker, her qualifications or her expertise and experience as an expert witness on the family situation.

18. At the time of the first social work report dated 24 July 2019, the appellant had only the two older children. Ms Opie-Greer "observed Mr Bennett to have a close and loving relationship with both of his children". At that time the appellant was responsible for caring for the children during the day as his wife was working and, as a result, in Ms Opie-Greer's opinion, was forming strong bonds with them. Ms Opie-Greer reported that it was "evident that Kh'mahni has a close relationship and bond with her father" and that their "relationship has already suffered, due to the time he spent in prison". Ms Opie-Greer maintained that if the appellant were to be deported, this would lead to "irreversible damage to Kh'mahni's sense of self identity and self worth". She considered that it would be "to the detriment of Kh'mahni's mental health to not have regular face to face contact with her father".

19. Ms Opie-Greer recorded in paragraph 4 of her report that "the thought of Mr Bennett being forced to leave the UK is having a negative effect on all the family members". She indicated in the same paragraph that "it is my

view that there is a risk of emotional harm to Kh'mahni and Kh'ane if their father is forced to leave the UK". She stated:

> "Mr Bennett forms part of Kh'mahni and Kh'ane's primary attachment, any change to this relationship would impact upon their emotional development. Kh'mahni has already experienced a period of separation from her father, owing to his incarceration. Despite this separation, the family report that Kh'mahni saw her father regularly, therefore, was able to maintain a level of physical contact".

and

> "I would be concerned that if Mr Bennett was forced to leave the UK, Kh'mahni and Kh'ane would not be able to maintain these relationships, and that, therefore, they would be at risk of emotional harm if their current circumstances change".

20. Ms Opie-Greer also considered the views of the family that it was important for the appellant to remain in the UK:

> "Given the bonds and attachment I have observed and assessed, I would support their wish. Currently Mr and Mrs Bennett are providing their children with the necessary routine, stability, encouragement and support in order for their children to thrive. If Mr Bennett is forced to leave then Mrs Bennett would become a solo parent, which would have a direct impact on the family's resources and it is unclear if Mrs Bennett could continue to meet her children's needs alone. An enforced separation is likely to make Kh'mahni feel that her wishes and feelings are not valid, which would impact on her sense of self worth and self importance."

Ms Opie-Greer concluded:

> "To disrupt this family any further would be detrimental to Kh'mahni and Kh'ane's emotional health, wellbeing and overall development".

21. Ms Opie-Greer set out similar views in her second report dated 18 October 2022. By the time that this report was prepared, the appellant's third child had been born. Ms Opie-Greer reported that the appellant and his wife were concerned about their oldest daughter who was aware of the precarious nature of her father's immigration status. She was both "very vocal" about her distress as to the potential of the appellant leaving the UK while her "school have noticed that she is '*withdrawn and quiet*'".

22. The report also indicates on page 11 of 18 that:

> "Mrs Bennett advised that she worries about her own mental health, is worried about becoming depressed and the negative impact this will have on their children, if Mr Bennett is forced to leave".

The report continues:

> "With regards to the impact on their son, Mr and Mrs Bennett advised that he would react to his father's absence, *'immediately, as he is very close*

> *with his father'*. Mrs Bennett advised that Kh'ane would struggle to regulate his emotions, which would be seen in his behaviour deteriorating and continuing to struggle at school. Kh'ane already struggles with a speech delay and has been kept in Reception class, while all his friends have moved on to year 1. He struggled to understand why this happened and has needed additional care, love and support from his father, in order to feel secure in his surroundings and improve his learning. With regards to baby Kh'liyah, Mrs Bennett advised that she would become, '*clingy*' and struggle to be left with other people and may even develop a fear of abandonment".

23. On page 12 of 18 Ms Opie-Greer confirmed that the oldest daughter's school have continued to notice that she has emotional issues concerning her father's deportation. Ms Opie-Greer's view was that the children would "experience feelings of grief and loss" in the event of the appellant's deportation and that the "removal of their father is likely to impact on the children's mental health and have a negative impact right up and into their adulthood".

    Ms Opie-Greer goes on to indicate on page 12 of 18:

> "It remains clear that the family maintain their wish to remain together in the UK and it continues to be my assessment that to remove the children's father would be detrimental to their emotional wellbeing, educational and social development and according to Ainsworth would cause irreparable harm".

24. Ms Opie-Greer confirmed that the appellant has a secure attachment to all of his children. Her professional view was that the removal of that attachment "can lead to an inability to trust or maintain healthy relationships as an adult". The appellant's deportation would impact negatively on the three children who would be likely to face difficulties and separation from their father could "profoundly disadvantage" the children "with the detrimental effects of this continuing into later life". She also stated on page 15 of 18 of the 2022 report:

> "The strong bond between Kh'mahni, Kh'ane and Kh'liyah and their father was evident in both assessments. Mr Bennett, Mrs Bennet, Kh'mahni, Kh'ane and Kh'liyah present as a close and loving family, who continue to support each other through the instability they continue to experienced due to Mr Bennett's tenuous immigration status ... To uproot any member of the family would have a devastating effect on the family dynamic and functioning, which in turn, would impact negatively on all three children and their developing confidence, stability and emotional wellbeing and prevent them from reaching their full potential".

25. Ms Opie-Greer's 2022 report included an assessment of the wider family situation and what support was available from the appellant's mother, his mother-in-law and siblings of the appellant and his wife. Ms Opie-Greer's second report found, notwithstanding this support, that the appellant's deportation would have a "devastating effect" on the children. This aspect of Ms Opie-Greer's opinion on the presence of other family members being insufficient to prevent undue harshness for the children was consistent

with the oral and written evidence on the health difficulties of the appellant's mother and step-sister and the appellant's mother-in-law working full-time and having to care for her own mother who is unwell.

26. The respondent maintained that the evidence provided did not show that there would be "unduly harsh" circumstances if the appellant were to be deported. It was my conclusion, however, that the evidence did show that the provisions of s.117C(5) were met. This was the clear view of Ms Opie-Greer who found that that the circumstances for the children in the event of their father's deportation would be "devastating", would lead to "irreversible damage" and would cause "irreparable harm". It did not appear to me that this could be a contentious conclusion where this appellant has lived with the children for all of their lives, other than for a short period of his older daughter's life, and has formed strong bonds with them, being their primary carer since 2016. The evidence showed that for these particular children, the effects of the appellant's deportation would be extremely serious and long-lasting and I accepted that their circumstances could be properly characterised as unduly harsh.

27. I was therefore satisfied that the evidence here did show that the elevated threshold for a finding of undue harshness was met where the children would be in "devastating" circumstances, would experience "irreparable harm" and "irreversible damage" if the appellant were to be deported. The provisions of s.117C(5) are therefore met and the appeal must be allowed.

Notice of Decision

28. The appeal is allowed under Article 8 ECHR.

Signed: S Pitt Date: 9 January 2023

Upper Tribunal Judge Pitt