IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004254

First-tier Tribunal No:
HU/57200/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:

On 16th of May 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

B O
(anonymity order made)

Appellant (in the FtT)

and

Secretary of State for the Home Department

Respondent (in the FtT)

For the Appellant: Mr M Shoaib, of M S, Solicitors, Glasgow
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 8 May 2024

DECISION AND REASONS

1. This decision refers to parties as they were in the FtT.

2. FtT Judge Kempton allowed the appellant's appeal against deportation by a decision dated 31 August 2023. The SSHD's appeal to the UT firstly came before me, sitting with Deputy UT Judge Farrelly, on 20 February 2024. Our decision dated 21 February and issued on 6 March 2024 (from which the name of Judge Farrelly was inadvertently omitted) should be read with this decision.

3. At [15], we identified these principal errors:

(i) failure to reach crucial findings within the framework of the undue harshness test;

(ii) treating "non-punishment of the child" as a significant, or near decisive, criterion;

(iii) treating rehabilitation as a significant, or near decisive, criterion; and

(iv) absence, or at least inadequacy, of reasons for the factual findings on acknowledgement of guilt and on rehabilitation.

4. We set aside the FtT's decision, other than as a record of what took place at the hearing, and retained the case in the UT for further decision. A transfer order has been made to enable that process to be completed by a differently constituted tribunal.

5. Parties were directed to provide any further evidence on which they sought to rely in compliance with directions previously issued, and to provide updated skeleton arguments , not less than 3 working days prior to the next hearing.

6. The appellant has not provided a skeleton argument. Mr Shoab said that the appellant took the same position as before the FtT, and relied on the skeleton argument provided there, although he made no direct reference to that document.

7. The respondent has provided a skeleton argument, for which time is extended.

8. Since the respondent's decision, the case has developed to the point where it turns firstly on whether it would be unduly harsh for the appellant's wife and two children to remain in the UK without him on his deportation to Nigeria (exception 2 in section 117(C)5) of the 2002 Act).

9. Mr Shoab did not seek to adduce any additional or oral evidence e.

10. Representatives agreed that the respondent should submit first.

11. There was no dispute on the approach to the legal test of undue harshness. It is explained in *HA (Iraq) & others v SSHD* [2022] UKSC 22, [2022] 1 WLR 3784, where the Court rejected the "notional comparator" approach and said: …

> 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. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).

43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.

44. Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it.

45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

12. Mr Mullen argued that there was no evidence of "distress and disadvantage caused by the loss of the appellant's guidance and support" which could be "distinguished from commonplace incidents of family life"; although the best interests of the children would be impaired by the absence of the appellant, there was no evidence that earlier separation while he was imprisoned harmed them; and there was only "informed speculation" about the future negative impact of his deportation. He submitted that the tribunal was bound to give very great weight to Parliament's view of the public interest in the deportation of foreign criminals, and the appellant did not found upon anything to outweigh that.

13. Having located the skeleton argument to which Mr Shoaib indirectly referred, it is based largely on the hypothesis of the appellant's son (the older child) remaining in the UK while his mother and sister went with the appellant to Nigeria. That scenario is no longer a live issue.

14. Apart from that, the argument founds at [6 (ii) – (vi)] on the report of Dr Boyle that separation might have a profound or traumatic

impact; the appellant's son was 10 years old and at a formative stage; strong emotional dependence on the appellant; and no practical possibility of maintaining a meaningful relationship, standing the financial circumstances.

15. Mr Shoaib in oral submissions said:

(i) The appellant came to the UK lawfully in 2007 and has been here for 17 years.

(ii) He formed his relationship with his wife while they were both here with leave.

(iii) Having served 18 months of his sentences (3 concurrent of 30 months, and two concurrent of 36 months) he was released without conditions.

(iv) His criminal conduct was in 2017, so 7 years have elapsed without further offending.

(v) Although he maintained his innocence in reports, that was to be seen in the context of an appeal and an application to the Scottish Criminal Case Review Commission, both of which were ongoing at the time.

(vi) The appellant has since then, in his evidence to the FtT, shown remorse and appreciation of the effects of his crime on his victims.

(vii) His son, almost 14, has been to Nigeria only once, for 11 days.

(viii) His daughter has never left the UK.

(ix) The report of Dr Boyle shows that his removal would have "phenomenal impact" on the children.

(x) Forcible relocation of the children would be a severe blow.

(xi) The appellant is helping his son to excel at school.

(xii) A letter from the school supports the case.

(xiii) The refusal letter is wrong about rehabilitation. The appellant worked industriously in prison. There is no risk of reoffending.

(xiv) The appellant's wife is in poor health, with asthma and high blood pressure, has been hospitalised at times, and has not worked for many years.

(xv) The appellant has never claimed public benefits, apart from child benefit.

(xvi) It is not in the public interest to remove the family breadwinner.

(xvii) The circumstances meet the tests in *HA (Iraq)* and in *KO (Nigeria)*.

(xviii) The appeal should be allowed.

16. I reserved my decision.

17. The submissions for the appellant were framed as if the tribunal is to engage in a free-ranging consideration of family and private life interests, but that is mistaken. The tribunal must apply section 117C, in terms of which the primary issue, as set out at [9] above, is now simply whether it would be unduly harsh for the appellant's wife and two children to remain in the UK without him on his deportation to Nigeria.

18. Mr Shoaib pressed the case in respect of the children, rather than the wife. There is no basis on which to conclude that the effect of deportation would be unduly harsh on her.

19. The respondent accepts that departure of the appellant is not in the best interests of the children and would have a harsh effect.

20. The issue is one of fact and degree. The standard, although short of "very compelling circumstances", is "highly elevated". Is there evidence to reach that?

21. The family members express their feelings strongly, as is understandable and to be expected, but the measure cannot be the intensity of the language they use.

22. The report by Dr Boyle, chartered psychologist, on the children, dated 16 November 2022, begins at p 53/249 of the bundle before me. Its conclusions are summarised at [1] and [2]. The first conclusion, that forced relocation would be traumatic, is no longer a live matter. The second conclusion is that on departure of the appellant his relationship with his children would inevitably decline; there is no substitute for face to face communication; he would be unable to provide his current level of support to his wife; and finally, "The loss to the children of a father who would be in an unknown and alien country would be profound."

23. On the impact of separation, under the heading of "conclusions", the report says at page 21 of 25 (73/249) that while their relationship was preserved while the appellant was in prison, "further prolonged separation would be traumatic", and at page 22 that a second period of absence "may be a severe blow to the children". The proposition follows that "Adverse childhood experiences can have a serious impact on the mental health of children", vouched by reference to authority. There is no reason to doubt that generality.

24. I have no difficulty in finding that the deportation of the appellant would have a harsh effect on his two children, but I do not consider that the evidence discloses anything at the "considerably more

elevated threshold" in terms of the direction approved by the Supreme Court.

25. The skeleton argument for the appellant in the FtT maintained that as an alternative the appeal should succeed on "very exceptional circumstances over and above" those described in statutory exceptions 1 and 2. The factors relied upon are the same combination as advanced by Mr Shoaib in his submissions.

26. Although Mr Shoaib did not take the alternative line, I deal with that for completeness. The appellant, although sentenced to less than 4 years, is not disentitled from relying on section 117C(6).

27. The skeleton argument for the respondent on this aspect relies upon *HA (Iraq)*, and in particular on this passage: …

> 49. As explained by Lord Reed in his judgment in *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60; [2016] 1 WLR 4799 at para 38:
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> > "… great weight should generally be given to the public interest in the deportation of [qualifying] offenders, but … it can be outweighed, applying a proportionality test, by very compelling circumstances: in other words, by a very strong claim indeed, as Laws LJ put it in the *SS (Nigeria)* case [2014] 1 WLR 998. The countervailing considerations must be very compelling in order to outweigh the general public interest in the deportation of such offenders, as assessed by Parliament and the Secretary of State."
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> 50. How Exceptions 1 and 2 relate to the very compelling circumstances test was addressed by Jackson LJ in *NA (Pakistan)*. In relation to serious offenders he stated as follows:
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> > "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."
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> In relation to medium offenders he stated:
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> > "32. Similarly, in the case of a medium offender, if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to

> say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision-maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

He also emphasised the high threshold which must be satisfied:

> "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."

51. When considering whether there are very compelling circumstances over and above Exceptions 1 and 2, all the relevant circumstances of the case will be considered and weighed against the very strong public interest in deportation. As explained by Lord Reed in *Hesham Ali* at paras 24 to 35, relevant factors will include those identified by the European Court of Human Rights ("ECtHR") as being relevant to the article 8 proportionality assessment ...

28. The matters advanced for the appellant fall within the general scope of the case law of the ECtHR.

29. One of those aspects is rehabilitation. I am sceptical of the proposition that the appellant accepts guilt and is remorseful, given his clear and persistent denials and his rather glib belated retraction when that better suits his purposes; but I also accept that the offending dates back 7 years, there have been no further convictions, and there is nothing to show a current significant risk of re-offending. That is a relevant factor but it is not a consideration of great weight; see *HA (Iraq)* at [53 – 58].

30. I do not find this case to be a "near miss" in terms of the exceptions.

31. The matters advanced for the appellant, taken together, do not amount to very compelling circumstances in terms of section 117C(6), as elucidated in the case law.

32. The appeal, as originally brought to the FtT, is dismissed.

33. In light of the involvement of children and the nature of the case, pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal)

Rules 2008, the appellant is granted anonymity. No-one shall publish or reveal any information, including his name or address, likely to lead members of the public to identify the appellant or his children. Failure to comply with this order could amount to a contempt of court.

Hugh Macleman

Judge of the Upper Tribunal,
Immigration and Asylum Chamber

10 May 2024