Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08635/2017

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 10 APRIL 2019	**On 15 APRIL 2019**

Before

UPPER TRIBUNAL JUDGE LANE

Between

EA
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Burrett
For the Respondent: Mrs Pettersen, Senior Home Office Presenting Officer

DECISION AND REASONS

1. By a decision promulgated on 6 February 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside:

> "1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant was born in 1983 and is a male citizen of Turkey. He appealed to the First-tier Tribunal (Judge Spencer) against the decision of the respondent dated 27 July 2017 to refuse his Article 8 human rights claim. The appellant had been served with a deportation order on 30 November 2016. He is married to a British citizen and the couple have two children, E J who was born in

2009 and A G who was born in 2014. The appellant is not the biological father of E J but is the biological father of A G. The appellant's wife, A G and the E J are British citizens. The First-tier Tribunal in a decision promulgated on 12 December 2017, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. The appeal before the First-tier Tribunal turned on whether the deportation of the appellant would have unduly harsh consequences for his wife and the children. I note that the hearing before the Upper Tribunal took place very shortly before the handing down of the judgment of the Supreme Court in KO (Nigeria) [2018] UKSC 53. I find that the judge's analysis is inadequate. The judge refers in detail to ZH (Tanzania) [2011] 2 AC 166) at [29]. At [30 – 31], the judge found that it would not be appropriate or reasonable for the children to relocate to Turkey. He found that there would be "linguistic disruption (sic) for both children and social disruption for the elder child." He considered that there would be a "loss of educational opportunities that are available to the children in the UK" and stated that there was "no evidence … that there is suitable education facility for the child in Turkey." It is not entirely clear what the judge means by that last sentence. The judge also found [31] that the children, if they move to Turkey, would have no direct contact with the mother's family in the United Kingdom. Having rejected the scenario by which the entire family would relocate to Turkey, the judge wrote:

I find that the children should in no way be punished for the appellant's criminal behaviour. I find it is in their best interests for them to remain in the UK and be close to their mother's family. I find that if the appellant has to return to Turkey this would break up the close family unit and this will be unduly harsh on both children.

3. The judge has failed to show why, on the facts of this particular case, the separation of the children from their father could have unduly harsh consequences going beyond what would necessarily be involved in the separation of parent from child. The focus of the judge's analysis is upon the children travelling to Turkey to live with the appellant; the alternative scenario whereby the appellant is deported to Turkey and the children remain in the United Kingdom has been given inadequate consideration.

4. I set aside the decision of the First-tier Tribunal. This is an unusual case in that the drugs offence for which the appellant was convicted did not concern the supply of drugs to others as His Honour Judge Mort observed in his Sentencing Remarks. The unusual nature of the offence was clearly in the First-tier Tribunal Judge's mind when he considered whether the separation of the appellant from the children by way of deportation would have unduly harsh consequences (see paragraph [25]). The severity of an appellant's offending should not be considered when determining the best interests of the children (see KO (Nigeria). Both the First-tier Tribunal Judge and Mr Burrett, who appeared before the Upper Tribunal on the appeal, made much of the fact that the appellant had imported drugs for his personal use and that, in consequence, his offence was in some way less serious than convictions involve the sale of drugs. In the light of KO (Nigeria), it may be no longer be arguable that 'softer' offending should influence the

> assessment of undue harshness in a manner which favours an appellant. The decision will be remade in the Upper Tribunal; none of the findings of fact of the First-tier Tribunal shall stand. As indicated, the Upper Tribunal will wish to hear submissions inter alia on the application of KO (Nigeria). Both parties may adduce evidence provided that any documentary evidence is sent to the other party and to the Upper Tribunal no less than 10 days prior to the resumed hearing in the Upper Tribunal.
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> Notice of Decision
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> 5. The decision of the First-tier Tribunal, which was promulgated on 12th December 2017 is set aside. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal following a resumed hearing at Bradford on a date to be fixed before Upper Tribunal Judge Lane."

2. The resumed hearing took place before me at Bradford on 10 April 2019. I heard evidence from a number of witnesses including the appellant himself, his partner, the partner's aunt and both of the partner's parents. I heard oral submissions from both representatives and then reserved my decision.

3. The evidence of the witnesses was not controversial. There was an issue as regards whether the younger child A of the appellant and his partner was attending an infant school but it seems clear that he has had his entry delayed until September 2019. Otherwise, the facts were very much as they had been before the First-tier Tribunal save that the appellant's partner is now in an advanced stage of pregnancy.

4. The issue in the appeal is a relatively narrow one. It focuses upon the application of section 117C of the 2002 Act:

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

5. Both parties accept that the appellant has a genuine and subsisting relationship with his partner L and with that the children E and A who are all British citizens.

6. What constitutes undue harshness is now clearer following guidance from the senior courts. Undue harshness must involve something more than difficulty or inconvenience or the generally anticipated consequences of separating a parent from children for whom he/she cares and his'/her removal from a family bound by ties of love and affection. The test is a child-focused one; the offending of the appellant whether aggravated or, as in this case, possibly mitigated by unusual circumstances should not be a factor in the analysis. The difficulty in a case such as this exists in setting aside evidence of the likely impact of deportation upon children which would clearly be very distressing but which would be likely to occur in the vast majority of deportations in which the deportee is a much-loved

and active member of a family from which he/she will be separated. One needs to distinguish evidence of such an impact from more unusual and (very likely) more disturbing consequences which can properly fall into the category of undue harshness.

7. I am assisted in this appeal by fresh evidence from the various family members involved but also, perhaps more significantly, by evidence from the head teacher of E's school and from A's doctor. It has to be said that the evidence is not particularly detailed but it does show that, in the case of the child A, the stress of being separated from his father during the latter's imprisonment appears to have contributed to medical difficulties from which he is now suffering, including facial tics. In the case of E, the headteacher provides some details of the support which child required from the school pastoral team. This evidence shows that when the appellant was imprisoned the separation had a negative impact upon the children's well-being. Mr Burrett, who has appeared for the appellant throughout, submitted that it was unnecessary for the tribunal to speculate as to the likely effect of separation upon these children; evidence was available to show how the children had suffered when separated from the appellant as they were during his recent imprisonment. In addition, there is evidence that the partner L had suffered mental difficulties and that the child E's own distress at being separated from her father was compounded by worries about her mother's state of health which, it is submitted, are likely to be further aggravated following the birth of another child. Mr Burrett submitted that it was likely that the children's distress is likely to be even greater given that they have had the advantage of being reunited with the appellant for some period of time following his release from prison; a second separation following on relatively soon from the first would be likely to intensify the impact on the children. Viewed as a totality, all these circumstances amounted, in Mr Burrett's submission, to undue harshness for the children as a consequence of the deportation.

8. This is an appeal which is finely balanced. Mrs Pettersen, who appeared for the Secretary of State, is justified in drawing attention to the brevity of the evidence from witnesses outside the immediate family. The filtering out of the 'normal' consequences of separation from the particular and the more severe is not straightforward. However, there exists clear evidence that both children have experienced severe and negative impacts upon their mental well-being as a consequence of separation from the appellant. Further, that impact was serious enough to require the intervention of the medical services and the school and appears likely, notwithstanding the fact that the family is now reunited, to have had a lasting impact in terms of residual symptoms for the child A. There is force in Mr Burrett's submission that such problems arose when the children were aware that the appellant was physically not far away and at a time when they were able to visit him in prison on a very regular basis. If he is deported to Turkey then such regular visits will simply not be possible and contact may be restricted to Skype, telephone calls, electronic correspondence and occasional visits. That the children will feel upset sad that they are

separated from their father is, frankly, to be expected as a consequence of deportation; that they should, as I find as a fact, suffer a diminution in their mental health possibly of a lasting nature and possibly impacting upon their development is out of the ordinary and can properly be described as unduly harsh. In the final analysis, therefore, I am satisfied that the evidence reveals that the test of undue harshness is satisfied in respect of both children. Consequently, the appellant's appeal against the decision to refuse his human rights claim consequent upon the making of a deportation order is allowed.

Notice of Decision

9. The appellant's appeal against the decision of the Secretary of State dated 27 July 2017 to refuse his human rights claim is **allowed.**

Signed Date 11 April 2019

Upper Tribunal Judge Lane

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.