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

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On 4 November 2019	**On 29 November 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE DAVEY

Between

MIRKHALILLAH [H]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr M Azmi, counsel instructed by Braitch Solicitors
For the Respondent: Mr D Mills, Senior Presenting Officer

DECISION AND REASONS

1. The Appellant, a national of Afghanistan, date of birth 1 February 1981, appealed against the decision of the Secretary of State for leave to remain on the basis of protection and human rights based grounds. His appeal came before Judge Obhi who, on 25 October 2018, dismissed it.

2. On 15 July 2019 I found a material error of law in the Original Tribunal's decision in respect of the way in which the Judge had considered the

evidence and assessed its quality in the context of it solely being argued as an Article 8 ECHR case. The protection claim had fallen by the wayside in the progress of the matter being resolved. I gave directions and additional evidence was served upon the Respondent but no further representations were made by the Respondent in advance of the hearing. I also gave directions that any medical evidence relied upon must be served promptly and in any event not less than ten clear days before the further hearing.

3. At the resumed hearing the Appellant's wife was unable to attend for childcare reasons, but the Appellant attended. Mr Mills had no questions for the Appellant and in the circumstances the matter proceeded based on the statements that had been produced and were relied upon by the Appellant's representatives.

4. There was significance in this because part of the claim was that the Appellant's wife, the mother of the Appellant's five children, who was currently pregnant with her sixth child, has been said to be depressed and anxious over the forthcoming events and the possibility of the Appellant's removal. The indirect evidence through the independent social worker's report was that the Appellant's wife, [AH], date of birth 11 March 1989, a British national, was being prescribed an anti-depressant (Sertraline) for her symptoms; which in one sense seem to be post-natal depression but continuing with low mood, low motivation, isolation. This condition has impacted on her wellbeing and, to a degree, ability to take care of the children. Why no GP report on her mental health or the need for anti-depressant (depressants) was unexplained. I therefore have very little evidence as such directly of her need for medical treatment or the impact on her psychological state of the removal of her husband. I infer a GP must have a proper basis to prescribe such a drug

5. It was said by Mr Mills that just as First-tier Tribunal Judge Obhi found and concluded that there was a measure of irresponsibility in her conduct, knowing the lack of settled status of the Appellant to have continued to

have children in those circumstances. The First-tier Tribunal Judge whose decision does not stand concluded that there was a choice being made in the number of children they had and it sat unhappily with the assertion that they were continuing to have children in the uncertainness and precariousness of his continued presence in the UK.

6. I take into account that she is a British national and all her children are British nationals. I also take into account her evidence that for religious reasons she does not accept contraception and that at least two, including the current pregnancy were accidental in the sense that they were unplanned, save insofar as presumably it was their choice to have the children as a fact.

7. The Appellant's wife said that she has found things very difficult in the uncertainties and worries that she had for her children and how they would cope without the Appellant: This was over and above the difficulties that she had faced when he was in prison, albeit in that period it was at least a finite period in which those uncertainties might arise.

8. The evidence of the effects of her husband's absence and the detrimental effect on the children's schooling was evidenced in school reports as well as replicated and repeated in terms of the independent social worker's assessment of the significance of the Appellant's removal.

9. The supplementary report of Ms Alison Tyrell, the independent social worker, was helpful because she at least was able to offer an objective assessment of the Appellant's family life when she visited the same, and her assessment of the way in which the Appellant and his wife share a great deal of the management of the children's needs and day-to-day activities. There was nothing to gainsay the evidence that the children are very attached to both parents and clearly the Appellant was actively involved in their day-to-day activities. The parenting responsibilities have of course, as a fact, increased with the addition of the fifth child since the matter was originally looked at, and all being well, no doubt will not be assisted in the sense of being made easier assuming the sixth child is born

as forecast in January 2020. Ms Tyrell therefore, in addition to her stated opinions in the original report, expressed her concern that the Appellant's wife being required to look after six children without support and involvement of the Appellant and its impact on the children's wellbeing.

10. The original report dated 26 May 2018 extensively set out the family history, the educational reports concerning the children, the accommodation and financial arrangements for them, as well as the cultural connections and social connections which the family have in the UK.

11. The other factual matter that undoubtedly created a sense of isolation for the Appellant's wife was that her family had broken off any relationship with her or contact with the children, and have in effect been out of touch for some eleven years, never having met the children, nor provided any support or involvement in their development and upbringing. The breakdown in relationships was, on the face of it, and there is no evidence to gainsay it, very much long over and there was nothing to indicate any likely resumption.

12. Ms Tyrell in that extensive report addressed the several questions that were being raised and concluded that there would be adverse impacts upon the children and the Appellant's wife as well as, obviously, an impact upon the Appellant in his loss of involvement with the development of the children. It seemed to me on a fair reading of Ms Tyrell's report that she saw there being the likelihood of negative impacts in terms of the removal of the Appellant from active involvement in the children's upbringing, daily decisions, control and playing a part in their lives as they developed. I find that to be an inevitable consequence of removal. I find, on the unchallenged evidence, the best interests of the children lie in being one family unit with the Appellant present.

13. This matter was put to me in the context of Section 117C(5) exception 2 where it states …:-

> "where C (the criminal) 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".

14. There is a variety of case law affecting the issue of what may or may not amount to a matter being unduly harsh in the very obvious circumstances where any deportation removing a family member was going to have inevitably some consequences. It was not suggested that either the Appellant's wife or the children should remove to Afghanistan. They are all British citizens and none of the children have any connection whatsoever with life in Afghanistan or the language.

15. In KO (Nigeria) [2018] UKSC 53 the Supreme Court indicated that the words "unduly harsh" were clearly intended to introduce a higher hurdle than that of reasonableness under Section 117B(6) of the NIAA 2002, taking account of the public interest in the deportation of foreign criminals. Further, the word "unduly" implies an element of comparison. It assumed that there was a due level of harshness, that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by Section 117C(1), that is the public interest in the deportation of foreign criminals. I was looking for a degree of harshness going beyond that which would not necessarily be involved for any child faced with a deportation of a parent. What it does not require in my view (subject to the discussion of cases in an exception) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the Section itself by reference to the length of sentence. Nor can it be equated with a requirement to show "very compelling reasons": That would be in effect to replicate the additional test applied by Section 117C(6) with respect to sentences of four years or more.

16. Unduly harsh was further considered in the case of RA (Section 117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC) in

which in a discussion of Section 117C, particularly with reference to KO and NA (Pakistan) [2016] EWCA Civ 662, in terms of an Appellant who was a medium offender, as is this case, if an Appellant falls within, for example, exception 2, then the Article 8 claim succeeds. If he does not then the next stage is to consider whether there are sufficiently compelling circumstances over and above those described in exceptions 1 or 2.

17. In respect of this case it was said, first, it will be unduly harsh for the Appellant's partner/wife and children to go and live in Afghanistan or to remain in the UK without the Appellant. In MM (Uganda) [2016] EWCA Civ 450, it was held that unduly harsh meant the same in Section 117C(5) of the 2002 Act as it did in paragraph 399(a) of HC 395 (the Immigration Rules). What amounted to unduly harsh required a holistic approach to all the circumstances, not least of course his offending, the likelihood of repetition, the extent of rehabilitation, the fact that there has not been reoffending and the fact that he had favourable remarks from the Probation Service and he was committed to permanent change in his conduct. The public interest should therefore be looked at in light of the above and the consideration of the best interests of the children. The best interests of the children plainly revolve around them being with their mother and, I find, their father, and whatever their life choices had been as parents, they were not the children's fault; as to the consequences of either their parents' decisions or the Appellant's to commit the serious offence which he did.

18. There therefore was also to be taken into account the very real evidence of the extent of connection between the Appellant and the children and plainly the negative emotional impact, spoken to in the social worker's report in the Appellant's bundle of his absence. That was in part demonstrated by the deterioration in conduct of the two elder children when the Appellant was imprisoned. To this extent I will also bear in mind the school reports contained within the Appellant's bundle from 2017.

19. The children are as follows: [S[1]], 11 years, [S[2]], 7 years, both female; [M], 5 years, male, [S[3]], 4 years, male, [S[4]], 1 year, female, and the Appellant's wife is pregnant with a further child.

20. There was in effect no challenge to what the Appellant's partner said about the relationship, her difficulties that she has previously faced and her general ability to cope. I find this was a question of fact and I give the public interest very considerable weight given the fortuitous position over the Appellant's criminality, as an arsonist, that more damage was done and fortunately no loss of life occurred. In the circumstances I find, on balance, that the evidence showed that exception 2 was made out and that the effect of the Appellant's deportation on the partner/wife and the children would be unduly harsh, that was more than just harsh as contemplated in the case law. In reflecting on the seriousness of the offence with which he had been convicted. I give full weight to the sentencing Judge had to say about the matter. Whilst rehabilitation will not ordinarily bear any real weight in favour of a foreign criminal, the fact was that he has not reoffended, he was regarded as having rehabilitated himself. He was completely aware of the consequences that his conduct might have were he to re-offend. On the evidence before this case was one of the few likely to succeed on Article 8 ECHR grounds. On the evidence I found the Respondent's decision was disproportionate.

NOTICE OF DECISION

21. The appeal is allowed on argument 8 ECHR grounds.

ANONYMITY

22. No anonymity direction was sought nor is one required.

TO THE RESPONDENT
FEE AWARD

If a fee has been paid, this is a case which has succeeded on the strength of after-arising evidence. I find no fee award is appropriate.

Signed Date 11 November 2019

Deputy Upper Tribunal Judge Davey