Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/03209/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 12 February 2020	**On 3 March 2020**

Before

UPPER TRIBUNAL JUDGE NORTON-TAYLOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

F S
(ANONYMITY DIRECTION MADE)

Respondent

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.

Representation:
For the Appellant: Ms Bassi, Senior Home Office Presenting Officer
For the Respondent: Mr Eteko, Solicitor at Iras and Co

DECISION AND REASONS

Introduction

1. For ease of reference, I shall refer to the Appellant in the Upper Tribunal as the Secretary of State and to the Respondent as the Claimant.

2. The Secretary of State appeals, with permission, against the decision of First-tier Tribunal Judge S J Clarke ("the judge"), promulgated on 3 December 2019, by which she allowed the Claimant's appeal against the Secretary of State's refusal of his human rights and protection claims. Those claims were made following the initiation of deportation proceedings by the Secretary of State following the Claimant's conviction for assault occasioning actual bodily harm and subsequent sentence of fifteen months' imprisonment in 2017.

3. The protection issue no longer plays any part in this appeal. In addition, it has been accepted throughout that the Claimant was unable to rely on the private life exception contained in section 117C(4) of the Nationality, Immigration and Asylum Act2002, as amended ("the 2002 Act"). In addition, the Claimant was not able to rely on his relationship with his partner due to his lack of status at the time the relationship was formed and thereafter. The focus of the Claimant's appeal before the First-tier Tribunal was that it would be unduly harsh for him to be separated from his daughter, a British citizen, born in December 2013.

The decision of the First-tier Tribunal

4. The judge found the Claimant and his partner to be credible witnesses and agreed with the Secretary of State's acceptance of a genuine and subsisting parental relationship between the Claimant and his daughter. The judge concluded, in line with the Secretary of State's position, that it would be unduly harsh for the family unit to go to Afghanistan. She then turned to consider the question of whether a separation of the Claimant from his partner, and more importantly his daughter, would also be unduly harsh. Reference was made to the decision of the President of the Upper Tribunal in RA (Section 117C: "unduly harsh"; offence: seriousness) [2019] UKUT 123 (IAC).

5. It is worth quoting [16] and [17] of the judge's brief decision in full:

> "16. Given the spouse does not come from Afghanistan and does not speak Pashtu, and neither does the child, and given it is not safe for them to travel to visit the Appellant, I find that a ten year deportation would indeed by (*sic*) unduly harsh because they would not enjoy any physical and face to face contact with the Appellant for ten years, and at best the only contact they can enjoy is by modern means of communication. The consequence is that the partner of ten years and the child aged 6 would not see the Appellant in person for another ten years, and this is not just bleak and severe, but unduly bleak because they cannot visit him and the security situation in Afghanistan is not recent but has endured for many years. It is foreseeable that the advice from the Foreign Office would remain in the future.
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> 17. In addition, the Appellant's spouse and daughter would be deprived of his assistance to them, albeit this is somewhat set off against by the presence of the step-son who could be called upon to assist more than he does if need be. I accept she is of low income having looked at her P60s for the last two years, and that

> she receives Universal Credit, and I find that it is not likely that they could raise sufficient funds to travel to visit the Appellant at some third country, or if the situation in Kabul improved, to visit him there in the foreseeable future."

On the basis of this the appeal was allowed.

Decision on error of law

6. Before me, Ms Bassi relied on the Secretary of State's grounds, which in essence assert that the judge failed to give adequate reasons for the conclusion that a separation of the family would have unduly harsh consequences on, in particular, the Claimant's daughter. She relied on paras 8 and 17 of RA and paras 34 and 46 of PG (Jamaica) [2019] EWCA Civ 1213.

7. Mr Eteko submitted that the reasons provided by the judge were open to her in light of the evidence as a whole. The judge had focused her attention on the position of the child which may have been different from that of the partner, and noted that the partner and the Claimant had been deemed to have given credible evidence.

8. As announced to the parties at the end of the hearing, I conclude that the judge has materially erred in law.

9. The reasons challenge is made out. Clearly, cases such as these are fact-sensitive, but the reasons provided must be done so in the context of the applicable legal framework and in this case that involved the unduly harsh test and all that that entails. As is made clear by the Supreme Court in KO (Nigeria) [2018] UKSC 53; [2018] 1 WLR 5273 and subsequent decisions at various levels, the threshold is high and that threshold will not be met by what has been described as the "ordinary consequences" of deportation or those that are to be "expected" as a result of such action.

10. In my judgement the reasons as stated by the judge in [16] and [17] cannot properly be seen as to amount to anything more than an identification of those ordinary consequences of deportation or consequences that are to be expected. As commented by Lord Justice Hickinbottom at para 46 of PG (Jamaica), one will always have a great deal of sympathy for innocent children whose lives will be greatly changed as a result of a parent having to leave. However, that is in essence the nature of the deportation framework as it currently stands. For the judge to have reached a sustainable conclusion as to the crossing of the unduly harsh threshold, reasons specific to further/additional features going beyond the ordinary consequences of separation would have had to be identified. They have not been so identified by this judge.

11. The error is clearly material, and the judge's decision must be set aside.

Remaking the decision

12. Mr Eteko urged me to remit this matter to the First-tier Tribunal. He asserted that he wished to obtain a report on the Claimant's daughter (presumably a psychological or psychiatric report, although this was not specified). I declined to follow this course of action for the following reasons.

13. First, a remittal of this appeal would be inappropriate given the nature of the issues involved, including the absence of any material factual dispute between the parties.

14. Second, there has been no information provided that any report has in fact been commissioned, or indeed that any relevant expert has even been contacted.

15. Third, the parties in this case (as in all cases before the Upper Tribunal) have been on notice that the presumption would be that a remaking of the decision in the appeal would follow immediately from a setting aside of the decision of the First-tier Tribunal. Parties should be prepared to make submissions and have adduced relevant new evidence in advance of the error of law hearing. Here there has been no indication (and certainly no details) concerning either any new evidence or indeed why expert evidence was not adduced before the First-tier Tribunal.

16. Fourth, although I take full account of the existence of a child in this case, it is of significance that the hearing before the First-tier Tribunal was held on 13 November 2019, only some three months ago. It cannot be said that the period between consideration by the judge and now by me is such that further evidence *must* be sought. Mr Eteko has not suggested that there have been any material changes in the child's circumstances.

17. In terms of the scope of the remaking decision, I am not concerned with protection issues. Mr Eteko had specifically conceded this point before the First-tier Tribunal (see [7] of the judge's decision) and he maintained that position before me. As mentioned earlier, the private life exception under the 2002 Act and the Immigration Rules is not open to the Claimant, nor is that relating to his partner. Thus, I am concerned first and foremost with the question of whether it would be unduly harsh on the Claimant's daughter were he to be deported from the United Kingdom, with reference to section 117C(5) of the 2002 Act and paragraph 399(a) of the Rules (it has been accepted throughout that the daughter is British and therefore a qualifying child, and that he has a genuine and subsisting parental relationship with her).

18. The evidence I have considered is contained in the Secretary of State's original appeal bundle and in the Appellant's bundle prepared for the hearing before the First-tier Tribunal (indexed and paginated 1-103). In addition, I have borne in mind the fact that the judge deemed the Claimant and his partner to be credible witnesses.

19. In all the circumstances, there is no material dispute as to the essential factual matrix in this case. The relevant facts are as stated below:

    (1) The Claimant came to the United Kingdom in January 2010. On 21 July 2017 he was convicted of assault occasioning actual bodily harm and sentenced to fifteen months' imprisonment. Shortly thereafter he put forward protection and human rights claims to the Secretary of State. On 22 March 2019 a deportation order was signed followed on 25 March of that year by a decision to deport and a refusal of the protection and human rights claims;

    (2) The Claimant is currently, and has been for some ten years, in a genuine and subsisting relationship with his partner, who is a British citizen;

    (3) his partner has a son from a previous relationship, aged 25. He is currently studying at university and he works part-time;

    (4) The Claimant's daughter is also a British citizen and was born in December 2013. She is healthy;

    (5) The Claimant's partner suffers from some health conditions, although there was no evidence to suggest that they are significant, whether taken in isolation or cumulatively, and she works part-time at weekends;

    (6) The Claimant has family members residing in Afghanistan.

20. There is no expert evidence before me.

21. By way of submissions, Mr Eteko urged me to focus primarily on the position of the Claimant's daughter and assess her best interests. The consequences of deportation would be ten years of separation between father and daughter. There would be difficulties in the daughter visiting the Claimant in Afghanistan, or indeed anywhere else. The deportation of the Claimant would place a real strain on the family unit in this country. The daughter would not be able to comprehend why she was being separated from her father. I was referred to para 5 of the partner's witness statement and the effects on the daughter when the Claimant was imprisoned in 2017. The Claimant has only one conviction to his name and is now "self-rehabilitated". His life in Afghanistan would be very difficult. The combination of factors should lead to the conclusion that it would be unduly harsh on the daughter for the Claimant to be deported.

22. Ms Bassi relied on the case law provided in respect of the error of law issue. She submitted that the evidence did not disclose any features raising this case above the threshold of consequences ordinarily expected in deportation matters.

23. In terms of the relevant legal framework. I direct myself to KO (Nigeria) and RA (Iraq). The unduly harsh test sets a high threshold but cases are fact-sensitive. The factual sensitivity must of course be placed in the

relevant context of the high threshold just described. At para 23 of KO Lord Carnwath stated that:

> "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent".

24. The Supreme Court specifically approved the "authoritative guidance" set out by the Upper Tribunal at para 46 of MK (Sierra Leone) [2015] UKUT 223 (IAC):

> "… 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".

25. For the reasons set out below, I conclude that it cannot properly be said that it would be unduly harsh on the Claimant's daughter (and certainly not on his partner) were he to be deported to Afghanistan.

26. First, I emphasise that my consideration of the unduly harsh issue incorporates taking the Claimant's daughter's best interests into account as a primary factor. It is quite obvious these best interests lie in her remaining with both parents. Having said that, these interests do not of course act as a "trump card".

27. Second, it is undoubtedly the case that the Claimant's daughter, at the age of 6, would be very upset by the enforced separation and would probably not comprehend why this was taking place. I accept that she would have been upset as a result of her father's incarceration in 2017. There is a very good father/daughter relationship between the two. To paraphrase Lord Justice Hickinbottom at para 46 of PG (Jamaica) one has great sympathy for this entirely innocent child. However, this upset and distress is, in a real sense, a consequence to be expected by enforced separation. In the present case there is insufficient evidence to indicate that the Claimant's daughter would suffer any particular and potentially lasting emotional and/or psychological damage by virtue of the separation over and above what would be expected following the removal of a loving parent from the life of their child (at least for a considerable period). The contents of the Claimant's and his partner's witness statements express understandable parental concerns relating the daughter's emotional wellbeing were deportation to occur, and there is reference to her being "very affected" whilst the Claimant was in prison. This evidence does not, with respect, take the case very much further: the upset caused by deportation and for that matter imprisonment is a natural consequence of enforced separation.

28. Third, I accept that the Claimant's deportation would deprive the family unit of practical and financial assistance. That would indeed place a strain upon his partner, and potentially his daughter as well. However, once

again, these matters are to be expected in the normal run of events following deportation. In the present case the evidence does not indicate that the partner would simply be unable to either work or care for her daughter. I note that the partner receives Universal Credit and is entitled to do so as a British citizen. Additional support from the state may potentially be required, but both the partner and the daughter are British and would be entitled to this. The judge found that the Claimant's adult step-son would be able to assist to a greater extent in the future if necessary. There is no evidence before me to undermine that finding.

29. Fourth, the Claimant's partner would also undoubtedly be upset by his deportation. The evidence before me does not disclose any features which elevate that understandable human emotion to the applicable high threshold.

30. Fifth, in respect of the family unit being able to meet face-to-face outside of the United Kingdom, it may well be the case that this could not take place in Afghanistan as matters stand. However, in my judgement this of itself cannot amount to a feature of such significance as to make a separation unduly harsh. The legal framework provides for the scenario in which it may well be unduly harsh for children and/or partners to travel with the deportee to the latter's country of origin: but that is not the end of the matter as it must also be shown that a separation would be unduly harsh on those left behind. Therefore, an inability to go to another specified country cannot be *decisive* of the unduly harsh test. Whilst meeting in a third country may involve difficulties, there is no evidence before me to indicate that this would be an impossibility (or even an unlikely option).

31. It follows from the above that the Claimant is unable to bring himself within the family life exception under section 117C(5) or the relevant Rule.

32. Although Mr Eteko did not specifically address me on the question of whether there were, in any event, "very compelling circumstances over and above" those described in either of the two exceptions, I nonetheless go on to deal with this issue.

33. On the evidence before me and in light of the facts found by the First-tier Tribunal, there are no features in this case that come close to reaching this very high threshold. In addition to the considerations I have already set out, the Claimant is a healthy individual who spent the great majority of his life in Afghanistan and has family there who could provide him with support. There are no protection issues in his appeal. In my judgement and on any rational view of the circumstances in this case, removal cannot be said to be disproportionate when the Claimant's specific rights are weighed against the strong public interest in deporting foreign national criminals.

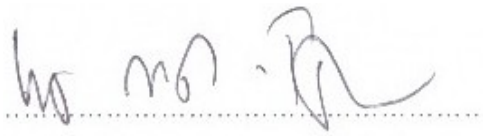
Anonymity

34. Although the First-tier Tribunal did not make a direction, I do so because of the existence of the child in this case.

Notice of Decision

The decision of the First-tier Tribunal contained material errors of law and I set it aside.

I re-make the decision by dismissing the appeal on all grounds.

Signed  Date: 14 February 2020

Upper Tribunal Judge Norton-Taylor