Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/08538/2019 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 29 March 2021 by Skype	**On 12 July 2021**

Before

UPPER TRIBUNAL JUDGE KOPIECZEK

Between

KS
(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M. Islam, M-R Solicitors
For the Respondent: Mr S. Whitwell, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal comes back before me after a hearing on 30 July 2020, following which I decided that the decision of the First-tier Tribunal ("FtT"), which allowed the appellant's appeal, should be set aside for error of law, and for the decision to be re-

made in the Upper Tribunal. The proceedings concern the respondent's decision, dated 30 April 2019, to refuse to revoke a deportation order.

2. For context, I repeat the background to the appeal. The appellant is a citizen of India, born in 1980. His immigration history is that he arrived in the UK on 16 November 2000 from France using the ID of one SS. He claimed asylum but then absconded.

3. He next arrived in the UK on 19 September 2003 from Copenhagen and again claimed asylum. That application was refused and his appeal against that refusal was dismissed.

4. He was arrested on 19 April 2004 and illegal entry papers were served on him. He was arrested again on 14 April 2007 for attempting to check in for a flight to Canada using a British passport in the name of another person. On 30 April 2007, in the Crown Court at Lewes, he was convicted of possession of a false identity document for which he received a sentence of 12 months' imprisonment.

5. On 6 November 2007 the respondent made a decision to make a deportation order, as a result of that conviction. The appellant's appeal against that decision was dismissed by the FtT in February 2008.

6. According to a letter from the respondent dated 21 March 2017, rejecting further submissions, on 6 May 2009 he was placed on the Police National Computer as an absconder and, therefore, the deportation order was unable to be enforced at that time.

7. The appellant was located in 2012 and further submissions were made in March and June 2013 in respect a claimed relationship with an EEA national. Yet further representations were made in 2015 and rejected on 19 December 2015. The deportation order was signed on 21 December 2015.

8. The appellant then made another application for leave to remain which was refused on 21 March 2017. A judicial review application in respect of that decision was unsuccessful. Further applications for leave to remain were made on 7 April 2018 and 24 November 2018.

9. On 25 January 2019 he was granted 30 months' leave to remain, seemingly on the basis of the 'ten-year route to settlement'. However, on 4 February 2019 the Home Office said that that decision had been made in error, and the grant of leave was withdrawn. In response to a letter from the applicant's solicitors dated 26 February 2019, the respondent said that the letter would be treated as an application to revoke the deportation order. That led to the decision under appeal, dated 30 April 2019.

10. The further context for the re-making of the decision are the following paragraphs from my error of law decision:

> "46. However, I do consider that there is merit in the argument on behalf of the respondent in terms of the FtJ's failure fully to reflect the appellant's poor immigration history, which at [57] and [66] she described as "some failure to

comply with reporting conditions". That does not properly convey the appellant's immigration history in terms of absconding.

47. More fundamentally, notwithstanding the detail in the FtJ's analysis of the very compelling circumstances issue, it is impossible to discern from the FtJ's decision what are the very compelling circumstances. The low risk of reoffending is, according to authority, not a matter of great weight. The sentence of imprisonment being at the lower end of the sentencing scale (in deportation terms), is nevertheless a sentence mandated by Parliament as one attracting deportation (subject to the exceptions; none of which apply). The length of time spent in the UK, without leave, which include periods of absconding and making unsuccessful applications or representations, could hardly be said to be a very significant factor in his favour.

48. Notwithstanding the nationalities of those affected by the decision ([60] of the FtJ's decision), there is a clear finding by the FtJ that it would not be unduly harsh for the appellant to be separated from his family.

49. With reference to what the FtJ said at [61] about the fracturing of the family if the appellant was deported, the effect of deportation is often to split families apart, as has been said many times. That is a commonplace. Likewise, the FtJ's emphasis of the closeness of the family in the analysis of very compelling circumstances, overestimates the significance of the family's relationships with each other, contrary to what was said in *NA (Pakistan) v Secretary of State for the Home Department & Ors* [2016] EWCA Civ 662 at [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."

50. The point was reiterated at [34] of *HA (Iraq)*, as was what was said about the best interests of children in *NA (Pakistan)*, at [35] of *HA (Iraq)*, a matter which the FtJ also relied on in her conclusions on the issue of very compelling circumstances.

51. The FtJ does not explain why she considered it significant that KK and G are *en route* to settlement. I do not say that she needed to explain the significance of every matter that she took into account on the issue of very compelling circumstances, but it is not clear why the fact that they are *en route* to settlement is significant. They have leave to remain until 14 December 2020, but neither of them has 'qualifying status' at present; only H does.

52. As regards the fact that the deportation order was not signed until 21 December 2015, a matter that the FtJ also took into account at [66], the appellant was arrested for the offence on 14 April 2007. On 30 April 2007, he was convicted of possession of a false identity document for which he received a sentence of 12 months' imprisonment and on 6 November 2007 the respondent made a decision to make a deportation order, as a result of that conviction. The appellant's appeal against that decision was dismissed by the FtT in February 2008.

53. According to the letter from the respondent dated 21 March 2017, rejecting further submissions, on 6 May 2009 the appellant was placed on the Police National Computer as an absconder and, therefore, the deportation order was unable to be enforced at that time. He was located in 2012 and further submissions were made in March and June 2013 in respect of an EEA national (not his wife, KK). Yet further representations were made in 2015 and rejected on 19 December 2015. The deportation order was then signed on 21 December 2015.

54. Although the FtJ did not characterise the period between the conviction and the signing of the deportation order as 'delay' on the part of the respondent, the basis upon which the FtJ considered that this was a significant matter in the appellant's favour is not apparent, particularly in the light of the events that occurred between the conviction and the signing of the deportation order.

55. I am satisfied, therefore, that the FtJ did err in law in her conclusion that there were very compelling circumstances over and above those within 399 or 399A and s.117C of the 2002 Act which outweighed the public interest in deportation. The factors which led her so to conclude are either not fully explained, not matters that could properly regarded as amounting to very compelling circumstances, or otherwise not sufficiently identified. Accordingly, her decision must be set aside."

11. At the re-making hearing, which both parties agreed could be dealt with remotely, the appellant and his partner (KK) attended the appellant's solicitors' offices. They both gave oral evidence through an interpreter, who also attended remotely. No issues arose in relation to interpretation or otherwise in respect of the fact that the hearing was conducted remotely.

12. Updated skeleton arguments were provided by both parties. In addition to evidence previously filed and served, there was a letter from the appellant's stepson, H, a British citizen (born on 15 July 2010), and a letter in relation to KK, dated 17 March 2021, from her GP.

13. The half-page letter from H refers to the things that they do together and the time that the appellant spends with H and his sister G (born on 20 November 2016). The letter says how sad H would be if the appellant had to go back to India.

14. The letter from KK's GP states that she complained of poor mental health on 12 February 2021 with associated symptoms of sleep difficulties and low mood. It goes on to state that she was referred to a specialist, is waiting for therapy and has been started on Sertraline 50mg.

THE ORAL EVIDENCE

15. In examination-in-chief the appellant adopted the witness statement he made in the proceedings before the FtT. In cross-examination he said that his wife only has her brother in the UK, apart from an uncle and aunt who he described as distant family.

16. He agreed that her uncle was the person who helped his wife buy her property. The uncle and aunt live in Surrey, in Virginia Water. His brother-in-law lives in Seven Kings in Ilford, about five or 10 mins away. He sees him quite frequently.

17. He disagreed that in his absence his brother-in-law would provide emotional or other support, saying that he is a bit selfish, lives hand-to-mouth and 'does his own thing'. They see him once every two weeks or once a month.

18. His children, H and G, have two cousins, who are his brother-in-law's children. One is aged 6 or 7 and the other about 4. The cousins do not have a good relationship with his children because his brother-in-law's wife and his wife do not have a good relationship.

19. KK also adopted the witness statement she made for the proceedings before the FtT. She last saw her brother, HS, last year, long before lockdown. In addition, she, KK, does night shifts and sleeps when she gets home from work. She does not get on with her brother's wife, either. She last saw her brother in October last year in the Sikh temple. The appellant speaks to her brother but because of his wife she does not go regularly to see them.

20. If she was in the UK without the appellant she does not think that her brother would support her because during lockdown she asked them to look after her children when the appellant had to go somewhere. They said that they could not as they would get a fine. They did not help and she cannot really trust them. Even before households were not allowed to mix her sister-in-law did not help her.

21. As to whether she had explained her difficulties to her aunt and uncle in Virginia Water, because of lockdown she only talks to them briefly on the phone. Because of her husband's tension and coronavirus stress she does not sleep very well. She does tell her uncle and aunt over the phone what she is going through but it is difficult for them to help her. They listen but they are busy with their own lives, and she and her husband are busy as well. It means that no-one can help anyone.

SUBMISSIONS

22. In submissions, Mr Whitwell relied on his skeleton argument and the decision letter. As regards the preserved findings from the decision of the FtT, he submitted that it was clear that the FtT found that it was not unduly harsh for H to be separated from the appellant. The addendum social work report is not materially different from the evidence that was before the FtT. There is no reason to go behind the finding that it would be harsh, but not unduly harsh, for the appellant to be separated from H.

23. If the only remaining consideration is whether there are 'very compelling circumstances' there is nothing in the evidence that is not covered by Exceptions 1 and 2 in s.117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), even cumulatively. That is so notwithstanding that there is only one "historic" offence to be considered.

24. The evidence is that there is family in Surrey. Although KK said that they only communicate by phone, that is necessarily so at the moment (because of Covid restrictions). They made a significant contribution to the purchase of KK's house. That indicates a willingness to help financially, and perhaps more.

25. KK's brother lives locally. The appellant said in evidence that he sees them once a month, whereas KK said that she had not seen them since October 2020. Although that issue is not determinative, it is relevant to the question of whether there are very compelling circumstances over and above the Exceptions.

26. Mr Aslam similarly relied on his skeleton argument. The addendum social work report is significant, he argued. The appellant and his stepson have a particularly close bond. In this respect [81] of *HA (Iraq) v Secretary of State for the Home Department (Rev 1)* [2020] EWCA Civ 1176 was relied on.

27. The decision of the FtT cites the example of the visit by immigration officers when H got particularly upset and the immigration officers decided as a result to leave the appellant at the house, rather than detain him, and took off the handcuffs.

28. The First-tier Tribunal judge ("the FtJ") observed that the independent social worker's report was not particularly focussed on the impact on H which is why the addendum report was provided. That addendum report does provide that focus. It highlights their close relationship.

ASESSMENT AND CONCLUSIONS

29. The test to be applied when considering whether to revoke a deportation order is set out in paragraphs 390-392 of the Immigration Rules HC 395 (as amended), read with paragraphs 398-399A. These provisions state:

> "**Revocation of deportation order**
>
> 390 An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
> (i) the grounds on which the order was made;
> (ii) any representations made in support of revocation;
> (iii) the interests of the community, including the maintenance of an effective immigration control;
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
>
> 391 In the case of a person who has been deported following conviction of a criminal offence, the continuation of a deportation order against that person will be the proper course:

(a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis as to whether the deportation order should be maintained
…
Unless… the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.

391A In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.

Deportation and Article 8

A398 . These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398 Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

…

the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399 This paragraph applies where paragraph 398(b)… applies if-

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A This paragraph applies where paragraph 398(b)… applies if-

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported."

30. Section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") provides:

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

> (a) C has been lawfully resident in the United Kingdom for most of C's life,
>
> (b) C is socially and culturally integrated in the United Kingdom, and
>
> (c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
>
> (5) Exception 2 applies where C 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.
>
> (6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
>
> (7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

31. In the error of law decision I stated that, subject to submissions from either party, I considered that the following facts found by the FtJ should be preserved:

- It would be unduly harsh to expect H to relocate to India.
- There is a genuine and subsisting relationship between the appellant and H.
- It would not be unduly harsh for H to be separated from the appellant.
- H has the medical conditions identified in the evidence before the FtJ ([44]).
- The appellant provides H with day-to-day care as KK works to support the family. Her employment is as stated in the evidence [45].
- The appellant's conduct has not been exemplary ([47]).
- The family is a close one.
- There is a low risk of reoffending.
- The appellant has acknowledged his wrongdoing and expressed remorse.
- The appellant is culturally and socially integrated in the UK.
- The appellant speaks English and is not a drain on public funds.

32. At the resumed hearing neither party took issue with any of the proposed preserved findings, with one exception. On behalf of the appellant, it was submitted that the finding that it would not be unduly harsh for H to be separated from the appellant should not be a preserved finding. For his part, Mr Whitwell submitted that whether or not that finding was preserved made no difference to the outcome of the appeal.

33. In the light of the agreement between the parties as to the majority of the preserved findings, all the findings set out in [31] above are preserved for the purposes of my decision, except for the finding that it would not be unduly harsh for H to be

separated from the appellant. I do not consider that it is appropriate to retain this as a preserved finding in the light of the addendum social work report from Dr Farooqi, dated 14 March 2021, the additional evidence that I refer to below, and the length of time since the hearing before the FtT on 18 February 2020. That finding aside, I proceed on the basis of the preserved findings.

34. The appellant's amended skeleton argument at [3] frames the issues to be determined in the re-making of the decision as being firstly, whether or not it would be unduly harsh for H to be separated from the appellant, and secondly, if not, whether there are very compelling circumstances such that the public interest in deportation would be outweighed by other factors.

35. It is not argued on behalf of the appellant that he is able to succeed in his appeal with reference *directly* to any provision of the deportation immigration rules or the Exceptions to deportation within s.117C(6) of the 2002 Act except in terms of his relationship with his stepson H and the 'unduly harsh' assessment of separation, alternatively in terms of very compelling circumstances over and above the relevant Exception.

36. I have considered the evidence that was before the FtT in the bundle of 386 pages. Additional evidence before me, apart from the addendum social work report, was an undated letter from H and a letter from KK's GP dated 17 March 2021.

37. The letter from H describes the things that he and the appellant do together, as well as their activities as a family and with his sister, in the home and outside, and the help that the appellant gives him and his sister G with homework. The letter describes how upset he would be if the appellant had to return to India.

38. The letter from KK's GP states that she registered with the practice in December 2009 and that she complained of poor mental health on 12 February 2021 with associated symptoms of sleep difficulties and low mood. The letter goes on to state that she was referred to "the specialist", is now awaiting therapy and has been started on medication in the form of Sertraline 50mg.

39. In terms of the Rules in relation to revocation of a deportation order, in this case, given that the appellant has not been deported, it is paragraph 390A that applies, which itself brings into play paragraph 398 of the Rules.

40. In a consideration of the Rules, and Article 8 generally, the best interests of the children, in particular H, are a primary consideration. Those best interests cannot, however, be decisive.

41. *HA (Iraq) v Secretary of State for the Home Department* (Rev 1) [2020] EWCA Civ 1176 is a recent decision of particular relevance to deportation cases involving, amongst other things, consideration of the 'unduly harsh' test, the best interests of a child, and the question of very compelling circumstances. The appellant's amended skeleton argument relies in particular on [56], and [81]-[82] of that decision. The respondent's skeleton argument could not have foreseen the reversal of the appellant's acceptance

that the unduly harsh test in relation to H was met. It, therefore, proceeds on the footing that only the question of very compelling circumstances needs to be determined. The respondent's skeleton argument relies in particular on [29] of *HA (Iraq)*, in terms of the relationship between the Exceptions to deportation provided for in s.117C of the 2002 Act and 'very compelling circumstances'.

42. So far as the children's best interests are concerned, I accept that it is in both their best interests for the appellant to remain with them as part of their family unit. The evidence in this case makes that an uncontroversial conclusion. It is not suggested on behalf of the respondent that H, a British citizen, should be required to go to India with the appellant, his mother and the younger child, G.

43. I have taken into account H's age. He was born of 15 July 2010. He is now, therefore, almost 11 years of age. That means that he is at a very significant stage of his emotional development. Separation from the appellant will undoubtedly have a significant impact on him. I accept that the appellant has a very close relationship with H. So much is clear from Dr Farooqi's reports, and from what H says in his undated handwritten letter. It is also relevant to take into account the evidence that was accepted before the FtT, namely that H believes the appellant to be his biological father, and that there is no contact with his biological father who does not provide any support for H and is not part of his life at all (see [42] of the FtJ's decision).

44. It is evident that whilst KK has been working long hours in a care home during the Covid pandemic, the appellant has as a consequence been very closely involved in the care of the children and has developed a closer bond with them because of that day-to-day close involvement with them.

45. Having said that, it is not the case that the children, and focussing on H in particular, would, in the event of the appellant's removal, be living outside a loving family environment. Their mother, KK, remains in the UK (albeit with limited leave to remain) and is clearly a very capable, loving and committed parent.

46. There is no reason to suppose that H would not be able to have contact with the appellant from India, and presumably he would be able to visit him from time to time. I recognise, however, that such contact is really no substitute at all for the close daily contact with a parent that a child needs, and which is in the majority of cases best for the child.

47. I do not accept that KK would be without support from other family members in the UK if the appellant had to leave. She has her brother here and although KK said in evidence that during lockdown she had asked for help from him and his wife but they did not help, that would necessarily be the case because of the social restrictions imposed by the Covid regulations and associated guidance. KK's evidence was that she was in contact with her brother and sees him, albeit not regularly. I do not regard it as likely that she would be left without her brother's support if the appellant had to leave. Furthermore, as was pointed out by Mr. Whitwell in submissions, it appears that KK's uncle and aunt who live in Surrey, made a significant financial

contribution to the purchase of KK's house. I agree with Mr Whitwell that that indicates a willingness to help financially, and is evidence of a general commitment to the family.

48. Furthermore, KK's brother lives a short distance away, about five or ten minutes according to the appellant, (presumably by car).

49. The evidence overall does reveal that family support would be available to KK and her children if the appellant left the UK.

50. The suggestion in Dr Farooqi's report that with the appellant's absence there would be a risk of separation of the children from their mother, with reference to s.17 of the Children Act 1989 in the event that KK is unable to care for them, is mere speculation, unsupported, and indeed contradicted, by the evidence. There is no basis for a conclusion that the children may have to be taken into local authority care. KK would have family support in the appellant's absence. She has some mental health concerns but, as already indicated, she is a loving and caring parent and is presently able to maintain employment in a demanding job, working long hours. That is a testament to her character and resilience, albeit that at present she has the appellant's support.

51. There is evidence of H having suffered from medical conditions (inguinal hernia in 2019 and investigation for a problem with his nasal passage) which were either investigated but seemingly required limited further action, or treated successfully. H's health was not argued before me as being a significant factor and is not referred to in the appellant's skeleton argument.

52. Considering all the circumstances, I am not satisfied that it would be unduly harsh for H to be separated from the appellant. It is undoubtedly the case that separation would be harsh. However, the degree of harshness revealed by the evidence is not such as to indicate a level that could properly be described as unduly harsh.

53. The question next, then, is whether there are very compelling circumstances over and above the Exceptions in s.117C. I have considered the Home Office guidance referred to in the appellant's amended skeleton argument at [17]. That guidance is entitled Criminality: Article 8 ECHR cases, version 8.0, dated 13 May 2019, which says the following on page 38:

> "When considering whether there are very compelling circumstances you must consider all relevant factors that the foreign criminal raises. Examples of relevant factors include:
>
> • the best interests of any children who will be affected by the foreign criminal's deportation
>
> • the nationalities and immigration status of the foreign criminal and their family

members

• the nature and strength of the foreign criminal's relationships with family members

• the seriousness of the difficulties (if any) the foreign criminal's partner and/or child would be likely to face in the country to which the foreign criminal is to be deported

• the Court of Justice of the European Union (CJEU) judgment in Ruiz Zambrano (European citizenship) [2011] EUECJ C-34/09

• how long the foreign criminal has lived in the UK, and the strength of their social, cultural and family ties to the UK

• the strength of the foreign criminal's ties to the country to which they will be deported and their ability to integrate into society there

• whether there are any factors which might increase the public interest in deportation – see section on the public interest

• cumulative factors, for example where the foreign criminal has family members in the UK but their family life does not provide a basis for stay and they have a significant private life in the UK. Although, under the rules, family life and private life are considered separately, when considering whether there are very compelling circumstances, both private and family life must be taken into account".

54. The guidance is useful in terms of the factors which may be taken into account in assessing the issue of very compelling circumstances, depending on the facts of the case. Whilst the guidance itself does not have the force of law, it reflects factors, such as the best interests of a child, that do. I do consider that some of those factors are relevant to the overall proportionality assessment in this case.

55. What is said in Dr Farooqi's report about the risk of the appellant committing suicide was expressly not a matter relied on on behalf of the appellant, as confirmed to me at the hearing, no doubt because of the lack of any significant evidence on the point.

56. As I have already found, there would be support for KK and the children in the UK if the appellant was deported. I was informed at the hearing that KK has further leave

to remain for 30 months, with G, but I cannot see that this is a matter of significance either in favour of the appellant or against. That it is accepted that H could not be expected to go to India to be with the appellant is the significant issue in terms of the family's stay in the UK.

57. The FtJ found that the appellant has family in India. So much is clear from his witness statement. The evidence does not suggest, however, that the appellant would be able to provide support for his family in the UK from there, which would be a potentially significant matter if KK had to give up her employment if the appellant had to leave.

58. There is nothing to be said in favour of the appellant in terms of any delay by the respondent having regard to the date of the appellant's conviction in 2007 and the initiation of deportation by the respondent. It has to be borne in mind that there was a significant period of absconding by the appellant for which the respondent was not responsible. I summarised the position in my error of law decision as follows:

> "52. As regards the fact that the deportation order was not signed until 21 December 2015, a matter that the FtJ also took into account at [66], the appellant was arrested for the offence on 14 April 2007. On 30 April 2007, he was convicted of possession of a false identity document for which he received a sentence of 12 months' imprisonment and on 6 November 2007 the respondent made a decision to make a deportation order, as a result of that conviction. The appellant's appeal against that decision was dismissed by the FtT in February 2008.
>
> 53. According to the letter from the respondent dated 21 March 2017, rejecting further submissions, on 6 May 2009 the appellant was placed on the Police National Computer as an absconder and, therefore, the deportation order was unable to be enforced at that time. He was located in 2012 and further submissions were made in March and June 2013 in respect of an EEA national (not his wife, KK). Yet further representations were made in 2015 and rejected on 19 December 2015. The deportation order was then signed on 21 December 2015."

59. In relation to the offence that the appellant committed, with reference to the sentence that was imposed, in my error of law decision I was dismissive of the FtJ having taken into account in the appellant's favour that the sentence imposed was at the lower end of the scale in terms of deportation. On reflection, I was wrong to take that view and the FtJ was correct in his assessment in this regard, as is clear from [92]-[94] of *HA (Iraq)*.

60. That there is a low risk of reoffending is also a matter of some relevance, but its significance should not be over emphasised, as is also clear from [141] of *HA (Iraq)*. The single offence of which the appellant was convicted occurred as long ago as 2007, now 14 years ago, albeit that he absconded for a period of time. The offence involved the appellant attempting to board a flight to Canada using a British passport in the name of another person.

61. I bear in mind KK's health, and what is said about her being on anti-depressant medication. Again, however, she is able to receive treatment in the UK and she has family support here.

62. I have also taken into account that with the appellant here, KK is able to work, and that without him in the UK to care for the children she may very well not be able to.

63. Naturally, there are factors that weigh on both sides in the balancing exercise, and in this case in particular when the balance shifts in either direction, it returns to even as the analysis continues. Although I have found that the removal of the appellant would not be unduly harsh in relation to H, the factors that tell in favour of it being (merely) harsh are nevertheless relevant.

64. The appellant is in large measure responsible for the fact that deportation proceedings were not initiated sooner, because he absconded, made further submissions in relation to a different partner in 2013 and yet further submissions which were again rejected in 2015. However, none of that is the fault of his family, encompassing not only H, but KK and G as well. The length of time since the commission of the offence has relevance in terms of the assessment of whether the public interest now demands the appellant's removal against the background of his established family life. So also does the fact that the appellant's offending involves one offence only which attracted a sentence at the lowest end of the deportation scale.

65. That family life involves a stepson who only knows the appellant as his father and who is approaching a significant time in his emotional development, a daughter approaching five years of age, and a wife who, presently, depends on the appellant so that she may continue as the breadwinner.

66. For H, the separation from the appellant would be harsh. The additional circumstances to which I have referred do, in my judgement, tip the balance in favour of the conclusion that there are very compelling circumstances over and above Exception 2.

67. The paragraphs 390 and 390A analysis is subsumed within the analysis of very compelling circumstances.

68. Given that I am satisfied that there are very compelling circumstances over and above the relevant Exception in s.117C of the 2002 Act, the appeal must be allowed.

Decision

69. The decision of the First-tier Tribunal involved the making of an error on a point of Law. Its decision having been set aside, I re-make the decision by allowing the appeal.

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

Because this appeal involves children, 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.

A.M. Kopieczek

Upper Tribunal Judge Kopieczek 12/07/21