Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001223
PA/03220/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 June 2022	**On 2 August 2022**

Before

UPPER TRIBUNAL JUDGE PERKINS
DEPUTY UPPER TRIBUNAL JUDGE CHAPMAN

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AA
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Ms A Ahmed, Senior Home Office Presenting Officer
For the Respondent: Mr Z Raza, Counsel instructed by Marks & Marks Solicitors

DECISION AND REASONS

1. Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the respondent (hereinafter "the claimant") is granted anonymity. No-one shall publish or reveal any information, including the name or address of the claimant, likely to lead members of the public to identify the claimant. Failure to comply with this order could amount to a contempt of court. We make this order because it is not otherwise practicable to explain our decision without identifying the claimant's children and they are entitled to privacy.

2. This is an appeal brought by the Secretary of State with the permission of Upper Tribunal Judge Lindsley against the decision of the First-tier Tribunal allowing on human rights grounds the appeal of the claimant against the decision of the Secretary of State on 23 April 2020 refusing him international protection and leave to remain on human rights grounds. The claimant is now the subject of a deportation order made on 22 April 2020. His liability to deportation appears to have prompted the application for international protection.

3. The appeal was allowed solely with reference to Article 8 of the European Convention on Human Rights.

4. In summary outline, for the purposes of introducing the issues, the First-tier Tribunal found that the consequences of removing the claimant would be unduly harsh for his son, identified as MSA, who was born in March 2005 and so is now 17 years old.

5. In order to understand the criticisms made by the Secretary of State we need to set out with some care a summary of the First-tier Tribunal's Judge's reasons for allowing the appeal.

6. The Judge began by noting that the claimant first entered the United Kingdom in March 1995 with entry clearance as the husband of TB. He was granted indefinite leave to remain in March 2008 some thirteen years later. By then he had divorced TB and remarried twice more. His wife, ZN, is the mother of his three children who were born in 2000, 2003 and 2005. Although living mainly in the United Kingdom since being granted indefinite leave to remain the claimant has spent considerable periods of time in Pakistan. On one such visit, in 2011, he married again but the marriage is bigamous. He remains married to ZN.

7. The claimant was convicted by the Magistrates of two offences of ill-treating his daughters, then aged 15 and 12 years. The offences were violent rather than sexual. The claimant was committed to the Crown Court for sentence. He appealed the convictions and his appeal was dismissed by the Crown Court in June 2016. The offences were punished with terms of 30 months and ten months' imprisonment to run concurrently. The claimant thus attracted "automatic deportation" within the meaning of Section 32(4) of the UK Borders Act 2007. The claimant was released from prison on license. At paragraph 10(iv) of her Decision and Reasons the First-tier Tribunal Judge noted that:

> "The Appellant's licence conditions prohibiting contact with his children under 18 years old until 16th September 2019 and him remaining the subject of a restraining order in relation to his youngest child SA, his son MSA and his wife ZN and her son MH."

8. The claimant's case for international protection was based on a fear of relatives or former relatives seeking vengeance. That part of his claim was refused and the subsequent appeal dismissed and we see no need to say very much about it in this Decision and Reasons. The Secretary of State found that the claimant had committed a particularly serious crime and was a danger to the community and was, in any event, disqualified from international protection by reason of Section 72 of the Nationality, Immigration and Asylum Act 2002. The Judge

explained at paragraph 42 of her Decision and Reasons that she declined to determine if she agreed with the Secretary of State's decision on this point.

9. The Judge also noted that the claimant was, or had been, subject to conditions prohibiting his having contact with his children and that his first wife had obtained a non-molestation and occupation order against him in 1999. His current wife in the United Kingdom had previously informed the Secretary of State that she was the victim of domestic abuse at his hands.

10. Nevertheless, the Secretary of State's decision to refuse leave on human rights grounds was made on the presumption that the children's best interest would lie in the claimant remaining in the United Kingdom and he was at the time of making that decision enjoying some contact with them. The oldest child, a daughter, had reached her majority and her relationship with the claimant was not considered by the Secretary of State.

11. The Secretary of State acknowledged that there have been Family Court proceedings that led to limited supervised contact between the claimant, his younger daughter and MSA but although the claimant had been allowed more contact with his son his contact with his daughter was reduced to telephone calls. The Secretary of State did not accept that the claimant enjoyed a subsisting parental relationship with his daughter or MSA.

12. The Secretary of State accepted it would be "unduly harsh" for the children to relocate to Pakistan with the claimant but not that it would be unduly harsh for them to remain in the United Kingdom without the claimant.

13. The claimant had not provided any evidence that he supported the children financially and their day-to-day care had come from their mother.

14. The First-tier Tribunal Judge considered the papers before her and noted that this is a case where the Protocol on Communications between Judges of the Family Court and Immigration and Asylum Chambers of the First-tier Tribunal had been followed and there was correspondence between Resident Judge Appleyard of the First-tier Tribunal and Her Honour Judge Thomas of the Birmingham Family Court dealing with these things.

15. The First-tier Tribunal Judge noted at paragraph 74 of the Decision and Reasons that the claimant:

> "pursues his appeal on the basis of his genuine and subsisting relationship with his son MSA and accepts for the purposes of the 'exceptions to deportation' that he does not currently have a genuine and subsisting relationship with his younger daughter SA."

16. The Judge noted that although the evidence of any contact between the claimant and his minor daughter was rather scanty the evidence of his relationship with his son pointed to a relationship that had strengthened since the claimant asked for leave to remain. On 6 August 2020, about 5 months before the First-tier Tribunal Judge heard the appeal, the restraining order was varied so there was no restraint on the claimant's relationship with MSA. It came to light at a Case Management Review Hearing in the First-tier Tribunal on 11 December 2020 that MSA had started to live with the claimant. This does not appear to contradict any court order but the First-tier Tribunal

informed the Family Court of MSA's change of address and the Family Court told the local authority to investigate.

17. It became apparent that MSA had been living with his father since October 2020.

18. The Secretary of State's case was that it would not be unduly harsh for MSA to return to live with his mother.

19. The judge accepted evidence that the claimant had been visited by a social worker at the instigation of the local authority and the social worker had had a private interview with MSA. Given the absence of any follow up or further enquiry, the Judge accepted that the social worker was at least broadly satisfied that the relationship was wholesome. The Judge confirmed that the substantial point in the appeal was whether the claimant's deportation would be unduly harsh for MSA.

20. There is certainly no evidence that the Family Court did not at least tolerate MSA living with his father.

21. The Judge, for the purposes of record, rejected any contention that the conviction was unsound and made her decision on the basis that the claimant was justly convicted on the evidence before the Crown Court. The Judge also rejected the contention that MSA, or indeed other children, had been manipulated to give untruthful evidence against the claimant at some stage. The claimant alleged the contrary and was supported by his oldest daughter but the Judge has explained in great detail that the claimant's daughter was a vulnerable and unreliable witness.

22. Paragraphs 90 and 91 of the Decision and Reasons are particularly important. I set them out below:

> "90. I do not accept the respondent's submission that any impact on MSA is alleviated or lessened with his ability to return to live with his mother, such that it is not unduly harsh for MSA to remain in the UK without his father. I find that such a submission does not take into consideration MSA's need for stability and his clear wish to maintain a close relationship with his father. Whilst it might be said that the instability previously experienced by MSA was a direct result of the [claimant's] own conduct, I remind myself, pursuant to the relevant and well-established case-law, that it is not something that can be laid at MSA's door. I also consider that such a submission is far removed from the [Secretary of State's] duty to have regard to MSA's welfare when discharging her function as a decision-maker in the [claimant's] deportation case.
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> 91. Having considered all of the evidence before me, as well as that available through the disclosure from the Family Court, I do find that it would be unduly harsh for MSA to remain in the UK without his father. I do not reach such a conclusion lightly, particularly in light of the specific nature and seriousness of the [claimant's] criminal convictions and the weight to be attached to the public interest in deporting those who have offended in such a way to engage the automatic deportation provisions."

23. The Judge then set out matters that she thought "tipped the balance" in the claimant's favour. These include the sentencing judge noting that the offences involved the claimant's daughters and that his son was "cherished and looked after", that time has passed so the Judge felt the emotional harm done to MSA

by seeing his sisters ill-treated had faded, that the Family Court had recommended supervised contact in 2019 and that MSA had "clearly voted with his feet". The Judge also noted that the claimant's elder daughter had resumed living with him and MSA. Further, and importantly, the Judge found that MSA was a "vulnerable child" and referred to his having had liver disease leading to a liver transplant and his need for lifelong intense medical supervision. Despite all that had happened MSA clearly wanted to maintain a relationship with his father and at paragraph 93 the Judge explained that:

> "I agree with the [claimant] that the disruption and sense of loss that the [claimant's] deportation would have on MSA renders it unduly harsh for MSA to remain in the UK without the [claimant]. Removing the [claimant] would entail another move for MSA, which brings about further instability. Ordinarily, this may not be sufficient to satisfy the 'unduly harsh' threshold but I consider that in this case, MSA in particular requires stability."

24. The Judge was also doubtful about the claimant's ability to maintain a relationship with his son if he returned to Pakistan. The Judge did not accept that MSA's mother would support his having contact and confirmed that she regarded his having to maintain a relationship over a long distance to be unduly harsh.

25. It is against these findings that we consider the Secretary of State's challenge. Upper Tribunal Judge Lindsley gave permission on each ground but her main reasons for giving permission were in the following terms:

> "The grounds of appeal contend, in summary, as follows. It is argued that the First-tier Tribunal erred in finding that the deportation of the [claimant] would be unduly harsh to his son MSA as it fails to give adequate reasons to support this finding particularly given that the [claimant] is found to be a medium risk to all children; and given the short period of time MSA had lived with the [claimant] rather than his mother; and given that removal from the [claimant's] home is found to amount to disruption and loss to MSA which does not amount to a sufficiently severe impact to be unduly harsh."

26. The grounds supporting the application refer simply to "ground 1" but then give particulars over paragraphs 4 through to 9. The ground is headed "Failing to give adequate reasons for findings on a material matter".

27. Paragraph 4 points out that at the time of the First-tier Tribunal determining the appeal MSA had been living with his father for about three months since October 2020 and no outcome was recorded for any investigation made by the Family Court. This is hardly a ground of appeal but does set the context.

28. Paragraph 5 notes that the Judge gave no reasons for MSA's decision to live with his father. It is contended that MSA's preference to live with his father does not amount to a reason to show that alternative arrangements are unduly harsh. We give some weight to this but it is slightly missing the point. The fact is that the Judge satisfied herself that it was MSA's considered wish, apparently confirmed in a private conversation with a social worker sent by the local authority, to live with his father. That finding does not need any further investigation or comment to be entirely understandable and permissible. It is right that the preference does not mean that any alternative is unduly harsh but the Judge did not say anything to the contrary.

29. The ground goes on that the Judge had regard to MSA's need for stability but said this came after a short period of time during which time he could be returned to live with his mother. The Judge did give a reason for saying this was unduly harsh. It was the Judge's view that the boy needed stability and should not be subjected to another removal after a relatively short period of time. It is clear that the Judge recognised that MSA went to some trouble to be with his father. As in the case of his older sister, the evidence points to his wanting it very much.

30. It is a feature of appeals in the Upper Tribunal that the interests of children are rarely represented separately. This is a case where it might have been helpful to have been told a great deal more about MSA's relationship with his parents and his reasons for wanting to live with his father but the Judge had to decide the appeal on the evidence that was before her. The Judge was entitled to find that a young person who had been living with his mother and sister but who wanted to go back to live with his father and had been able to go back to live with his father would find his father being removed from his life after such a short period of time an undesirable hardship. However it went further than that. The First-tier Tribunal Judge had regard to MSA's vulnerability and her finding on the likely consequence of removal were illuminated by her observations of MSA as he gave evidence. Her finding is very "case specific" and it was the cumulative effect of many strands of evidence that led her to find that the "unduly harsh" threshold was reached.

31. Paragraph 6 complains that the Judge gave weight to the claimant's conviction being for crimes against his daughters and says this does not ameliorate the fact that the claimant was assessed to pose a medium threat to children. We do not agree that there is any merit in this point. It is clear from the OASys Assessment that the concerns that the claimant is a threat to children is in the context of children within the family that he felt he had to discipline or control. It is not suggested that the claimant is a threat to children generally. Clearly, given this background, there must be concerns about whether MSA is safe living with his father. The Judge found that MSA wanted to be with his father and the arrangement appears to have been endorsed by the Family Court at least to the extent of being tolerated by it when there was opportunity to intervene. There is nothing in the Judge's Decision and Reasons that suggest that she thought it was somehow acceptable to assault the claimant's daughters. Rather the point she was making is that there was a history of preferential treatment of the son. The Judge was clearly not persuaded that there was a real risk to MSA's safety by reason of his living with the claimant and this finding is neither perverse nor reasoned inadequately.

32. It is suggested that MSA is unwilling to live with his mother because of animosity between him and his stepbrother and this Judge is criticised for giving weight to something that is no more than MSA's preference. We reject that criticism. Clearly the fact that MSA does not want to live with his stepbrother supports the Judge's finding that the consequences of removing the claimant would be unduly harsh for MSA but it is only one reason in the matrix that supports the Judge's conclusion.

33. The grounds then refer to the decision in **HA (Iraq) v SSHD [2020] EWCA Civ 1176** which recognises that the decision to deport a parent can have "huge

detrimental consequences for a child" but that does not stop it being lawful. In **MK (Sierra Leone) v SSHD [2015] INLR 563** at paragraph 46 the Court of Appeal reminded itself that an evaluative assessment was required and that "unduly harsh" is not the same as uncomfortable, inconvenient, undesirable or merely difficult but looks for an elevated threshold.

34. It may be that this submission goes to the very crux of the case. It is not suggested that the First-tier Tribunal misdirected itself in any significant way, if at all. Ms Ahmed did however make the entirely justified observation that giving a self-direction is not the same as following a self-direction. It is absolutely clear to us that the Judge has decided the best interests of MSA lie in his living with his father and remaining there at least for some significant time rather than returning to his mother even though she seems able to provide good care. If we were simply concerned with MSA's best interests we would find it very hard to criticise the decision. We know what the Judge has done and we know why she has done it. The high watermark of the case is whether the predicted consequences on MSA are sufficient to justify a finding that removal is unduly harsh. Ms Ahmed said they are not. Mr Raza says that they are. The Judge was clearly concerned because she indicated expressly that it may not have been enough just to say that the child wanted to be with his father. At paragraph 93 the Judge directed herself that "I consider that in this case, MSA in particular requires stability". This was in the context of recognising that removing the child MSA from his father and presumably back to his mother because, as we have set out at paragraph 23 above, the Judge says:

> "Ordinarily, this may not be sufficient to satisfy the 'unduly harsh' threshold but I consider that in this case, MSA in particular requires stability."

35. This is a clear finding that there is a particular element in this case which tips things in favour of allowing the appeal. We cannot agree that reasons are not given. The reasons are there. The reasons for the reasons may not be as clear but the Judge does refer to MSA's vulnerability and desire to be with the claimant and associated wish to be away from the mother and stepbrother. This is not an area of law where the answer to a legal test is always clear. It is an area where there is a big margin for judicial discretion. Even though the claimant has been in trouble for hurting children and has been restrained from behaving in a way which suggests a propensity to bully and abuse his family, we are very reluctant to interfere with a decision allowing an appeal when it is quite clear that the Judge has reached that decision for reasons that are expressed and are not even said to be perverse. They are not. Mr Razar also reminded us, rightly and appropriately, that the fact that we might have wanted to determine the appeal in a different way does not mean that the decision that has been made is wrong.

36. Putting everything together we are not satisfied that there is an error of law in the First-tier Tribunal's decision. We dismiss the appeal by the Secretary of State.

37. However, although this is something that will be obvious to the Secretary of State and the claimant's advisors, we wish to emphasise that the First-tier Tribunal allowed the appeal for the sake of the claimant's relationship with his

son. The child will achieve his majority in less than a year's time. It is not for us to make any decisions about what sort of leave the claimant is given as a result of this decision but there is nothing in the decision that would necessarily justify the claimant remaining in the United Kingdom much after his son achieves his majority. Further, if the Family Court's take a position which puts a different light on MSA's decision to live with the claimant it may well be that the issue of deportation needs to be looked at again. We merely wish to make the point that the claimant must not assume that this decision brings matters to an end.

Notice of Decision

38. Nevertheless for all the reasons given, we are not satisfied that the First-tier Tribunal erred in law and we dismiss the appeal against the First-tier Tribunal's decision.

Jonathan Perkins

Signed
Jonathan Perkins
Judge of the Upper Tribunal

Dated 20 June 2022