IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI 2022 002680
First-tier Tribunal No:
HU/04127/2020

THE IMMIGRATION ACTS

Heard at Field House IAC
On the 19th December 2022

Decision & Reasons Promulgated
On the 14 February 2023

Before

UPPER TRIBUNAL JUDGE RIMINGTON
DEPURTY UPPER TRIBUNAL JUDGE SYMES

Between

IBRAHIM EKINCI
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Hossain, Counsel, instructed on a Direct Access basis
For the Respondent: Mr Tufan, Senior Presenting Officer

DECISION AND REASONS

1. This is the appeal of the Secretary of State against the decision of the First-tier Tribunal (of 25 April 2022) allowing the appeal of the Respondent, Ibrahim Ekinci, against the deportation order made against him.

2. Mr Ekinci is a citizen of Turkey born 5 June 1981; he entered the UK on 17 November 2000, pursued an unsuccessful asylum claim whereby his appeal was dismissed on 14 February 2005, although was ultimately granted indefinite leave to remain on 10 August 2010.

3. On 10 May 2019 Mr Ekinci was convicted of common assault and battery, and sentenced to 26 weeks' imprisonment, suspended for 18 months; restraining and non-molestation orders were imposed. In September and October 2019 he was subsequently convicted of breaching a non-molestation order and on two counts of breaching the restraining order, and sentenced to 15 months' imprisonment, with a restraining order in place until 2023. The sentencing remarks record that the offending arose in the context of the breakdown in the relationship between Mr Ekinci and his wife, Seda Marinova Ivanova; she had obtained a non-molestation order prohibiting him from using or threatening violence against her and a three-year restraining order against preventing contact other than via their solicitors and prohibiting his attendance at her home. Nevertheless the Appellant had attended the café beneath her flat, abused and threatened her, had to be restrained by members of the public, and threatened her in the strongest terms via telephone calls to her mother, at one point stating he planned to come to Tottenham to kill people. He now appeared to have cleared himself of the alcohol addiction which had previously contributed to his behaviour, and had suffered a personal tragedy involving his sister the previous year.

4. On 6 July 2020 he was advised of his liability to deportation; he argued that his family life with his children and stepdaughter precluded such action.

5. The Secretary of State considered it appropriate to proceed with deportation because she did not accept that Mr Ekinci had evidenced either the existence of the children or a genuine and subsisting relationship with them. Mr Ekinci appealed against that decision.

6. Determining that appeal, the First-tier Tribunal accepted that Mr Ekinci was father to two boys R (born 29 September 2013) and Y (born 2 March 2016); he also had a stepdaughter, K S I, born 23 May 2011. The mother of all three children is his ex-partner Ms Ivanova. He saw all three children on a consistent basis: they stayed with him every weekend and most of the time during the school holidays. There had been disputes in the past between himself and his ex-partner, but these were resolved now, and she allowed him regular access to the children. He was settled in the UK and all his ties were here, although he had not obtained British citizenship.

7. The First-tier Tribunal placed significant weight on the January 2022 report of Kerry Redfern, an independent social worker. She observed that he had regular contact with the children, every weekend and extended contact during the school holidays, and during 2021, he had all three children for two weeks when their mother went on holiday; they were relaxed and comfortable in his care, and he could meet their needs easily. His

departure to Turkey would sever the relationship, as the family could not finance his return here for visits, and it would be unlikely that Ms Ivanova would take them to Turkey. His departure would significantly impact upon them, as they had a close attachment developed from an early age and K saw him as a father figure; their social-psychological development was at an important stage and experiences now would impact on their future interactions as adults.

8. The First-tier Tribunal identified some flaws in the report: the author lacked the benefit of having seen the refusal letter, did not refer to Mr Ekinci's offending and its impact on the children, and failed to particularise the nature of the asserted significant harm that his expulsion would cause.

9. A Cafcass report of September 2021 stated that the allegations of domestic violence made against Mr Ekinci, if true (at that time he denied committing domestic abuse), would have led to emotional and physical harm to the children, though now he and Ms Ivanova had reached an agreement as to childcare arrangements. The Barnet family court ordered in February 2022 that the children be permitted to stay with Mr Ekinci from Saturday afternoons to Sunday evenings, that they be collected and returned by his nephew, and that its Order might be disclosed in immigration proceedings. The Appellant's nephew Mehmet confirmed that, having witnessed the children in that context, he could see that the Appellant loved them, and was constantly talking about them; he was aware that the Appellant cooked for them and provided financial support. The Tribunal noted that all three children had written of their closeness to Mr Ekinci though treated those letters with circumspection given that they were under the care and authority of Mr Ekinci himself in a context where he faced deportation.

10. The First-tier Tribunal concluded that

    (a) The Appellant had a genuine and subsisting relationship with all three children, evidenced by the important part he played in their lives including issuing family proceedings to ensure contact with them, and the content of the Cafcass report confirming Ms Maranova's assent to such ongoing contact;

    (b) K as well as R was now a qualifying child;

    (c) The childrens' best interests were to remain here: if they left the UK to live with Mr Ekinci they would be separated from their mother, their education would be disrupted, and they would lose the relationships and friendships they had formed whilst growing up here;

    (d) Mr Ekinci had been convicted of serious offences (even though the sentence was only three months over the minimum for a medium offender) both via threats and breaches of the orders, which included an assault on his partner in May 2019 to which he had pleaded guilty albeit he denied this at the hearing;

(e) This offending nevertheless arose in the context of a relationship and the tension that underlaid it had now been resolved, as had his alcohol abuse; he now had the offer of a job to which to return;

(f) In conclusion, deportation was unduly harsh in its impact on the two qualifying children and would additionally separate him from (the non-qualifying child) Y contrary to the latter's best interests.

11. The Secretary of State appealed on the grounds that the high threshold for undue harshness was not crossed on these facts bearing in mind that the test was a high one going beyond what would normally be involved for any child facing parental deportation.

12. On 16 May 2022 the First-tier Tribunal granted permission to appeal, on the basis that the Judge had failed to address the degree of harshness the Appellant's expulsion would have on the children.

13. For the Secretary of State Ms Ahmed submitted that the First-tier Tribunal's reasoning was inadequate given the guidance from the authorities. Were we to find an error of law, the matter might reasonably be retained in the Upper Tribunal to remake the decision, with preserved findings.

14. Mr Fidler submitted that this was a case turning on the adequacy of the First-tier Tribunal's reasons. Clearly separation from the child Y alone would suffice to constitute undue harshness. The question of "very compelling circumstances" remained to be decided. If the Upper Tribunal found an error of law, the matter should be remitted to the First-tier Tribunal.

Decision and reasons

15. Lord Carnwath stated in *KO (Nigeria)* [2018] UKSC §27:

> "Authoritative guidance as to the meaning of 'unduly harsh' in this context was given by the Upper Tribunal … in *MK (Sierra Leone)* … [2015] INLR 563 …. They referred to the 'evaluative assessment' required of the tribunal:
>
> > 'By way of self-direction, 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.'"

16. At §§42-45 Lord Carnwath went onto endorse the *MK* test. Our primary concern with the First-tier Tribunal's decision is that whilst it gives careful attention to the children's best interests and to the severity of the Respondent's offending, and whilst it cites the *MK (Sierra Leone)* elevated test, it does not identify its reasoning for concluding that the test is traversed. This is particularly important when the social worker's report

which was the major factor in the Tribunal's conclusions was itself subject to certain shortcomings including, most importantly, the judge's observation that "apart from generic quotes from studies on the effect of separation of children from their parents, [40],[46], there is no explanation of the nature of the significant harm that would be suffered by the children in the context of their relationship with the appellant."

17. Essentially the First-tier Tribunal's approach was to find that Mr Ekinci's expulsion from the UK would be contrary to the childrens' best interests and then to conclude find that the public interest occasioned by his offending did not outweigh that consideration. This approach fails to recognise that the facts must disclose severe or bleak circumstances, which are to be contrasted with matters which are uncomfortable, inconvenient, undesirable or merely difficult. Failing to evaluate the reasons why this elevated threshold is crossed is a material error of law.

18. There is a further material error of law relating to the assessment of the public interest. The First-tier Tribunal stated that "the sentence the appellant received was only three months over the 12-month threshold for triggering automatic deportation, but this must be balanced against the impact of domestic violence on society and not least the children of the victims." Accordingly, it is clear that the fact that the Appellant's offending was at the low end of the medium offender scale received active consideration in the balance.

19. However Lord Carnwath in *KO (Nigeria)* [2018] UKSC 53 at [23] stated:

> "section 117C(1) … does not require in my view (and subject to the discussion of the cases in the next section) 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 length of sentence."

20. This would not have been a material error of law had the reasoning appeared in an assessment of "particularly compelling" circumstances and outside the context of whether the deportation fell within the specified exceptions based on family life. But it was a misdirection in relation to the treatment of medium offenders within those exceptions.

21. Mr Ekinci's appeal had a further limb to it, positing the question as to whether there were "very compelling" considerations contraindicating his deportation. As the First-tier Tribunal believed its consideration of the "unduly harsh" limb under s117C was sufficient to dispose of the appeal, it did not conduct that enquiry. However the Tribunal that next hears this appeal may need to assess the matter for itself, depending on its conclusions as to the "unduly harsh" proviso.

22. We considered whether this matter might be retained in the Upper Tribunal, but bearing in mind that Mr Ekinci succeeded in his appeal below, that the best interests of the children have not yet been lawfully assessed against the public interest, and that the independent social worker's report

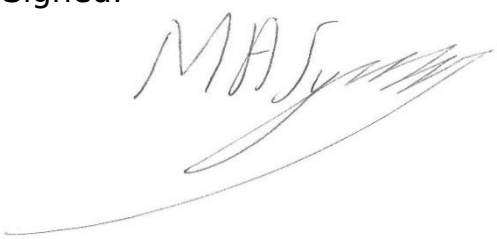
was clearly inadequate in certain respects, we have decided that remittal is more appropriate in order to fully preserve the subsequent appeal rights of both parties. The findings at [38]-[40] of the First-tier Tribunal's decision should be preserved, as they are not reasonably controvertible; otherwise all issues are to be determined afresh.

Decision:

1. The making of the decision of the First-tier Tribunal involved a material error of law.

2. We set aside the decision of the First-tier Tribunal dismissing the appeal and remit the matter to the First-tier Tribunal for re-hearing afresh.

Signed:



Deputy Upper Tribunal Judge Symes Date: 12 January 2023