IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-000495

First-tier Tribunal No: HU/01316/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 14 September 2023

Before

UPPER TRIBUNAL JUDGE OWENS

Between

The Secretary of State for the Home Office

Appellant

and

Mr Kashyap Natwarbhai Patel
(NO ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Mr Basra, Senior Presenting Officer
For the Respondent: Ms Pinder, Counsel, instructed by Takk & Company Solicitors

Heard at Field House on 4 May 2023

DECISION AND REASONS

Introduction

1. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Roots "the judge" sent on 12 January 2023 allowing Mr Patel's appeal against the decision to refuse his human rights claim dated 7 April 2020 which followed a decision to deport him from the United Kingdom.

2. Permission to appeal was granted by First-tier Tribunal Mills on 27 February 2023.

Background

3. Mr Patel is a national of Pakistan who has been lawfully resident in the United Kingdom from February 2005. On 21 September 2021 he was sentenced to a total of 32 months' imprisonment for the offence of dangerous driving and one count of perverting the course of justice. The Secretary of State decided that it was in the public interest to deport Mr Patel from the UK and served a Notice of deportation decision on 9 November 2021. In response, Mr Patel raised a human rights claim. On 7 April 2022 the Secretary of State made a decision refusing the human rights claim on the basis that Mr Patel is a foreign criminal who does not meet any of the Exceptions at Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") because it would not be unduly harsh for his two children to remain in the United Kingdom without him or alternatively it would not be unduly harsh for the children and their mother to relocate with him to India as a family unit. It was not accepted that the appellant had a genuine and subsisting relationship with his youngest child. Further, the Secretary of State decided that there were no "very compelling circumstances" which outweigh the public interest in deportation.

4. Mr Patel's case is that he has a British partner and two British children aged 12 and 5, with whom he was intending to reside after he was released from prison. He asserts that it is in the best interests of his children to remain in the United Kingdom with him and it would be unduly harsh for the children to either relocate to India or remain in the United Kingdom without him. He meets Exception 2 of Section 117C(5) of the 2002 Act and it would be a disproportionate interference in his protected rights pursuant to Article 8 ECHR to remove him from the UK.

The decision of the judge

5. The judge heard evidence from Mr Patel and his fiancée. The judge took into account Mr Patel's criminality as well as his personal and family situation. The judge concluded that it would be unduly harsh for Mr Patel's two children to relocate to India as a family unit and that it would also be unduly harsh for them to remain in the United Kingdom without him. The judge found that Exception 2 at 117C(5) of the 2002 Act applied. The judge allowed the appeal on this basis.

Grounds of appeal

6. The grounds of appeal are as follows:

Material misdirection of law

The judge misdirected himself by failing to appreciate the high threshold of the "unduly harsh" test as set out in HA (Iraq) [2022] UKSC 22.

Inadequate reasons

There was insufficient evidence to demonstrate the extent of the detrimental emotional, psychological or physical impact on the children and particular to the appellant's son. The evidence relied on was the written and oral evidence of the witnesses. There was no school evidence. It was speculative of the judge to suggest that if the appellant were deported that there was likely to be a medium and long-term impact on the children's wellbeing. The judge has given inadequate reasons in respect of both the "go" and "stay "scenarios.

Material misdirection of law

7. At the outset of the hearing Mr Basra conceded that the judge had in fact directed himself appropriately to the correct legal test and that he would not pursue this ground.

8. I am in agreement. At [15] the judge says:

> "The Supreme Court has recently given guidance in HA (Iraq) [2022] UKSC 22. This summarises and clarifies much of the previous caselaw including NA Pakistan, and HA Iraq. It re-states and clarifies the "unduly harsh" test. I have applied that test and the guidance. The SC reiterated at 21 and 41 a focus on the wording of MK Sierra Leone [2015] UKUT 223 (IAC) which stated:
>
> *"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 antitheses of pleasant or comfortable. Furthermore, the addition of the adverb unduly raises an already elevated standard still higher.""*

9. The judge was manifestly aware of the correct legal test and that the "unduly harsh" test poses an elevated threshold. Further, the judge had a detailed skeleton argument before him which set out the relevant law in detail and made submissions about how the effect on the eldest child would be bleak. As an experienced judge, he could be expected to adhere to the self-direction in accordance with the principles set out by Lady Hale at [30] in AH (Sudan) v SSHD [2007] UKHL 49.

10. This ground is not made out.

Inadequate reasons

11. In respect of this ground, I note firstly that there is no challenge in the grounds to any of the judge's factual findings. This was confirmed by Mr Basra in submissions.

12. Mr Basra made brief submissions in respect of ground 2. His primary submission is that the judge's factual findings were not capable of meeting the "elevated" test. The judge has not explained adequately why it would be bleak for the children to remain in the UK when their mother had been coping as a single parent and running her business. It was not adequately explained why it would be "unduly harsh" for the family to move to India. At most the facts demonstrate some difficulty. Many children move. They would be with both of their parents and have their grandparents there. There would no financial difficulty.

13. In my view these grounds are straying into a submission that the judge's decision is irrational, and I remind myself of the high hurdle of establishing irrationality.

14. Ms Pinder submitted that the grounds amount to no more than a disagreement with the decision. She submitted that the decision was detailed, concise and efficient. The judge records the evidence and makes appropriate findings. The judge directed himself correctly, has reminded himself throughout the decision that he is dealing with the concept of unduly harsh and his findings are capable

of supporting his ultimate conclusion that it would be unduly harsh for the children to remain in the UK without their father or to go as a family unit to India.

15. I am in agreement with Ms Pinder. The judge had sight of the "sea" of evidence before him which consisted of the representations and evidence submitted to the Secretary of State in support of Mr Patel's human right's claim, as well as the numerous documents contained in the appeal bundle which included detailed witness statements. He also heard oral evidence from the witnesses.

16. At [24] the judge found the witnesses to be credible and reiterated this at [35] where he noted that the witnesses' credibility was not challenged in any significant way by the Secretary of State in the hearing. The credibility finding is not challenged in the grounds of appeal indeed given the lack of challenge in the hearing this would be a difficult ground to run.

17. The judge found that the children's parents separated in January 2019 and that Mr Patel's wife divorced him and remarried. The judge accepted that the elder child, the appellant's son, who I will call XX, went to live with his father after the couple separated in January 2019 and lived with him until the couple reunited in June 2021 after Mrs Patel's second marriage broke down and thereafter remained living with his father until Mr Patel was incarcerated on 21 September 2021.

18. The judge was manifestly entitled to find at [29] that Mr Patel had a particularly close relationship with his son because he was his primary carer for over two years and that they have a "strong relationship". The evidence before the judge was that Mr Patel was heavily involved with bringing up his son, taking him to Kudo, swimming, football, walking the dog, taking him to school and supporting him with his homework and education as well as meeting his practical and emotional needs. He also took him to medical and dental appointments.

19. At [30] the judge found that XX was aware that his mother had remarried and that his stepfather moved into his mother's home in December 2020 and that this significantly affected his relationship with his mother. He found that XX he stopped taking to her for a while. The judge accepted the witnesses' evidence that XX is closer to his father than his mother.

20. Contrary to the assertion in the grounds, there was evidence from XX's school at pages 87 to 912 of Mr Patel's appeal bundle. This evidence demonstrated that after Mr Patel went to prison the eldest son's attendance at school fell to 83% and was of concern and that he had received numerous detentions for truancy, "failure to hand in homework" and "insufficient work" etc. All of these detentions dated from after Mr Patel was incarcerated and this evidence was in stark contrast to earlier evidence before the judge from RTC tutors in January 2020 when the child was living with his father. In an email from his tutor to Mr Patel it is said that there has been "a dramatic change in his attitude and application in class. He is now enthusiastic, concentrates well, contributes his ideas and volunteers answers. It really is an incredible change from those early weeks, so that you for talking to him and really well done XX for bringing about the changes". The judge referred to this evidence at [38]. It was manifest that XX was now having significant problems in engaging with education.

21. It was clearly open to the judge to find on this evidence, as well as from the parents' evidence that the absence of Mr Patel from XX's life was having a negative impact on his education and that his mother was not managing to cope bringing up children as a single parent without the help of Mr Patel. There was a

further letter from the headteacher of St Matthew's High Brooms C of E Primary school confirming that mum was "struggling and not managing to organise" what the younger child needed. The reference by the Secretary of State to a lack of evidence from schools is in error.

22. In this respect, the assertion in the grounds that the witnesses' oral evidence is unsupported simply has no basis. There was independent evidence before the judge to support the parents' evidence that Mr Patel's absence from the children's lives was having a very negative and detrimental impact on both children, in terms of their education, mental health and their mother's ability to cope. I take into account that the judge disregarded the independent social work report in its entirety because of the weaknesses in that report which demonstrates his ability to weigh up evidence appropriately.

23. The judge was also manifestly entitled to find at [35] that XX has found it emotionally very difficult to visit his father in prison and at [39]:

> ".. there has been a very significant effect on XX. He has lost interest in activities that he previously did with his father, who always took him to those things and that XX has said he has little interest in pursuing those activities in his father's absence. I find that there is a strong emotional bond and dependence between XX and Mr Patel".

24. At [41] the judge found that XX was approaching a "pivotal stage" in his education because he would shortly be approaching his GSC curriculum. This finding is not challenged.

25. Having considered all of the evidence the judge found that the absence of Mr Patel:

> "would very likely in the medium to longer term to have a significant effect on Mrs Patel, her ability to run the business and her ability to care for the children. There is evidence that she is on anti-depressants and I accept there has been a deterioration in her mental health. I accept that this is having and is likely to heave a significant medium and long-tern impact on the children's welling if the appellant were deported".

26. The grounds take exception to this last paragraph suggesting that the finding is "speculative" by which I understand that the position of the Secretary of State is that the finding is irrational because it is not grounded in the evidence.

27. Firstly, there was in the appellant's bundle at pages 65 to 73 GP records for Mrs Patel. These confirm that she had been prescribed sertraline for depression. It also confirms that she takes pain killers for back pain. The GP notes record that Mrs Patel is struggling because her partner is in prison and not out until January. She has low mood and back pain. At page 74 there is a letter from her GP stating that she is "going through a stressful period in her life and suffering from depression. She is finding it challenging to look after her children, support her partner and run her business by herself". There is also evidence that she has been referred to physiotherapy for her back pain and that she finds her back pain debilitating.

28. The school evidence is also that Mrs Patel was struggling. The school gives concrete examples of this by pointing to Mrs Patel bringing her daughter to school late and bringing her in wearing uniform on non-uniform day. In their

witness statements, both witnesses give evidence that Mrs Patel is suffering from depression. In her own witness statement she says:

> "I cannot sleep at night I spend most nights worrying and crying. I have a lot of anxiety with the current situation I am in with my children and no support system from my fiancée. I have very poor ill health. The doctors have advised me to take time off for myself, but this is impossible because I cannot manage without Mr Patel. Now that I have been diagnosed with depression, I do not want my children to suffer anymore and in order to help my situation, I just need their father out of prison to help and support me".

29. There was also extensive oral evidence. The evidence was not challenged, and the judge was entitled to find that the witnesses were credible. I am satisfied that on the basis of this evidence it was open to the judge to make a finding that the incarceration of Mr Patel was causing Mrs Patel to feel depressed, that she was struggling with her business and children and the deterioration in her son's mental health and her poor mental health would be likely to continue if her partner were deported and that this would affect her children's wellbeing. This finding cannot be categorised as either inadequately reasoned or irrational.

30. In this appeal, the judge was clearly entitled to find that it would be unduly harsh for the children to remain in the UK without their father on the basis of his findings that that XX had a strong bond with and dependency on his father; that he had been negatively impacted by his mother's remarriage and then again by his father's absence in prison in terms of his emotional wellbeing and education; that his mother was struggling to cope without Mr Patel and that Mr Patel played an important role in the family. The judge manifestly considers that the situation would involve an elevated level of harshness. The Secretary of State's grounds on the "stay" scenario are merely an attempt to reargue the appeal and these points would have been made to the judge in submissions. I am satisfied that the judge has given adequate reasons why it would be unduly harsh for this particular child to remain in the UK without his father.

31. The judge's findings are similarly relevant to the "go" scenario. The judge was entitled to take into account that the children were British and had lived all their lives in the UK and had ties to the UK. He was also entitled to take into account their rights as British citizens. The judge was also entitled to take into account XX's clearly expressed wish to remain in the UK where he had grown up.

32. The judge recognised that the family had financial resources and extended family in India but ultimately having found that XX had experienced negative feelings when his parents separated; that he lived separately from his mother and had negative feelings towards her because of her second marriage, that he had experienced further disruption and distress when his father went to prison which had impacted on him to such a negative extent that he was playing truant from school, failing to complete his homework, pursue his previous hobbies was withdrawn and isolated; and was at a pivotal stage of his education, he was manifestly entitled to find that the further significant change of relocating to India at this age would, for this child, be unduly harsh. I take into account that reasons do not always need to be perfectly expressed. It is tolerably clear that the judge found that the child would be negatively impacted by any further major disruption to his life such as a move to India and that this would be more than undesirable or inconvenient. I am satisfied that this finding was open to the judge on the evidence before him and is adequately reasoned. I am satisfied that

the judge has properly understood the level of harshness required and has applied the correct test in this appeal.

33. In this respect I note the words of Lord Hamblen in HA at 37:

> 37. Fourthly, a test involving a notional comparator child is potentially inconsistent with the duty to have regard to the "best interests" of the child in question as a primary consideration in accordance with section 55 of the Borders, Citizenship and Immigration Act 2009. This requires having "a clear idea of a child's circumstances and of what is in a child's best interests" and carrying out "a careful examination of all relevant factors when the interests of a child are involved" - see Zoumbas at para 10. The focus needs to be on the individual child, but the discounting of what are said to be the "normal" or "ordinary" effects of deportation by reference to a notional comparator child risks the court or tribunal ignoring the actual impact of deportation on the particular child in a search for features which are outside the supposed norm. As Lord Carnwath stated at para 15 of his judgment in KO (Nigeria), the presumption is that the statutory provisions are intended to be consistent with the general principles relating to the "best interests" of children.
>
> 38. Fifthly, the notional comparator approach gives rise to the risk that a court or tribunal will apply an exceptionality threshold. Searching for particular features which take the facts of an individual child's case outside the ordinary run of cases is likely to mean looking for exceptional or rare cases. As Underhill LJ stated at para 56:
>
> > "… if tribunals treat the essential question as being 'is this level of harshness out of the ordinary?' they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of 'ordinariness'. Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."
>
> 39. Sixthly, the Secretary of State's suggested approach is likely to lead to perverse results. The respondents give the example of a case involving the impact of parental deportation on an eight-year-old who cohabits and has a very close relationship with the parent. As the norm for "any child" in that qualifying child's position would be that the effect of separation would be considerable, it would allow the significant effect of that deportation to be treated as acceptably harsh and thereafter discounted from further consideration. This can be contrasted with the case of a 17-year-old who lives separately from the parent and whose relationship is at the very lowest end of the genuine and subsisting relationship spectrum. As the norm for "any child" in that qualifying child's position would be that the effect of separation would be of much more limited significance, it is likely to be easier to satisfy the unduly harsh test because it will be more straightforward to identify particular features that take the case above the much lower baseline level than the higher bar set for the highly dependent eight year old"

34. Overall, I am satisfied that the judge followed the approach set out at [44] of HA where it is said:

> "Having given that self-direction, and recognised that it involves an appropriately elevated standard, it is for the tribunal to make an informed assessment of the effect of deportation on the qualifying child or partner and to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it."

35. That is precisely what the judge has done in this appeal. The grounds are a disagreement with the decision. I cannot identify an error in the judge's approach. The finding of undue harshness is perhaps generous but was firmly rooted in the evidence and does not reach the high threshold of perversity as alleged by the Secretary of State.

36. In this respect I take into account the words of Reed LJ in Henderson v Foxworth Investments Ltd [2014] UKSC 41 at [62];

> "It does not matter, with whatever degree of certainty, that the appellate court considers that it would have reached a different conclusion. What matters is whether the decision under appeal is one that no reasonable judge could have reached."

37. I also remind myself of the comments of Carnworth LJ in Mukarkar approved by the Supreme Court in MM (Lebanon) 2017 SC10 that:

> "The mere fact that one tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law, so as to justify an appeal under the old system, or an order for reconsideration under the new… However on the facts of a particular case the decision of a specialist tribunal should be respected".

Conclusion

38. It follows that none of the Secretary of State's grounds of appeal are made out and the Secretary of State's appeal is dismissed.

Decision

39. The decision of the First-tier Tribunal allowing the appeal is upheld.

Judge of the Upper Tribunal
Immigration and Asylum Chamber

14 September 2023