IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-004385

First-tier Tribunal No: EA/01428/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:

12th February 2024

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

Pankaj Dheer
(NO ANONYMITY ORDER MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

Representation:
For the Appellant: Mr M Azmi of Counsel, instructed by Super Immigration Services
For the Respondent: Ms T Rixom, Senior Home Office Presenting Officer

Heard remotely at Field House on 9 February 2024

DECISION AND REASONS

1. To avoid confusion, the parties are referred to herein as they were before the First-tier Tribunal.

2. By the decision of the First-tier Tribunal (Judge Hamilton) dated 11.9.23, the respondent has been granted permission to appeal to the Upper Tribunal against the decision of the First-tier Tribunal (Judge Mehta) promulgated 16.8.23 allowing the appellant's appeal against the deportation order made on 28.2.23 following his conviction and sentence to imprisonment for sexual assault.

3. The appellant is a national of India who overstayed his leave and married BB, an EEA national. The couple have two children.

4. In summary, the grounds assert that the First-tier Tribunal made a material misdirection of law and erred by failing to provide adequate reasons for findings on a material matter, namely that the appellant's deportation would result in unduly harsh consequences for his children.

5. In granting permission, Judge Hamilton considered it “arguable the Judge has not provided adequate reasons for finding that the high and demanding threshold for establishing unduly harsh consequences had been crossed. In particular, it is arguable the Judge failed to give adequate reasons for accepting the independent social worker's conclusions that the children would suffer ‘significant emotional harm’”.

6. Very late, the Upper Tribunal has received by email a number of bundles, including an appellant’s bundle, an ‘addendum bundle,’ and Mr Azmi’s skeleton argument. It is not entirely clear why these documents were not uploaded to the online platform in time or at all. However, they have been carefully considered and taken into account.

7. Following the helpful submissions of both representatives, I reserved my decision to be provided in writing, which I now do.

8. At [35] of the decision, the First-tier Tribunal concluded that “the appellant’s deportation would cause significant emotional harm to his children and I therefore find that it would be unduly harsh for the appellant’s children to remain in the UK without the appellant.”

9. The respondent argues that there is no sufficient reasoning to support this conclusion beyond a finding that he has a genuine parental relationship with the children, takes them to school and other activities, and that it is the children’s wish that their father should not be deported. The respondent points out that this role can be fulfilled by the mother. Even though she does not drive, the children were still able to attend school during the appellant’s incarceration and there are bus routes to school directly passing their home. It is submitted that there was nothing in the evidence to demonstrate that deportation would bring the consequences to the very high threshold of being unduly harsh as understood by the case law cited in the grounds.

10. Unarguably, the ‘unduly harsh’ threshold is a high one. In KO (Nigeria) [2018] UKSC 53, the Supreme Court confirmed that the necessary level of harshness goes beyond what would necessarily be involved for any child faced with the deportation of a parent and is a high threshold. In PG (Jamaica) [2019] EWCA Civ 1213, the Court of Appeal made clear that in the case of a foreign offender who is sentenced to 1 to 4 years it is only where the consequences for the children are ‘unduly harsh’ will deportation be constrained, and that this is entirely consistent with article 8 ECHR.

11. Unarguably, between [21] and [27] the judge set out a detailed self-direction on the law relating to the phrase ‘unduly harsh’, referencing excepts from the case law, concluding with the Court of Appeal’s decision in HA (Iraq) [2020] EWCA Civ 1176, where it was held that, “The underlying question for tribunals is whether the harshness which the deportation will cause for the partner and/or son is of a sufficiently elevated degree to outweigh that public interest.” The judge correctly notes that the term “sets a bar which is more elevated than mere undesirability but not as high as the “very compelling circumstances” test in s.117C(6). Beyond that, further exposition of the phrase “unduly harsh” is of limited value. Moreover, as made clear at [56]-[57], it is potentially misleading and dangerous to seek to identify some “ordinary” level of harshness as an acceptable level by reference to what may be commonly encountered circumstances: there is no reason in principle why cases of undue hardship may occur quite commonly; and how a son will be affected by a parent’s deportation will depend upon an almost infinitely variable range of circumstances. It is not possible to identify a baseline of “ordinariness”.”

12. In assessing the issue of undue harshness, the judge was entitled to place reliance on the independent social worker (ISW) report, which concluded that it is in the children's best interests for the appellant to remain in the UK and that without the appellant the children would suffer 'significant emotional harm'.

13. However, the respondent justifiably complains that other than citing the ISW, at [34] the judge identifies no reasoning other than "Mr Chester is of the view that on balance the children would suffer significant emotional harm if the appellant were to be deported against their wishes. I place significant weight upon this conclusion as Mr Chester has thoroughly analysed the evidence and substantiated his conclusion with reference to leading research from a renowned expert and human development. Mr Chester has also addressed the welfare checklist when assessing the harm to the children if the Appellant were to be deported." The judge has effectively abdicated the judicial role of providing cogent reasoning by simply adopting the conclusion of the ISW, being impressed by Mr Chester's report.

14. The grounds also complain that it has not been explained how it can be in the children's best interests for them to live with a convicted sex offender where the victim was a child, and the consequences of the attack were 'considerable and severe'. At [12] of the decision, the judge noted that the facts described by the sentencing judge were stark and disturbing. The 16-year-old victim was left with such anxiety that she had to give up her college course. The judge described the effect of the offence to have been "long lasting and severe" and was satisfied that the appellant had caused serious harm. Neither has the judge addressed the role and ability of the mother to attend to the children's emotional needs, or the fact that the children were the subject of joint care between the parents on different days. Neither has the judge addressed the support available from other family members, particularly when the appellant stated that "my mother cares for the children a lot." In short, there is no balancing exercise here, no assessment of factors, simply the unreasoned and wholesale adoption of the ISW, accepted at [34] that Mr Chester's view of 'significant emotional harm' was credible and assumed to be sufficient to cross the high threshold of 'unduly harsh.'

15. Even though the separation from their father and tragic breakup of the family may be distressing, that is the inevitable consequence of deportation and by itself insufficient to reach the requisite high threshold, perhaps even if it produces significant emotional harm. Of course, each case must turn on its own unique facts and how a child will be affected may depend on an almost infinitely variable range of circumstances, but the Tribunal must properly identify with clarity the reasons why the threshold is crossed on the particular facts of this case. I accept the respondent's submission that this was not done in this case.

16. In summary, I am satisfied that the judge has failed to identify within the decision what in particular would produce significant emotional harm sufficient to reach the high threshold of 'unduly harsh,' with the consequence that the decision is flawed for absence of adequate reasoning and therefore in error of law.

17. Both Mr Aziz and Ms Rixom submitted that it was not appropriate for this matter to remain in the Upper Tribunal, as further evidence would be required to address the current circumstances of the children and the appellant. Mr Aziz stated that there will be further evidence that Social Services are no longer involved with the children. In all the circumstances, I am satisfied that this is a case falling within paragraph 7.2(b) of the Practice Statement such that it is appropriate to remit it to the First-tier Tribunal to be remade afresh with no findings preserved.

Notice of Decision

The respondent's appeal to the Upper Tribunal is allowed.

The decision of the First-tier Tribunal is set aside.

The making of the decision in the appeal is remitted to the First-tier Tribunal with no finding preserved.

I make no order as to costs.

DMW Pickup

DMW Pickup

Judge of the Upper Tribunal
Immigration and Asylum Chamber

9 February 2024