IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-002110
First-tier Tribunal No: HU/56578/2022
IA/09393/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 07 August 2024

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

RAJESH IBHRAMPURKAR
(ANONYMITY ORDER NOT MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr S Karim, of Counsel, instructed by Cassady's Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 30 July 2024

DECISION AND REASONS

Introduction

1. The appellant is a citizen of India born on 9th June 1975. He came to the UK as a Tier 4 student migrant and was granted indefinite leave to remain on 31st January 2014. He was convicted of kidnapping his daughter, a British citizen, and removing her to India when she was 8 years old on 28th March 2017 and sentenced to two years' imprisonment. A deportation order was made against him on 1st March 2018.

2. As a result of human rights submissions the appellant had an appeal to the First-tier Tribunal which was dismissed by Judge of the First-tier Tribunal Oliver in a decision promulgated on 22nd March 2021. On 5th October 2021 the appellant made further human rights submissions

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with an application to revoke the deportation order on human rights grounds and these were refused on 2nd September 2022. The appellant's appeal against this decision was dismissed by First-tier Tribunal Judge Moffatt after a hearing on the 16th January 2024.

3. Permission to appeal was granted by Upper Tribunal Judge Keith on 30th May 2024 on the basis that it was arguable that the First-tier Tribunal Judge had erred in law firstly by making erroneous findings that the offence of the appellant had caused serious harm when this was not needed because the appellant was sentenced to a two year term of imprisonment, and so was in any case a foreign criminal, and it was arguable that this might have infected the proportionality assessment. Secondly, it is found to be arguable that the First-tier Tribunal erred in finding at paragraph 56 of the decision, that a previous judge had made no finding that there was a genuine and subsisting relationship between the appellant and his daughter when arguably such a finding had been made. Thirdly, it is found to be arguable that the First-tier Tribunal failed to consider the best interests of the appellant's daughter as a child. The Fourth ground is found to arguably contend that as there was no challenge at the hearing to the fact that the appellant's partner has renounced her Indian citizenship it had to be accepted she simply has British citizenship. Fifthly, it is found to be arguable that the First-tier Tribunal failed to consider the consequences for the appellant's mental health conditions in the context where his family remained in the UK whilst he was deported.

4. The matter now comes before me to determine whether the First-tier Tribunal erred in law, and is so whether any such error was material and whether the decision of the First-tier Tribunal should be set aside.

Submissions – Error of Law

5. In the grounds of appeal and in oral submissions from Mr Karim it is argued, in short summary, that the First-tier Tribunal erred in law as follows.

6. Firstly, it is argued, that the First-tier Tribunal erred in the determination of the issue of whether the appellant is a foreign criminal at paragraphs 41 to 47 of the decision. It is found that the appellant is a foreign criminal because he has caused serious harm which was not the respondent's case, the respondent's case being that he was a foreign criminal by virtue of his two year sentence. The appellant was not therefore on notice that it was contended that he had caused serious harm and could not and did not respond to this allegation. There was a failure to comply with the case of Lata (FtT: principal controversial issues) [2023] UKUT 00163 in dealing with the issues the parties have identified as live in the appeal, and that this prejudiced the appellant in the consideration of proportionality at paragraph 92 of the decision. It is argued that serious harm was not territory that the First-tier Tribunal

was entitled to consider even in the context of consideration of the appeal on the basis of very compelling circumstances over and above the exceptions to deportation.

7. Secondly, it is argued that there is an error of law as contrary to what is said at paragraph 62 of the decision there was no finding that the appellant did not have a genuine and subsisting relationship with his daughter by the previous First-tier Tribunal Judge Oliver, in fact at paragraph 23 of Judge Oliver's decision it was found as follows: "[p]aragraph 399A applies in this case only if the appellant has a genuine and subsisting parental relationship with his daughter. The respondent has argued that this condition is not met, because he has not seen her physically since 2015, having had only indirect contact thereafter. I disagree with this finding". The position of the previous First-tier Tribunal was that the appellant had not seen his daughter since 2015 but had been in touch by sending letters, cards and gifts. There was evidence in the bundle before this First-tier Tribunal of on-going correspondence was at pages 114-155 of the bundle. This First-tier Tribunal further errs by finding at paragraph 57 of the decision by finding that cards and gifts sent by the appellant between 2017 and 2023 could not have photographed, as this was not put to the appellant and clearly he could have taken photographs of them before he sent them, and thus in speculating about this issue. There were also photographs of the gifts he has sent via a trusted third party every quarter which he is allowed to do as per the contact order. It is argued that there was no reason to depart from the finding of the previous First-tier Tribunal that the appellant did have a genuine and subsisting relationship with his daughter.

8. Thirdly, it is argued that there was a failure to fully consider the best interest of the appellant's child. It is found that it would not be unduly harsh for the appellant's daughter to receive gifts from India at paragraphs 63 to 64 of the decision.

9. Fourthly, it is argued, that the First-tier Tribunal errs in consideration of the unduly harsh test vis a vis the appellant's British citizen partner. At paragraph 70 of the decision the First-tier Tribunal finds there is no evidence that the appellant's partner had to renounce her Indian citizenship when she became a British citizen. It had been noted that the appellant relied upon the case of Gurdeep Kaur v SSHD [2023] EWCA Civ 1353 at paragraph 27 of the decision. This case found that it was not possible to retain Indian citizenship, and this should have been followed by the First-tier Tribunal. Citizenship, and whether the partner was an Indian citizen, was relevant to whether it would be unduly harsh to the partner in the go scenario. The First-tier Tribunal further erred by finding that no weight should be given to the partner's British citizenship when this was contrary to the judgement of the Supreme Court in ZH (Tanzania) v SSHD [2011] UKSC 4.

10. Fifthly, it is argued, that the First-tier Tribunal errs in law in consideration of the unduly harsh test in the stay scenario because of the failure to make findings and therefore consider the appellant's mental health issues which include severe depression, a crisis in 2022, insomnia and bereavement as evidence by the letter from the Community Mental Health nurse at page 235 of the bundle. It is argued that the only reference to the mental health evidence is at paragraph 16 of the decision where it is said that the appellant has "on-going mental health issues". The mental health issues are serious and should have been factored into the consideration of whether it was unduly harsh for the appellant to leave whilst his partner stays in the UK, and the proportionality consideration.

11. Mr Karim tried to extend the fifth ground to add in a contention that there had been a failure by the First-tier Tribunal to treat the appellant as a vulnerable witness. I find that, aside from the fact that this was not a pleaded ground, it was not explained how this had prejudiced a fair hearing before the First-tier Tribunal. It had not been part of the appellant's skeleton argument before the First-tier Tribunal that the appellant was a vulnerable witness and there were no requests in any way for any adjustments to the hearing as a result of his being vulnerable. In the circumstances I did not permit this ground to be argued further.

12. There was no Rule 24 notice filed by the respondent but the grounds were opposed. Mr Tufan drew attention to the fact that as set out in HA (expert evidence, mental health) Sri Lanka [2022] UKUT 111, relying upon SL (St Lucia) v SSHD [2018] EWCA Civ 1894 an appellant cannot succeed under Article 8 ECHR simply because of their mental health if the Article 3 ECHR test in Paposhvili cannot be met, although medical factors might cumulate with other Article 8 ECHR factors to enable an appellant to succeed. There was no evidence which would enable to the appellant to succeed on medical grounds alone as the high threshold was not met and there was no evidence the relevant medication and treatment for the appellant's depression was not available in India. As none of the first four grounds were ultimately material any error in not balancing the medical matters was not material.

Conclusions – Error of Law

13. It is clear from paragraphs 18 to 21 of the decision that the issues in the appeal were firstly whether it would be unduly harsh to deport the appellant due to his relationship with his minor daughter and his new partner, and so whether he met the family life exception to deportation; and secondly whether it would be a disproportionate breach of his right to respect for private life to remove him given his integration in the UK – in other words whether he could meet the very compelling circumstances over and above the exceptions test to deportation when an Article 8 ECHR balancing exercise was conducted.

14. In relation to the first ground of appeal I make the following findings. The First-tier Tribunal acknowledges that it was not argued by the respondent that the appellant's offence had caused serious harm at paragraph 45 of the decision so clearly the appellant would not have anticipated that this was an issue at this point. I find that findings related to whether serious harm had been caused by the appellant's offence do not belong where they are found in the decision in the findings under the head "Is the Appellant a Foreign Criminal?". However I do not find that they were applied in a prejudicial way. They are not applied when considering the family life exception to deportation. I find that the public interest in the appellant's deportation, when considered outside the statutory exceptions in the balancing exercise at paragraphs 90 to 105 of the decision looking for very compelling circumstances over and above the exceptions, makes the nature of the offending relevant. I find that the impact of the offending was relevant in this balancing exercise, and it is only at this point, at paragraph 92 of the decision, that the finding of emotional harm to the appellant's ex-wife and daughter is brought into play. This was with reference to the findings of the Crown Court judge, and is, I find, a fair summary: whilst the emotional harm was found to be serious it is also noted that "the offence did not fall within the highest degree of culpability and harm for sentencing purposes"; and, at paragraph 94 of the decision, that there had been no further offending, no breach of licence or recall to prison. I find that it is fairly concluded that there remains a substantial public interest in the appellant's deportation. I find that the appellant and those representing him would have been fully aware that the impact of the offence would have been relevant to this proportionality exercise, and so it was not unfair that the First-tier Tribunal applied the finding of emotional harm. I do not ultimately find that there was any material error of law with respect to findings of the appellant's offending having caused serious harm.

15. With respect to the second and third grounds addressing contended errors regarding findings about the relationship between the appellant's daughter and the appellant I also find that there are also no material errors. The First-tier Tribunal infers, at paragraph 56 of the decision, that that the previous First-tier Tribunal Judge had found that there was a genuine and subsisting parental relationship. So there is no error of law in not starting from the correct position of the previous Tribunal. I find that the First-tier Tribunal correctly set out at that there is no information as to whether the daughter welcomes the gifts and cards the appellant sends, and, at paragraph 58 of the decision, that the information from the Family Court is that she has ambiguous feelings towards the appellant. I find that it is accepted that the photographs of the cards and gifts could have been taken before being sent as at paragraph 57 it is said: "The photographs either have been taken deliberately before the gift and letters have been sent for the purpose of adducing them in evidence or the photographs have been taken without being sent." I find that the First-tier Tribunal gives unarguably

reasonable reasons for finding, at paragraphs 59 -62 of the decision, that given the three years since the last First-tier Tribunal decision that there is no genuine and subsisting relationship between the appellant and his daughter because of the lack of any action to increase contact by the appellant and the lack of reciprocity from his daughter in the context of her age, which was 17 years at the time of hearing. In any case the First-tier Tribunal then looks at the case in the alternative, so on the basis that a genuine and subsisting parental relationship does exist, at paragraphs 63 and 64 of the decision. I find that the best interests of the appellant's daughter are considered in these paragraphs, and it is reasonably conclude that her best interests are to continue living with her mother and step-father and to receive the gifts and letters from the appellant which he accepts could be sent from India if he were deported. It was unarguably open to the First-tier Tribunal to conclude that in all the circumstances the appellant's deportation would not be unduly harsh to his daughter and there are no material errors in this analysis.

16. With respect to the fourth ground which goes to findings as to whether the appellant's deportation would be unduly harsh to his partner I find as follows. Whilst evidence does exist in the public domain that Indian nationals cannot be dual nationals, and so once the appellant's partner became a British citizen she would not be an Indian citizen, I find that that the failure to accept this at paragraph 70 of the decision is not a material error. This is because the appellant's partner accepted in her evidence, as recorded at paragraph 33 of the decision, that she could return to India and work there as an occupational therapist as she had done in the past, although she did not wish to do so, and as a result it was rationally open to the First-tier Tribunal to conclude it would not be unduly harsh for her to return to India, at paragraphs 71 to 75 of the decision and again at paragraphs 81 to 84, because in India she could work in her chosen field, she has no language barriers and would not have to undergo cultural adjustments. Consideration is given to the fact that she is a British citizen, as noted at paragraph 74 of the decision, and to her ties with the UK through work.

17. With respect to the appellant's mental health conditions I accept that there is no discussion of these matters. They did not feature in the skeleton argument for the appellant beyond a statement at paragraph 5 that he has "on-going mental health issues" and that these should be seen as relevant to whether his deportation would be unduly harsh vis a vis his partner at paragraph 19 of the skeleton, and be part of overall balancing exercise looking for compelling circumstances over and above the exceptions at paragraph 21 of the decision. There is evidence that the appellant has severe depression and takes medication and clearly it was an error for the First-tier Tribunal not to briefly factor these matters into both considerations. I find however this was not a material error. There was no evidence or contention that the appellant could not be treated equally well or adequately for his mental health

conditions in India or that return to India would worsen his condition. The appellant also gave oral evidence that if he were to return to India he, or they if his partner went with him, would be living with his family and also that he would be able to find work given his qualifications, as recorded at paragraph 69 of the decision. I find that his mental ill-health problems therefore could have provided no weight in arguing that deportation was unduly harsh either in the "go scenario", where his partner accompanied him to India, or in the the "stay scenario" where she remained in the UK as in both cases he would be living with supportive family, well enough to work and there was no evidence he would not access adequate medical care or suffer a worsening of his condition. For the same reasons I find that it was not a factor of any weight that could under any circumstances have meant have meant that he succeeded in his appeal on the basis of an overall balancing exercise under Article 8 ECHR.

Decision:

1. The making of the decision of the First-tier Tribunal did not involve the making of a material error on a point of law.

2. I uphold the decision of the First-tier Tribunal dismissing the appeal on human rights grounds.

Fiona Lindsley

Judge of the Upper Tribunal
Immigration and Asylum Chamber

31st July 2024