Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07549/2017**

THE IMMIGRATION ACTS

Heard at Manchester CJC	**Decision & Reasons Promulgated**
On 17 December 2019	**On 02 January 2020**

Before

UPPER TRIBUNAL JUDGE PICKUP

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

S K
[ANONYMITY DIRECTION MADE]

Claimant

Representation:

For the claimant: Ms K Smith, instructed by G Manchester Immigration Aid Unit
For the appellant: Mr M Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).

1. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Cruthers promulgated 20.6.19, dismissing on protection grounds but allowing on article 8 ECHR grounds, the claimant's appeal against the decision of the Secretary of State, dated 27.7.17, to refuse his protection and human rights claims and to maintain the deportation order of 14.10.15.

2. As children are involved, it is appropriate to make the above anonymity direction.

3. First-tier Tribunal Judge Feeney granted permission to appeal on 14.8.19.

4. The appeal came before me on 27.9.19. In my decision promulgated on 30.9.19, I found such error of law in the decision of the First-tier Tribunal as to require the decision to be set aside and remade in the Upper Tribunal. I have summarised below my reasons for finding an error of law.

5. The decision was not immediately remade as I acceded to the request of Ms Smith to adjourn the remaking of the decision to enable the claimant to adduce further or updated evidence as his and his family's circumstances, and to have an interpreter in Kurdish Sorani assist the appellant and his wife in their oral evidence to the Tribunal.

6. Thus the matter came back before me at Manchester CJC on 17.12.19. Rather late in the day did the claimant's representatives comply with my direction issued on 30.9.19 to ensure that all evidence on which the claimant sought to rely was contained within a single consolidated bundle, indexed and paginated, together with any skeleton argument and copies of any authorities relied on. The bundle was apparently couriered to the CJC the day before the hearing and was only retrieved and received by me after the hearing had started. I note that there was no skeleton argument submitted, or any authorities. Neither was the bundle complete; Ms Smith also wished to rely on the social work report of John Cooke, dated 18.3.19, which had not been included in the consolidated bundle.

7. I confirm that I have carefully considered all the submitted materials and taken them into account along with the oral evidence of the appellant and his wife, and the submissions of the representatives, before reaching any of my findings, as set out below.

The Relevant Background and Appeal History

8. The claimant, an Iraqi national, sought to avoid deportation on protection and humanitarian grounds. He is married to a British citizen and is father of two of her three sons, also British citizens, the eldest of the three children is now 6 years of age. The deportation order followed the claimant's conviction and sentence in 2013 to a term of 12 months' imprisonment for offences of using a false UK residence permit and falsely obtaining state benefits in the sum of £17,383.

9. As the claimant is a foreign criminal sentenced to concurrent terms of 12 and 3 months' imprisonment for offences of using a false instrument with intent and for making false representations in order to obtain benefit, he is liable for deportation unless he can meet the 'unduly harsh' exceptions set out above under paragraphs 399 and 399A. For the purposes of this appeal, it is accepted that the claimant has a genuine and subsisting parental relationship with the three children.

10. His appeal was first heard in October 2017 when First-tier Tribunal Judge Swinnerton allowed it on article 8 grounds. However, the Upper Tribunal found an error of law in the making of that decision, with the result that it was set aside and the appeal remitted to the First-tier Tribunal to remake the decision afresh with no preserved findings. Thus it came to be heard before First-tier Tribunal Judge Cruthers on 20.3.19, who drafted and signed the decision on 17.6.19, almost three months after the appeal hearing.

11. It was made clear at the First-tier Tribunal appeal hearing before Judge Cruthers that the protection grounds were not pursued. Neither were health grounds nor obstacles to integration in respect of private life pursued. Reliance was placed squarely on family life human rights grounds only. In essence, his claim was that returning him to Iraq would be 'unduly harsh' and a disproportionate breach of his rights to respect for his family life and that of his immediate family members.

12. At [49] of the First-tier Tribunal decision, Judge Cruthers found that if the tribunal was purely considering the position of the claimant's wife, it could not properly be said that it would be unduly harsh for her to remain in the UK without the claimant or to relocate with him to Iraq. She was born in Iraq and regularly made return visits to family in Iraqi Kurdistan, including taking with her one of her children on different visits to her own family and to that of the claimant. There has been no challenge to that conclusion and I have preserved that finding.

13. However, the appeal was allowed by the First-tier Tribunal on human rights grounds, on the basis that it would be unduly harsh for the three children to either relocate with the claimant in Iraq, or remain in the UK without him. The judge does not refer to either the Immigration Rules or section 117C of the Nationality, Immigration and Asylum Act 2002 but it is clear that he was considering the 'unduly harsh' exceptions to deportation of a foreign criminal.

The 'Unduly Harsh' Test

14. This case concerns the 'unduly harsh' test set out in the Immigration Rules. Paragraphs A398 to 399A of the Immigration Rules provide as follows:

> "Deportation and Article 8
>
> A398. These rules apply where:
>
> > (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;
> >
> > (b) a foreign criminal applies for a deportation order made against him to be revoked.
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> > (a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;
> >
> > (b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

15. Virtually identical statutory provisions appear in sections 117A to 117C of the Nationality, Immigration and Asylum Act 2002. To all intents and purposes, the tests and the exceptions are the same:

"117A Application of this Part

> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

16. Section 117B sets out a number of public interest considerations which are applicable in all cases. It is unnecessary for present purpose to refer to these in further detail. Section 117C, so far as is material, provides:

> "117C Article 8: additional considerations in cases involving foreign criminals
>
> (1) The deportation of foreign criminals is in the public interest.
>
> (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
>
> (3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
>
> …
>
> (5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh."

17. In its submissions to the Upper Tribunal on the error of law hearing, the Secretary of State relied on the recent case of RA (s117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 123 (IAC), which was promulgated after the FTT hearing but before the promulgation of the decision, which for some unknown reason did not take place until three months after the hearing.

18. In summary, the grounds pursued by the Secretary of State were that the judge erred in law in his assessment of the 'unduly harsh' test. It is asserted that the First-tier Tribunal did not establish facts which could surmount the threshold of 'unduly harsh,' and/or that the conclusion was inadequately reasoned.

What Does 'Unduly Harsh' Mean?

19. In KO (Nigeria) [2018] UKSC 53, the Supreme Court held that one has to look for "a degree of harshness going beyond what would be necessarily involved for any child faced with the deportation of a parent." The Supreme Court also endorsed what the Upper Tribunal had said as to the meaning of 'unduly harsh' in MK (Sierra Leone) [2015] UKUT 223 (IAC).

20. As stated at [23] of KO, 'unduly harsh' is intended to introduce a higher hurdle than that of 'reasonableness' under section 117B(6) of the Nationality, Immigration and Asylum Act 2002, taking account of the public interest in the deportation of foreign criminals. 'Harsh' assumes that there is a level of harshness that may be acceptable in the relevant context. 'Unduly' implies something going beyond that level.

21. At [46] of MK, the Upper Tribunal panel 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 antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher." I note that in RA, the Upper Tribunal decision disagreed with the 'severe or bleak' description of MK.

22. On the facts specific to that particular case, the Upper Tribunal in MK found that the test was satisfied:

> "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel."

23. At [40] of MK, the Upper Tribunal panel also considered whether the appellant's deportation would have an unduly harsh effect on either of the two 7-year-old British children, one a biological child, the other a step-child. The panel stated:

> "Both children are at a critical stage of their development. The Appellant is a father figure in the life of his biological daughter. We readily infer that there is emotional dependency bilaterally. Furthermore, there is clear financial dependency to a not insubstantial degree. There is no evidence of any other father figure in this child's life. The Appellant's role has evidently been ever present, since her birth. Children do not have the resilience, maturity or fortitude of adults. We find that the abrupt removal of the Appellant from his biological daughter's life would not merely damage this child. It would, rather, cause a gaping chasm in her life to her serious detriment. We consider that the impact on the Appellant's step son would be at least as serious. Having regard to the evidence available and based on findings already made, we conclude that the effect of the Appellant's deportation on both children would be unduly harsh. Accordingly, within the matrix of section 117C of the 2002 Act, "Exception 2" applies."

24. However, in RA, the Upper Tribunal distinguished MK when giving further consideration to what is meant by 'unduly harsh', stating,

> "As a result of KO (Nigeria) the position is that, in determining whether Exception 2 (in section 117C(5)) applies, a court or tribunal is not to have regard to the seriousness of the offence committed by the person who is liable to deportation. Importantly, however, the expression 'unduly harsh' sets a high threshold."

25. It is significant that the Upper Tribunal in RA also held that the endorsement of MK by the Supreme Court did not include the way in which the Upper Tribunal applied its formulation to the facts of the case before it and that "the way in which a court or tribunal should approach section 117C remains as set out in the judgment of Jackson LJ in NA (Pakistan) & Another v Secretary of State [2016] EWCA Civ 662."

26. At [14] of RA, the Upper Tribunal panel rejected the submission that it was bound to apply the same alleged test as elaborated in MK, to the effect that children aged at or around 7 are "at a critical stage of their development". The panel in RA held that MK did not in fact set any such precedent or legal test, but found that the decision was confined to its own facts, pointing out that the panel in MK found it to be a "difficult and borderline case" and involved "an exercise bereft of bright luminous lines".

27. At [23] of RA, the Upper Tribunal explained that,

> "the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is the public interest in the deportation of foreign criminals. One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent."

28. Distancing itself from MK, at [17] of the decision, the panel in RA held, "It is not enough for the outcome to be "severe" or "bleak". Proper effect must be given to the adverb "unduly". The position is, therefore, significantly far removed from the test of "reasonableness", as found in section 117B(6)(b).

29. The facts in RA are themselves not dissimilar to those in the present case, involving an deportee sentenced to 12 months' imprisonment and who emanated from Erbil within the IKR of Northern Iraq, with a qualifying relationship with a partner of Kurdish Iraqi origin and six-year-old child, who were both British citizens. However, in her submissions, Mr Smith reminded me that the Upper Tribunal warned against trawling for factual precedent between cases and it is may not be appropriate to rely on the fact that in RA the circumstances were found insufficient to amount to reach the 'unduly harsh threshold.'

30. More recently, in SSHD v PG (Jamaica) [2019] EWCA Civ 1213, Lord Justice Holroyde, with whom the other Lord Justices agreed, considered the issue of 'unduly harsh' in relation to a claimant (PG) who fathered 6 British citizen children and was sentenced to a term of imprisonment of three years four months for drugs offences. The First-tier Tribunal had allowed the appeal, finding that deportation would cause very serious disruption to and interference with family life, with particular reference

to a teenage child (R) with difficulties after being the victim of a knife crime, so that the consequences of his removal would be unduly harsh. The judge also considered it would be unduly harsh given that the partner (SAT) would be left alone to look after three boys, referring to emotional and behavioural 'fallout.' The Upper Tribunal (Judge Finch) upheld the decision, finding no error of law.

31. At [39] of the Court of Appeal's decision, Lord Justice Holroyde stated:

> "… I recognise of course the human realities of the situation, and I do not doubt that SAT and the three children will suffer great distress if PG is deported. Nor do I doubt that their lives will in a number of ways be made more difficult than they are at present. But those, sadly, are the likely consequences of the deportation of any foreign criminal who has a genuine and subsisting relationship with a partner and/or children in this country. I accept Mr Lewis's submission that if PG is deported, the effect on SAT and/or their three children will not go beyond the degree of harshness which is necessarily involved for the partner or child of a foreign criminal who is deported. That is so, notwithstanding that the passage of time has provided an opportunity for the family ties between PG, SAT and their three children to become stronger than they were at an earlier stage. Although no detail was provided to this court of the circumstances of what I have referred to as the knife incident, there seems no reason to doubt that it was both a comfort and an advantage for SAT and the children, in particular R, that PG was available to intervene when his son was a victim of crime. I agree, however, with Mr Lewis's submission that the knife incident, serious though it may have been, cannot of itself elevate this case above the norm. Many parents of teenage children are confronted with difficulties and upsetting events of one sort or another, and have to face one or more of their children going through "a difficult period" for one reason or another, and the fact that a parent who is a foreign criminal will no longer be in a position to assist in such circumstances cannot of itself mean that the effects of his deportation are unduly harsh for his partner and/or children. Nor can the difficulties which SAT will inevitably face, increased as they are by her laudable ongoing efforts to further her education and so to improve her earning capacity, elevate the case above the commonplace so far as the effects of PG's deportation on her are concerned. In this regard, I think it significant that Judge Griffith at paragraph 67 of her judgment referred to the "emotional and behavioural fallout" with which SAT would have to deal: a phrase which, to my mind, accurately summarises the effect on SAT of PG's deportation, but at the same time reflects its commonplace nature."
>
> "I conclude that, whether considered individually or collectively, the matters relied upon by Judge Griffith were clearly insufficient to enable a judge properly to conclude that the effect of PG's deportation would be unduly harsh for either his children or SAT. The evidence certainly showed that what might be regarded as the necessary and expected consequences of deportation would be suffered by PG's family, but it cannot be said to have revealed harshness going beyond that level. The points made by Mr Rees were fair points as far as they went, but they were not capable of taking the case beyond the commonplace. The evidence did not provide a basis on which PG could establish Exception 2 under section 117C(5) of the 2002 Act (and there was no suggestion that Exception 1 could apply), and accordingly section 117C(3) required his deportation. It follows that in my judgment there was no rational foundation for the decision of Judge Griffith, and both it and the decision of Judge Finch must be set aside. I accept Mr Lewis's submission that there is no ground on which it would be appropriate to remit the matter for a further hearing: as I have indicated, I can see only one answer to the issue which must be decided."

32. Lord Justice Hickinbottom added at [45] to [46]"

> "I agree with the analysis and conclusion of Holroyde LJ, and his proposed disposal.
>
> "When a parent is deported, one can only have great sympathy for the entirely innocent children involved. Even in circumstances in which they can remain in the United Kingdom with their other parent, they will inevitably be distressed. However, in section 117C(5) of the 2002 Act, Parliament has made clear its will that, for foreign offenders who are sentenced to one to four years, only where the consequences for the children are "unduly harsh" will deportation be constrained. That is entirely consistent with article 8 of the ECHR. It is important that decision-makers and, when their decisions are challenged, tribunals and courts honour that expression of Parliamentary will. In this case, in agreement with Holroyde LJ, I consider the evidence only admitted one conclusion: that, unfortunate as PG's deportation will be for his children, for none of them will it result in undue harshness."

Was it Unduly Harsh for the Children to go to Iraq?

33. At [50] of the decision, the judge found that it would be unduly harsh to expect the three young children to relocate to Iraq. Reasons for that conclusion are set out at [50]-[52]. The judge found that relocation to Iraq would involve the loss of most of their rights as British citizens. One of the other two reasons given was that the oldest child had limited but ongoing contact with his biological father, about once or twice every six weeks. Mr McVeety submitted that the judge speculated about future development of a relationship with the biological father. The other, at [52] of the decision, was that the standard of education and educational opportunities available to them in Iraqi Kurdistan "would be well below the opportunities that they are likely to have growing up in the UK."

34. In relation to this finding, at [23] of my error of law decision, I observed that:

> "The mere fact that a child has British citizenship cannot logically render it unduly harsh to relocate with their mother and the claimant. The cessation of limited contact with a biological father once or twice every six weeks might be harsh but there was insufficient evidence to show that it would be damaging to the child who would be living with both parents in a loving environment with the support of extended family of both parents. It may also be possible for visits one way or the other in order to maintain a limited degree of contact with the biological father. Similarly, I am not satisfied that it was reasonably open to the judge to conclude that the prospective loss of educational opportunities available in the UK when compared with that which might be available in Iraq would be unduly harsh."

35. However, at the Upper Tribunal continuation hearing, I heard further detail about the relationship of the older child with his biological father. I accept the evidence that he sees his father on a regular basis, about every six weeks. I was told in evidence that the claimant and his wife had broached the subject of relocation to Iraq with the father and he has refused permission for his child to leave the UK, for perhaps obvious reasons, that he would no longer be able to have face to face contact with his son in the UK. In the circumstances, taking account of the best interests of all the children, I accept that it would be unduly harsh for that child to go to live in Iraq. It follows that, regardless of the difficulties or otherwise of being raised in Iraq, or

being effectively deprived of the benefits of their British citizenship, it would also be unduly harsh for the other children to be separated from their elder half-sibling. In practical terms, given that the claimant and his wife are the de facto parents of all three children that cannot happen.

36. Further, as Ms Smith pointed out in her submissions to me in the continuation hearing, at [25] of my error of law decision, I specifically found an error of law only in relation to the First-tier Tribunal conclusion that it would be unduly harsh for the children to continue to live in the UK without the claimant.

37. In the circumstances, I accept that on the facts of this case, it would be unduly harsh for the children, or any of them, to go and live in Iraq with the claimant and his wife.

Would it be 'Unduly Harsh' for the Children to Remain in the UK without the Claimant?

38. It follows from the above that I accept that the sole remaining issue in the remaking of the decision is whether it would be unduly harsh for the children, or one or more of them, to remain in the UK without the Claimant.

The First-tier Tribunal's Consideration of 'Unduly Harsh'

39. At [53] of the FTT decision, the judge considered whether it would be unduly harsh to expect the children to remain in the UK without the claimant, giving his reasons in the succeeding paragraphs. Unsurprisingly, the judge considered that the best interests of the children were to remain in the UK with the claimant's continued involvement in their lives [54]. The judge also reflected on the situation that the claimant's wife would be left in the UK without him, having to raise three young children by herself and unable, because of their young ages, to work to support the family [55]. In the light of those circumstances, and the other considerations referred to at [56] to [58] of the decision, the judge concluded that the claimant met the 'unduly harsh' test and thus allowed the appeal on human rights grounds.

40. In respect of that conclusion, at [25] of my error of law decision, I stated:

> "…Nothing in the judge's considerations distinguished between what might be harsh and what would be unacceptable as being more than harsh and reaching the high threshold of unduly harsh. Frankly, all of the factors relied on to support the conclusion are nothing more than the inevitable consequences of deportation in most such cases which result in separation of the deportee from family members. The mere fact that their best interests would be to remain and live in the UK with their father cannot be unduly harsh, as the natural consequence of deportation is that it interferes with family life and breaks up families. As stated in RA, "One is looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent." I find the judge has failed to identify in what degree or what respect the consequences of the deportation of this claimant goes beyond the necessary consequences of deportation of a parent. Neither can the speculative economic effect of the wife being left to raise three children by herself, to have to survive on state benefits and be unable to work, be reasonably regarded as of sufficient weight to amount to being unduly harsh. Single parent families may experience some hardships but it is difficult to see how the family becoming dependent on state

> benefits, where their basic needs will be provided for, can amount to being unduly harsh; the children will not be left hungry or homeless. It is also relevant that at [22] and [55] of the decision the tribunal recorded that the claimant's wife regularly visited her brother and his family in Leeds, had an unmarried nephew in Peterborough, and would be able to interact with other Kurds in her local area. There must be many such single-parent families in similar circumstances and it would be astonishing to describe such a situation as amounting to unduly harsh by the definition set by the relevant authorities. Looked at from the other way, if the judge's assessment was rationally and reasonably justified, it is difficult to see how deportation of any person with a partner and children could be justified. I take Ms Smith's point that it is necessary to consider the cumulative effect rather than individual factors. However, taken as a whole, notwithstanding the judge's self-direction on KO, I find that the reasoning provided in the decision to be inadequate and insufficient to justify the conclusion that the undoubted and significant interference with family life outweighs the strong (statutory or Rule-based) public interest in removing a foreign criminal."

41. Whilst I accept that the determination of what is or will be unduly harsh for the children involves an evaluative assessment for the Tribunal to conduct on the relevant evidence, I was satisfied that nothing in any of the reasons advanced by the First-tier Tribunal in support of the conclusion that it would be unduly harsh for the children to remain in the UK without the claimant demonstrated that there would be any lasting detriment to the physical or emotional integrity of the children caused by the removal of the claimant, or would properly amount to unduly harsh.

42. As set out in my error of law decision, I found that none of the reasoning, even taken together in the round, can properly be considered to reach the high threshold of being unduly harsh. I found that, even taking the claimant's case at its highest, on the facts of this case the reasoning provided by the First-tier Tribunal for finding it unduly harsh for the children to continue to live in the UK without the claimant was inadequate and ultimately unsustainable. In the circumstances, I found that the decision could not stand and had to be set aside to be remade.

Remaking the Decision in the Appeal

43. In remaking the decision in the appeal on the narrow issue of whether it would be 'unduly harsh' and therefore disproportionate for the three children to remain in the UK without the claimant, I have carefully considered all the materials placed before me in the consolidated bundle and the social work report, together with the oral evidence and submissions of the two representatives. I note the photographs of the claimant with the children, have taken full account of the witness statements, and considered the various reports and articles dealing in general terms with the relationship between parents and children.

44. I have given careful consideration to the best interests of the children as a primary consideration, pursuant to Section 55 of the Borders, Citizenship and Immigration Act 2009. In doing so, I have also had regard to the decision of the Supreme Court in ZH (Tanzania) [2011] UKSC 4, addressing the weight to be given to the best interests of children affected by a decision to deport a parent. Obviously, in normal circumstances, the best interests of the children will be to have the love and parental input of the claimant throughout their lives, assisting in their upbringing and

development. I also take into account that live without the claimant may be made more difficult for his wife and that this would impact on her parenting and ability to care for and look after the children as a sole parent. I take into account the principles set out in ZH and I do not underestimate the significant effect of separation and isolation on a child, as highlighted in the articles in the claimant's bundle. I acknowledge that the best interests of the child must be a primary consideration so that the overall well-being of a child must be considered. I accept in general terms that separation is counter-productive to a child's well-being and is not to be considered lightly. However, whilst a primary consideration, it is not the only consideration when there are serious public interest considerations in removing the claimant. I accept that in an ideal world the best interests of each of the children would be to have a continuation of the claimant's full and meaningful parental involvement.

45. The social work report, drafted on 18.3.19 and now somewhat out of date, observes that the children are all well-cared for and well-loved by the claimant and his wife. They are described as contented, comfortable and fulfilled, living happy lives within their family environment. It is not surprising that the author of the report expresses concerns for the children's continued emotional and behavioural development should the claimant be deported. It is said that he is instrumental in supporting his wife to provide the stable and nurturing home life the children have so far experienced. It is pointed out that the wife has limited social support networks and would struggle to provide the same level of care if she became the sole carer. However, there is little or nothing remarkable in this report that would not equally apply to any other family in generally similar circumstances. None of the potential consequences referred to could be described as anything other than those to be expected by separation. The report has limited value in that it fails to distinguish the commonplace effects from anything which would be 'unduly harsh.' In the circumstances, the report does not demonstrate, either by itself, or in conjunction with other evidence, that there would be unduly harsh effects on the children, either directly, or indirectly through their mother, by the claimant's deportation. However, I have taken the report and its contents fully into account in the context of the assessment of the whole of the evidence.

46. In additional to the documentary material put before me, I also heard direct oral evidence from both the claimant and his wife, through the Kurdish Sorani interpreter.

47. As stated above, I heard and accept the evidence that the elder child has a subsisting relationship with his biological father, seeing him about every 6 weeks. Otherwise, he is parented by both the claimant and his wife in the same way as the other two children.

48. In essence, the remaining oral evidence was to the effect that since November 2019 the claimant's wife has worked in a hairdressing salon 16 hours a week, divided into approximately four hours on each of the days from Monday to Thursday, usually starting at 10 am and finishing at 2 pm. At times, the hours may be flexible, depending on customers' needs. Whilst she is out at work, the claimant looks after

the three children, including by taking the elder child, 6 years of age, to school. The other two children, boys, were born in 2017 and 2018 respectively and are too young to yet have any notion of their environment outside the family home. The claimant does not work.

49. When each was asked in cross-examination whether there was any reason why the wife could not give up work to look after the children herself, neither appeared willing to answer the question directly, even though the question was rephrased and repeated. In summary, the claimant said, eventually, only that it would be very difficult for her and life would be hard, as there would be no one to look after the children. She also said that it would be very difficult if the claimant is deported as she could not live without him and suggested that if one of the children became ill and had to go to hospital there would be no one to look after the other children. When the question was pursued, she became tearful and maintained that she wanted to settled down in the UK with the claimant. Mr Diwnycz then sensibly curtailed any further cross-examination.

50. In their oral evidence, neither the claimant nor his wife identified any particular or compelling reasons why she could not look after the children on her own if he were deported, even if she had to give up work to do so. Taken at the highest, all they could speak of was that there was no one to look after the children if she worked or had to take a child to hospital. There were no special features of the bond between the claimant and any or all of the children, or any physical, medical, psychological, or emotional needs that only the claimant could meet, or which could only be met with his presence and participation in the UK. There was nothing identified other than the normal and expected consequences one might expect from deportation. That is the nature of deportation; it breaks up families. Whilst it will be difficult and emotionally upsetting for the claimant's wife and perhaps also the children, to greater or lesser degree, and might well be described as hard or even approaching harsh, there was nothing in the evidence and submissions made to me that even began to identify anything in the effect of the claimant's deportation on the children that could be properly described as 'unduly harsh' in the sense identified in the authorities highlighted and analysed above. In fact, there is nothing on the facts of this case that demonstrate anything more than the 'commonplace' referred to by Lord Justice Holroyde. The fact that the wife may not be able to go out to work, or that there may be no one else to look after the children if one is taken ill and has to go to hospital cannot elevate the circumstances to being 'unduly harsh.'

51. Inevitably, the wife will be distressed by the claimant's removal and face the challenge of being a single parent; unfortunately, a situation faced by many thousands of parents in this country. Whilst one may have sympathy for her situation, or that of the children without a father figure in their lives, I am satisfied that none of the matters I have addressed above, nor those set out in the oral or documentary evidence, or in the submissions of Ms Smith can possibly meet the threshold of 'unduly harsh' but are no more than the 'necessary and expected consequences' of deportation. In the circumstances, the decision of the respondent was not disproportionate to the private and family life of the claimant and more particularly his wife and the children when balanced against the strong public

interest in his deportation from the UK. In the final analysis, there can be only one outcome to this appeal, its dismissal.

Decision

52. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law such that the decision should be set aside.

I set aside the decision.

I remake the decision by dismissing the appeal.

Signed 

Upper Tribunal Judge Pickup