IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06213/2020

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10th December 2021	**On 17th January 2022**

Before

UPPER TRIBUNAL JUDGE KEITH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SATINDER SINGH
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the appellant: Mr T Melvin, Senior Home Office Presenting Officer
For the respondent: Mr Z Raza, Counsel, instructed by Marks & Marks Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which I gave orally at the end of the hearing on 10th December 2021.

2. The Secretary of State appeals against the decision of First-tier Tribunal Judge Hughes, who, following a hearing at Hatton Cross on 7th June 2021, allowed the appeal of the respondent, an Indian national, (hereafter, 'Claimant') against the Secretary of State's refusal on 10th June 2020 of his human rights claim. That refusal was in the context of the Secretary of

State having made a deportation order in respect of the Claimant on 6th March 2015.

3. The deportation order was made under the automatic deportation provisions of Section 32 of the UK Borders Act 2007. The Claimant's single offence was of possession with intent to supply Class-A drugs, for which he was sentenced to two years' imprisonment on 29th November 2013.

4. In the context of the Claimant's human rights application, the Secretary of State accepted that the Claimant had and has genuine and subsisting relationships with his British wife, 'BB'; and son, 'NG', born on 10th May 2018. The Secretary of State disputed that the effect of the "go" scenario (with the Claimant's wife and son joining him in India) would be unduly harsh, given the Claimant's formative years in India; his wife's ability to speak Punjabi; support from UK relatives; and the relatively young age of the Claimant's son. The Secretary of State also disputed that the effect of the "stay" scenario (the Claimant's wife and son remaining in the UK without him) would be unduly harsh. The wife and son would continue to benefit from the support of their extended family in the UK.

5. In respect of the Claimant's private life, the Secretary of State noted that the Claimant had not been lawfully resident in the UK for most of his life, having entered the UK illegally at the age of 18 and never having had lawful residence.

6. The Secretary of State considered whether there were very compelling circumstances, noting the seriousness of the Claimant's offence; the Claimant's immigration history, including his illegal entry; absconding on multiple occasions; and the limited weight to be attached to his lack of reoffending since 2013. Whilst the Secretary of State accepted that he had made friends and acquaintances and had established family life in the UK, he could continue to maintain contact with his family and friends via social media communications and visits. The Claimant's private and family life did not outweigh the strong public interest in the Claimant's deportation.

The judge's decision

7. The judge reminded himself of the law at §5; §§32a to 34; and §39 to 43. The judge made findings at §29 and considered the sentencing remarks of His Honour Judge Dugdale. The judge considered the Claimant's wife's mental health difficulties at §36 and the Claimant's wife's support of her husband, to free himself from his drug addiction, which had been the context of his offending. That same context had been reflected in the reduced prison sentence. At §37, the judge reflected on the close relationship between the Claimant and his son and accepted as credible that it was likely that his wife would be unable to cope in the UK, in the absence of the Claimant. Nevertheless, at §44, the judge was unable to find that the effect of deportation on the Claimant's wife would be unduly harsh on her. The judge bore in mind that that the Claimant's wife was aware of his status when she entered a relationship with him, and the high

threshold of what was meant by "unduly harsh". Such separation, the judge concluded, was the anticipated consequence of deportation.

8. At §45, the judge concluded that the Claimants child's best interests were to remain as part of a stable family unit and that it would not be reasonable to expect the son to follow the Claimant to India. However, the judge concluded that the effect on the son of the "stay" scenario would not be unduly harsh, as he would remain in the continued care of his mother, with financial and emotional support of the extended UK family.

9. The judge went on to consider the balancing exercise in the context of "very compelling circumstances" and a "balance-sheet" approach at §46. The judge attached less weight than he might otherwise have done to the public interest in deportation, given the sentencing remarks about the context of the Claimant's offending, as he had developed a chronic addiction to crack cocaine and heroin. The Claimant had been free of drugs following his arrest for the index offence. He had immediately addressed his addiction; was remorseful; and pleaded guilty at the first opportunity (§50). His risk of reoffending was low. He had not reoffended.

10. At §51, the judge considered the Claimant's son's best interests and the strength of their relationship. At §52, the judge considered the Claimant's wife inability to cope in the event of the Claimant's deportation and his wider cultural and social integration in the UK. At §56, the judge noted that the Claimant had no subsisting relationships with anyone in India, given the circumstances of his being sent to the UK by his father as a child and he had been effectively ostracised from family in India. Those findings had not been the subject of any challenge. The judge reached his conclusions at §58, noting the absence of ties of the Claimant's wife to India (inaccurately described as her home country) and was satisfied that the Claimant had established very compelling circumstances.

The grounds of appeal and grant of permission

11. The Secretary of State sought permission to appeal on two grounds. The first was that the judge had given significant weight to the Claimant's rehabilitation which was contrary to the authorities (in particular §141 of HA (Iraq) v SSHD [2020] EWCA Civ 1176.

12. The second ground was that whilst the judge had considered the particular weight to the Claimant's wife's absence of ties to India at §58, the judge had failed to consider the Claimant's ability to integrate in India, his country of origin, as a healthy adult male with work experience.

13. Judge Chohan of the First-tier Tribunal granted permission on all grounds on 12th July 2021.

The hearing before me

The Secretary of State's submissions

14. On behalf of the Secretary of State, Mr Melvin first referred to §48 of the decision, which started with a reference to Section 117C of the Nationality,

Immigration and Asylum Act 2002. In this case, the context, where neither Exceptions 1 nor 2 were met, was whether there were "very compelling circumstances", which was a high test.

15. Turning to §49 of the judge's decision and §39 of Akinyemi v SSHD [2019] EWCA Civ 2098, the judge had considered the moveable as opposed to the fixed quality of the public interest in deportation. However, the judge had failed to consider §40 of that authority and it being necessary to go back to the facts of the case. In the case of Akinyemi, the individual concerned had succeeded where regard had to be given to the fact that he had been in the UK lawfully for the whole of his life, while the Upper Tribunal had wrongly factored into the balance that his residence had been without any lawful leave.

16. In this case, the judge should have gone beyond §39 of Akinyemi and should have reminded himself of the main facts. Mr Akinyemi had never been to Nigeria and had been legally resident in the UK for the whole of his life. In stark contrast, the Claimant had never had lawful leave either to enter or remain in the UK and it was almost as though he were being rewarded for his criminal offending.

17. Coming on to the question of consideration of NG's best interests as a child, what was made clear in HA (Iraq) was that the best interests of children were to be included in the analysis of "unduly harsh" effect of deportation, (see §§51 and 52 of HA). Instead, the judge had considered NG's best interests again in the context of very compelling circumstances and had double-counted. Having concluded that the effects of deportation on NG would not be unduly harsh, the judge had then gone on to consider NG's best interests again, when he ought to have looked at matters over and above Exception 2 for the purposes of very compelling circumstances.

18. Whilst the judge had referred at §56 to no meaningful support for the Claimant in India, the judge had failed to consider that he was a healthy adult, nearly 30 years old and there was a lack of consideration as to his ability to integrate there.

19. In summary, the grounds were not a mere disagreement with the FtT's decision, as the Claimant had suggested in the Rule 24 response, but a misdirection by reference to Akinyemi at §49 and double-counting in relation to NG's best interests where the test of very compelling circumstances had to be over and above Exceptions 1 and 2. Mr Melvin candidly accepted that this was almost in the region of a "perversity" challenge, and the judge's decision was not adequately explained.

The Claimant's submissions

20. Turning to the submissions of Mr Raza, I refer briefly to his Rule 24 reply first. At §55, the judge had expressly noted the guidance on the limited weight to be given to matters such as rehabilitation but had provided sound reasoning for attaching greater weight than usual. Similarly, the judge had not been required to consider whether the Claimant could re-integrate into India, where the focus of this challenge was in relation to

family life in the UK and the judge had already concluded that there were very compelling circumstances. The judge had correctly reminded himself of the test of very compelling circumstances by reference to HA (Iraq) at §60 of his decision.

21. Developing this in his oral submissions, Mr Raza submitted that the Secretary of State's challenge was, in essence, a perversity challenge. By reference to MI (Pakistan) v SSHD [2021] EWCA Civ 1711 and in particular §§41, 51 and 53, the judge was best placed to consider all relevant factors, having seen and heard the evidence. The judge was, as the Court of Appeal had reminded itself in MI, an expert Tribunal and his findings of fact should be respected, and the evaluative nature of his task meant that this Tribunal should be slow to interfere with those findings. At §53 of MI, the Court had remarked that the judge's reasoning in relation to one of the scenarios necessarily reflected a summary of the findings made in an earlier part of the decision, which was inevitably surrounded by a penumbra of imprecision as to emphasis, relative weight, minor qualification and nuance, "*of which time and language do not permit exact expression but which may play an important part in the judge's overall evaluation*".

22. What was said here was that the judge had analysed in some detail from §§46 to 58 the closeness of the relationship between the Claimant and his son; his wife's mental health issues, the credit that the judge had given to the Claimant's lack of offending since his single conviction and remaining drug-free after that offence. The Court in HA (Iraq) allowed this as a part of a fact-sensitive analysis. The judge had also unarguably considered that the Claimant would be ostracised by family in India; was vulnerable; and it was unsurprising in that context as to the judge's eventual conclusions as to the Claimant's lack of ability to integrate in India.

23. The judge specifically referred to the sentencing remarks of HHJ Dugdale, who had given the lowest sentence possible, because of the context of offending. The judge was unarguably entitled to consider and place weight on the fact that the Claimant had been drugs-free for many years and had turned his life around. All of those factors, Mr Raza urged me to consider, were relevant, clearly explained and reasoned. In that context, the judge was entitled to place more than limited weight on rehabilitation and any alleged failure to consider obstacles to integration should be seen in the context of what was a family life claim. In any event, the relevant findings had been made as to likely difficulties including ostracism in India.

24. Returning to the thrust of Mr Melvin's challenge, Mr Raza invited me to consider that it was now being suggested that when considering very compelling circumstances for the purposes of Section 117C(6) of the 2002 Act it was impermissible to consider factors that were relevant to either Exceptions 1 or 2. That was plainly incorrect. Indeed, HA (Iraq) specifically permitted that, to which the judge had reminded himself at §32 where in turn he had referred to §60 of HA.

Discussion and conclusions

25. First, I remind myself that it is not for me to decide what I would have decided in this case. The jurisdiction for this Tribunal is whether the judge erred in law. I am also acutely aware that the judge will have had the benefit of evaluating the evidence before him in a way and in detail that I have not, and I am also conscious that it is not appropriate to take isolated phrases out of context. Those are all propositions which are reflected in the authority of MI (Pakistan), to which Mr Raza referred me.

26. I then turn to the Secretary of State's challenges. I turn first to Mr Melvin's submission that there has been some form of double-counting by the judge in considering factors that were relevant for Exception 2 for the purposes of "very compelling circumstances". I do not regard this as disclosing any error of law. As Mr Raza, in my view correctly, identifies and as the judge himself correctly identified at §32 by reference to §60 of HA (Iraq), there may be cases where a Tribunal is satisfied that there is a combination of circumstances, including but not limited to the harsh effect of the Claimant's deportation on his family, which together constitute very compelling reasons sufficient to outweigh the strong public interest in deportation but where it may be debatable whether the effect on the family taken on its own is unduly harsh.

27. Put another way, even where, as here, the judge was not satisfied that Exception 2 was met, nevertheless in a wider balance sheet assessment by reference to Section 117C(6) of the 2002 Act, in my view it was both entirely open to and indeed appropriate for the judge to consider relevant factors such as the effect of deportation on the qualifying child and partner, recognising of course that that is part of an overall wider assessment. That is not something that is inconsistent with the authorities. The fact that the Claimant failed on Exception 2 does not mean that there is some form of double-counting because that factor is considered again for the purpose of very compelling circumstances. That challenge therefore unsustainable.

28. I turn to the two other challenges. The first is that the judge attached impermissibly too high a weight in relation to rehabilitation. Mr Melvin placed particular emphasis on §40 of Akinyemi and a comparison of the circumstances of that case with the circumstances of this. It was said therefore in reminding himself of Akinyemi by reference to §39, as the judge did at §49 of his decision, her erred in law.

29. The flaw in this challenge is that effectively it seeks to compare different sets of facts and somehow draw an analogy and comparison and say that because the judge failed to consider the specific facts of Akinyemi as opposed to the general legal proposition as to the weight having a moveable rather than fixed quality that there was somehow a misdirection of law. Instead, I accept Mr Raza's submission that the judge was plainly conscious that the Claimant had not had leave in the UK and that was a relevant factor. There was no misdirection in these circumstances. This aspect of the challenge is not sustainable.

30. I turn then to the final aspect of the appeal and the question of whether the judge erred in failing to consider the potential for the Claimant's integration in India in circumstances where the judge had specifically considered his integration in the UK. What was said was that where there is, as here, a need for a balancing exercise, the omission of an important factor was one that could have a potential material impact.

31. On the face of it, this aspect had more attraction than the other two grounds but nevertheless I returned to the propositions outlined in MI (Pakistan) that it is appropriate to read the judgment as a whole and notwithstanding that there is not an explicit reference to integration in India in §§52 to 58 onwards, there is clearly a consideration of the very factors relevant to integration in India. There was consideration at §56 to the lack of any subsisting relationships with people in India; the ostracism that the Claimant would face and the lack of any meaningful support for the Claimant on his return to India.

32. There was also consideration of relevant factors under Section 117B of the 2002 Act. At §58, having considered all the relevant facts including the limitations on integration in India (when, as I accept Mr Raza's point, the focus was on family life) the judge ultimately reached a conclusion that does not in my view come close to being a perverse decision.

33. The judge's decision contains a carefully structured, sufficiently explained analysis of the evidence. The judge explains why, on the particular and unusual circumstances of this case, including the nature of the offence; the circumstances in which that offence was committed, (namely that the Claimant was at the time a drug addict from which he is now clean and has been clean for many years and is at low risk of reoffending); the particular circumstances of the closeness of the relationship between the Claimant and his wife and in circumstances where the "go scenario" would not be possible, there were very compelling circumstances over and above Exceptions 1 and 2. I emphasise that it is not necessarily a decision I would have reached but I am equally satisfied that the decision was adequately reasoned and explained. The judge's findings were ones that were unarguably open to him to make. There were no failures to consider relevant factors, nor impermissible double-counting of factors.

34. In the circumstances, the Secretary of State's appeal fails and is dismissed.

Decision on error of law

35. I conclude that there are no errors of law in the judge's decision.

36. Therefore the Secretary of State's challenge fails and the decision of the First-tier Tribunal shall stand.

Notice of Decision

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

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed J Keith Date: 29th December 2021

Upper Tribunal Judge Keith