IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2023-005395

First-tier Tribunal No: IA/15804/2021
PA/55236/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 21st May 2024

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

B S A
(Anonymity order in place)

Appellant

and

Secretary of State for the Home Department

Respondent

For the Appellant: Mr I Halliday, Advocate, instructed by Latta & Co, Solicitors
For the Respondent: Mr A Mullen, Senior Home Office Presenting Officer

Heard at Edinburgh on 9 May 2024

DECISION AND REASONS

1. This is an appeal against the decision of FtT Judge McLaren, promulgated on 4 October 2023. The case has a long history, but, helpfully, was presented to the FtT on agreed facts, narrated at [9 (a) – (f)] of the decision, and on issues set out at [11 (a) – (c)].

2. The grounds on which permission was granted are incorporated into the skeleton argument for the appellant, dated 1 May 2024.

3. Ground 1 is that the Judge erroneously relied on *Imran* (section 117C(5); children; unduly harsh) [2020] UKUT 00083 (IAC), which was overruled in *MI (Pakistan)* [2021]

EWCA Civ 1711, and should have applied *HA (Iraq)* [2022] UKSC 22, [2022] 1 WLR 3784 as "the most authoritative and up to date summary of the law on the unduly harsh test".

4. Ground 2 is failure to focus on the position of the children, contrary to *KO (Nigeria)* [2018] 1 WLR 5273, not on the conduct of the parent.

5. The remedy sought is that the UT should remake the decision "by reference to the unchallenged factual findings made by Judge McLaren" and should allow the appeal.

6. Mr Mullen indicated at the outset of the hearing that it was conceded that the Judge cited an authority which had been overturned. However, he maintained that the error was immaterial, a complaint of form not substance, and that the Judge's approach was in substance compatible with *HA (Iraq)*.

7. In *HA (Iraq)*, the Supreme Court rejected the "baseline" or "notional comparator" approach to the "unduly harsh" test, and continued:

> 41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the *MK* self-direction:
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> > "… '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."
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> 42. This direction has been cited and applied in many tribunal decisions. It recognises that the level of harshness which is "acceptable" or "justifiable" in the context of the public interest in the deportation of foreign criminals involves an "elevated" threshold or standard. It further recognises that "unduly" raises that elevated standard "still higher" - ie it involves a highly elevated threshold or standard. As Underhill LJ observed at para 52, it is nevertheless not as high as that set by the "very compelling circumstances" test in section 117C(6).
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> 43. Whilst it may be said that the self-direction involves the use of synonyms rather than the statutory language, it is apparent that the statutory language has caused real difficulties for courts and tribunals, as borne out by the fact that this is the second case before this court relating to that language within four years. In these circumstances I consider that it is appropriate for the *MK* self-direction to be adopted and applied, in accordance with the approval given to it in *KO (Nigeria)* itself.
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> 44. 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.

45. Such an approach does not involve a lowering of the threshold approved in *KO (Nigeria)* or reinstatement of any link with the seriousness of the offending, which are the other criticisms sought to be made of the Court of Appeal's decision by the Secretary of State.

8. I note that at [18] Judge McLaren said, "The respondent's agent referred me to … *Imran* … which the appellant's agent took no issue with".

9. Mr Halliday (who also conducted the case in the FtT) said that the Judge was referred to *HA (Iraq)*; and even if the Judge was not assisted as accurately she might have been, tribunals must get the law right.

10. A decision should not lightly be set aside over a nicety of formulation of the legal tests. However, in this instance Mr Halliday identified the Judge's search at [33 and 36], in particular, for "something more" and for the "exceptional". That partakes of the approach criticised by the Supreme Court up to [40] of its judgment.

11. I do not uphold the submission that the error of approach is immaterial.

12. There is also force in ground 2. The Judge was invited to find the appellant to be of reformed and rehabilitated character. She made no error in explaining why she declined to reach that conclusion, but the ordering of her decision does not make it clear that this factor bears only on whether there are very compelling circumstances over and above the statutory exceptions, and not on the unduly harsh test.

13. Mr Halliday suggested that but for her errors, the Judge would have found the test to be satisfied. I am not persuaded to that extent. The Judge's factual findings might also be applied, as Mr Mullen argued, to the contrary effect.

14. There was no application to admit further evidence. The essential facts have not changed. Neither representative asked, if the decision were to be set aside, for the case to be remitted to the FtT, or for a further hearing in the UT. It was common ground that the case should be decided, applying the correct test, on the evidence and submissions already adduced.

15. The appellant (realistically and correctly) does not dispute the outcome in terms of "very compelling circumstances". It is also uncontroversial that the effect on his wife would be harsh, but not unduly harsh.

16. It has not been suggested that the FtT got anything wrong, in substance, about the effects of separation of the appellant from the children. Extracting from its decision matters relevant to undue harshness, I detect the following:

    i. The appellant is in genuine and subsisting relationships with C, whom he married on 13 April 2017; with her son, H, of a previous relationship, born on 22 February 2010; and with the daughter, L, he has with his wife, born on 30 November 2022. [C, H and L are all UK citizens.]

ii. H has no contact with his biological father. Separation from the appellant would be [at the least] upsetting.

iii. The family's health visitor states that the appellant " … is a kind, caring, supportive, loving husband and the family would benefit from being together".

iv. L would be affected by removal of one of her two primary care-givers, losing the opportunity to bond with him directly and to learn from him directly about the Iraqi side of her heritage.

v. "Modern means of communication" would lessen the impact of L's separation from the appellant.

vi. C suffers from depression and anxiety. The appellant's departure would decrease her already small support network. There might be an indirect impact on the children through deterioration of their mother's mental health.

vii. It would be in the best interests of both H and L for the appellant to remain in the UK.

17. Neither representative directed attention to any other factor.

18. There is no error in observing, as a matter of fact, that the children might communicate with the appellant in Iraq; but that does not significantly mitigate the negative effect of absence of day-to-day and face-to-face interaction. I give it minimal weight.

19. I also find that separation will be a negative impact on C. There is no reason to doubt she will do her best to overcome this for the sake of her children, but this is likely, to some degree, to worsen the impact on them.

20. I have no difficulty in sharing the conclusion that it would be in the best interests of both children for the appellant to remain, or in finding that separation from an actively caring parent would have harsh effects on both L and R.

21. I do not find that those effects are raised to the "considerably more elevated threshold" explained in *MK* and approved in *HA*.

22. The decision of the FtT is set aside.

23. The appeal, as originally brought to the FtT, is dismissed.

Hugh Macleman

Judge of the Upper Tribunal
Immigration and Asylum Chamber
13 May 2024