IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2024-001514

First-tier Tribunal No: HU/00891/2023

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On 16th of July 2024

Before

UPPER TRIBUNAL JUDGE REEDS

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HUSSAIN SULAYMAN KHIDR
(ANONYMITY ORDER NOT MADE)

Respondent

Representation:
For the Appellant: Ms Young, Senior Presenting Officer
For the Respondent: Ms Cleghorn, Counsel instructed on behalf of the respondent

Heard at IAC on 26 June 2024

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal (hereinafter referred to as the "FtTJ") who allowed the appeal against the decision made to refuse his protection and human rights claim made in the context of his deportation in a decision promulgated on 13 November 2023.

2. The FtTJ did not make an anonymity order and no grounds were submitted during the hearing for such an order to be made.

3. Although the appellant in these proceedings is the Secretary of State, for convenience I will refer to the Secretary of State for the Home Department as the respondent and to the appellant before the FtT as "the appellant," thus reflecting their positions before the First-tier Tribunal.

The background:

4. The background to the appeal is set out in the evidence and in the decision of the FtTJ. The FtTJ recited the appellant's immigration history which had not been in dispute as follows.

5. The appellant claims to be an Iraqi national (although recorded by the Respondent as being an Iranian national). He arrived in the UK on the 2 December 2004 and, after being issued with a notice of illegal entry on the 6 December 2004, claimed asylum, Humanitarian protection, and leave to remain on human rights grounds. His claim was refused by the Respondent on the 28 January 2005. The appellant was later encountered working in January 2007. The appellant signed forms for voluntary return to Iraq in 2008. However, in 2010 he made further submissions, and on the 26 August 2010 was granted indefinite leave to remain in the UK. In April 2019 he was convicted at the Magistrates Court of several counts of possession of tobacco for sale with false trademarks, and without the relevant health warnings. He was sentenced to a Community Order of 200 hours. He failed to comply with this order. In 2020 he was convicted at the Magistrates Court of further counts of supplying tobacco without health warnings and with false trademarks. He was committed to the Crown Court for sentencing and was sentenced to 12 months' imprisonment concurrent for these offences, and also concurrently for the previous offences, the Community Service Order being revoked.

6. As a result of his offending, on the 10 August 2020 the respondent issued a notice of intention to deport the appellant. On the 14 August 2020, the Appellant wrote in response, making a human rights claim.

7. On the 26 February 2021, the Respondent refused the human rights claim and made a decision to make a deportation order.

8. The appellant appealed the decision which came before the FtTJ and in her decision she allowed the appeal on human rights grounds.

<u>The appeal before the Upper Tribunal:</u>

9. The written grounds on behalf of the Secretary of State set out a number of challenges to the decision of the FtT. However, on 20 March 2024, FtTJ Lawrence granted permission to appeal the decision of the FtTJ ,but this was a partial grant of permission as follows:

> "It is not arguable that the judge materially erred in law in their finding that the Appellant enjoyed genuine and subsisting relationships with his partner and children and that his family life with them are protective factors to deter the Appellant from re-offending. Such findings do not require the support of expert evidence and the judge's reasons for so finding were not arguably unreasonable or irrational. Permission is refused on those grounds.
>
> It is however arguable that the judge gave inadequate reasons or misdirected themselves by allowing the appeal on the basis that the Appellant met the requirements of paragraphs 399(a) and (b) of the Immigration Rules without explaining what those provisions require or how they were satisfied nor whether, and if so why, the public interest

> question that is referred to in section 117A of the Nationality, Immigration and Asylum Act 2002 fell to be answered in the Appellant's favour. Permission is granted on those grounds.

10. At the hearing Ms Young, Senior Presenting Officer appeared on behalf of the Secretary of State and Ms Cleghorn of Counsel appeared on behalf of the Mr Khdir. Ms Cleghorn had made a request for the hearing to take place as a hybrid hearing, and she appeared before the tribunal by way of video hearing and Ms Young was present at the hearing centre. There were no difficulties encountered in hearing the submissions made by each of the advocates.

11. By way of a preliminary issue, Ms Young did not have a copy of the response filed on behalf of the appellant and a copy was made available to her and time was given for her to digest its contents. Furthermore, Ms Young confirmed that the grant of permission was a limited grant of permission and there had been no application made for further permission to appeal on the grounds upon which permission had not been granted.

12. In her submissions, Ms Young stated that she relied upon the relevant part of the written grounds and that it was arguable that the FtTJ gave inadequate reasons or misdirected itself in law for finding that the appellant met paragraph 399 (a) of the Immigration Rules, what those provisions required or how they were satisfied or why the public interest question fell to be assessed in the appellant's favour.

13. She submitted that the judge made findings of fact concerning the appellant's genuine and subsisting parental relationship with the 3 relevant children, but the judge was also required to deal with the issue set out in the Immigration Rules under paragraph 399 (a) and (b) and the question of undue harshness. She submitted that the respondent's position was that the FtTJ did not adequately deal with the requirements under the Rules adequately.

14. She submitted that it was "Robinson obvious" that the decision in HA(Iraq) of the Supreme Court applied which had set out and confirmed the legal test of undue harshness, however the FtTJ had failed to have any regard to that decision, and this is an obvious material misdirection.

15. Ms Young referred to the decision of the FtTJ and the key paragraphs which she identified as being between paragraphs 34 – 36 of the decision. Paragraph 34 referred to the respondent's argument that it would not be unduly harsh for them to remain in the UK without the appellant, given the public interest in the deportation of foreign criminals, but that this was the only place where the FtTJ referred to the issue of "unduly harsh".

16. Ms Young referred to the Rule 24 response (paragraph 6) where it was stated that Judges of the FTT are encouraged to provide shorter reasons and that there was no need to explain the provisions. However, there was a single issue identified, namely whether it would be unduly harsh for the children to remain in the UK without the appellant, or unduly harsh for his partner to remain in the UK without the appellant and as such the FtTJ was required to provide adequate reasoning as to how that test was satisfied.

17. In her submission paragraphs 35 and 36 failed to address the test and there were no reasons given as to what made these particular facts or how the test which is an elevated threshold was met.

18. She submitted that whilst judges are encouraged to make shorter decisions, it was still required for them to provide a legally reasoned decision from which the reader needed to know whether the immigration rules were met and why. The fact that the appellant had a genuine and subsisting parental relationship with the children did not get over that hurdle.

19. Ms Young referred to paragraph 36 where the FtTJ stated that "bearing in mind the significant absence of any other father or partner figure in the lives of the children and herself and that the appellant is generally involved in all aspects of the parenting for children and making a substantial contribution to their upbringing", that did not pass the threshold as adequate reasoning. The FtTJ was required to say what factors with reasons met the elevated threshold to meet the unduly harsh test under the Rules or Statute.

20. She submitted that on a fair reading of the decision the judge appeared to deal with the appeal applying general article 8 principles rather than through the lens of undue harshness and through the lens of the deportation rules. She therefore submitted that the grounds of challenge were made out and that there was a material error of law in the decision and thus should be set aside.

21. Ms Cleghorn relied upon her written response as follows:

22. It is submitted that the grounds are misconceived. It had been accepted that it would be unduly harsh for the appellant's wife and children to return to Iraq or Iran with him. The only was therefore narrow as to whether it would be unduly harsh for the appellant's wife and children to remain in the UK without him. The entire appeal centred around this issue and nothing else especially once it was clear that the appellant and his wife were in a genuine subsisting relationship and there were British children involved and the sentence was one of only 12 months.

23. The FTJ reminds herself of the law when the refers to the respondent's argument that it would not be 'unduly harsh' for them to remain in the UK without the appellant given the public interest in the deportation of criminals §34.

24. The FTJ then refers to 117c and the balancing of factors §35. She then gives her analysis of the evidence and concludes that he is genuinely involved in all aspects of parenting the four children, and making a substantial contribution to their upbringing and concludes that;

(i) the public does not require him to be deported and this is particularly the case in relation to the children §36
(ii) For those reasons she concludes that he meets the requirements of paragraphs 399 (a) and (b) of the Rules §37.

25. It is submitted that it is therefore inconceivable that she did not know that the public interest requires the deportation of criminals unless it would be unduly harsh for his wife and children to remain in the UK without him.

26. FTJs are now encouraged to prepare short reasons. It is therefore submitted that there was no need for the FTJ to explain the provisions or how they were satisfied given that it was ultimately that single issue to resolve once the relationship between the appellant and his wife had been accepted.

27. In her oral submissions, Ms Cleghorn submitted that the FtTJ did direct herself to the argument of unduly harsh at paragraph 34 and gave her reasoning between paragraphs 35 and 36. At paragraph 37 she set out that she found that the appellant met the requirements paragraphs 339(a) and (b) of the Rules.

28. Ms Cleghorn submitted that she relied upon MK (duty to give reasons) Pakistan [2013] UKUT 641 (IAC)at paragraph 11 and **"**The depth and extent of the duty to give reasons will inevitably vary from one case to another. The duty is contextually sensitive. Thus, as the Upper Tribunal observed in **Shizad** [2013] UKUT 35 (IAC), a tribunal's reasons need not be extensive if its decision makes sense." She submitted that when applied to this decision the judge had given clear reasons.

29. She place further reliance on the decision in KC (Gambia) v SSHD [2018] EWCA Civ 2847 at paragraph 33 which reads as follows:

> "Overall this is a case where the Secretary of State's decision was centrally based upon a rejection of the truth of the KC's assertions about the risks she faced in the Gambia. When that account was vindicated by the FTT, the Secretary of State fell back on her alternative arguments relating to internal relocation and state protection. When these too were rejected, the appeal to the UT was based upon narrow forensic arguments concerning the reasoning of the FTT. After the UT, wrongly in my view, allowed itself to intervene in a case that it considered to be finely balanced, the Secretary of State has been driven to seek to bolster that decision with yet more elaborate arguments by way of a Respondent's Notice. None of these attempts persuade me that the FTT did not direct itself correctly in law or that the decision was not one that it was entitled to reach on the evidence it heard. Ms Khan's submission that there was nothing wrong with the FTT's decision is unanswerable."

30. She further relied on R(on the application of PA (Iran) and the Upper Tribunal (IAC) and the SSHD [2018] EWCA Civ 2495 and the postscript which stated :

> "There is an increasing tendency for First-Tier judgments to be overly long and to contain unnecessary detail. This can, itself, cause problems of consistency and cogency. Laborious recitation of every piece of evidence is not necessary or desirable and simply adds to the already heavy burden on First-Tier judges. It is only necessary to refer to evidence that is relevant to the issue or issues for determination. Length is no substitute for analysis."

31. Ms Cleghorn submitted that the point that she was making was that the FtTJ prior to the conclusion and self-direction had given lengthy information about the background of the case. She had explained the appellant's partner had been forced to relocate to a different area (see paragraph 12). The FtTJ had set out their meeting and his offending and details about the relationship and the acceptance of that relationship. She submitted that given the detail provided it was not necessary to repeat this again when self-directing to the relevant test. It was not necessary to unnecessarily burden herself by repeating what she had said in the early part of the decision when judges are encouraged to provide short decisions, and this is what should be adequate. Ms Cleghorn submitted that it was difficult to see what else the judge could have done, and it could not be argued that the decision contained an error of law.

32. Ms Young by way of reply submitted that the point made by the respondent was that the FtTJ had not applied the relevant test when reading paragraphs 35 and 36 there was no application of the facts to the test that should be applied. Whilst the background was set out earlier, those factual findings had to be applied and analysed against the question of whether it would be unduly harsh. The caselaw cited by Ms Cleghorn did not get around that point. She submitted that it could not be enough for a FtTJ to do this without applying the facts to the test and that there must be some analysis and how the background factors and evidence satisfied the elevated threshold and that was not apparent or clear from the decision. Thus there was a clear material error of law which should result in the setting aside of the decision.

Discussion:

33. The applicable legal framework is not in dispute. When considering whether the appellant's deportation would be unlawful under Section 6 of the Human Rights Act 1998 as being in breach of Article 8 of the ECHR, any decision-maker considering the human rights issue is required to have proper regard to section 117 of the Nationality, Immigration Asylum Act 2002 and to adopt a structured approach to that question.

34. By section 117A(1), Part 5A of the 2002 Act applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts (such as a decision to deport a foreign criminal) would breach a person's right to respect for private and family life under article 8 ECHR. In such a case "the public interest question" is defined as being whether an interference with a person's right to respect for private and family life is justified under article 8(2) ECHR: see section 117A(3).

35. When considering that question, a court or tribunal "must (in particular) have regard" in "all cases" to the considerations in section 117B, and in "cases concerning the deportation of foreign criminals" to the considerations in section 117C: section 117A(2).

36. Section 117B provides that the maintenance of effective immigration controls is in the public interest (117B(1)); that it is in the public interest and in particular in the interests of the economic well-being of the United Kingdom that persons seeking to enter or remain in the United Kingdom are "able to speak English" (117B(2)) and are "financially independent" (117B(3)); and that little weight should be given to a private life, or a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the UK "unlawfully" (117B(4)) or to a private life established by a person when the person's immigration status is "precarious" (117B(5)).

37. Section 117C 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.
(4) Exception 1 applies where –
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(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.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.
(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

38. The relevant Immigration Rules have been set out by Ms Cleghorn in her reply (Paragraph 399 and 399A).

39. The first question as to whether the appellant is a foreign criminal, as defined in section 117D(2) of the 2002 Act is not in dispute; the appellant is not a British citizen and has been convicted in the United Kingdom offence and has been sentenced to a period of imprisonment of at least 12 months (he was sentenced to a period of 12 months imprisonment). He is therefore a "foreign criminal."

40. The central issue of this appeal concerns the issue of undue harshness.

41. There has been a significant amount of case law concerning the unduly harsh test. In HA (Iraq) v SSHD (Rev 1) [2020] EWCA Civ 1176 the court gave further guidance on KO (Nigeria) & Ors v SSHD [2018] UKSC 53. This has now been endorsed by the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22.

42. The Supreme Court, in HA (Iraq) v Secretary of State [2022] UKSC 22 endorsed the approach of Underhill J and rejected the SSHD's contention that Lord Carnwath was contemplating a notional comparator test in KO (Nigeria). Giving the lead judgement Lord Hamblen stated:

> 32. 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:
>
> "... '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."
>
> 33. 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" - i.e. 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).

34. 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.

35. 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.

36. 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".

43. I am grateful to the advocates for the helpful submissions made by each of them and how they have advanced their respective cases. Before assessing those submissions, and as a general starting point I bear in mind the following propositions, which are not controversial, that judicial caution and restraint is required when considering whether to set aside a decision of the First-tier Tribunal, and that their decisions should be respected unless it is clear that they have misdirected themselves in law.

44. Furthermore, an appellate court should not rush to find misdirection's simply because they might have reached a different conclusion on the facts or express themselves differently (see AH (Sudan) v SSHD [2007] UKHL per Baroness Hale of Richmond; paragraph 30). The decision must be read sensibly and holistically, and that justice requires that the reasons enable it to be apparent to the parties why one has won, and the other has lost (see English v Emery Reimbold and Strick Ltd [2002] EWCA Civ 605 at paragraph 16).

45. The central thrust of the respondent's grounds is that the FtTJ failed to address and apply the applicable legal test of undue harshness set out in section 117C (5) in her factual findings and analysis and failed to have regard to the nature of the test identified in HA (Iraq) and the high elevated threshold required to meet that paragraph. Furthermore that there was no reasoning provided by the FtTJ on the particular facts as to how the elevated threshold was met.

46. In this respect, Ms Young identifies that the only paragraphs which purport to address the unduly harsh test are those set out between paragraphs 35 – 36. Ms Cleghorn submits by way of response that the FtTJ directed herself to the argument of undue harshness at paragraph 34 and gave her reasoning between paragraphs 35 and 36. She further submits that prior to the conclusion at paragraph 37 that the appellant met the requirements of paragraph 399 (a) and (b), the FtTJ had set out the background to the appeal concerning the appellant's partner and her former history and that in light of that detail it was not necessary to refer to this when "self-directing to the relevant test".

47. Having considered the submissions made by each of the parties and in the light of the decision of the FtTJ I am satisfied that the FtTJ fell into legal error in the way

advanced in the respondent's grounds of challenge. I give my reasons are reaching that decision as follows.

48. As identified by Ms Young, whilst the FtTJ set out at paragraph 34, "the respondent's subsidiary argument is that it would not be unduly harsh for them to remain in the UK given the public interest in the deportation of foreign criminals", that paragraph states no more than to identify the issue that the respondent had advanced. Whilst it is not necessary for a judge to set out and recite passages of case law, it is necessary to identify the legal test that should be applied, in this case as set out in HA (Iraq). There is no reference at paragraph 34 nor within paragraphs 35-36 to the test to be applied either in form, by reference to HA (Iraq) or in substance.

49. Furthermore, paragraph 35 gives the appearance of applying the wrong test. The FtTJ sets out at the end of paragraph 34 that it would be unduly harsh on them to remain in the UK without the appellant "given the public interest in the deportation of foreign criminals" and then at paragraph 35 states "the issue requires me to balance the various factors", and then refers to the nature of the offences committed, and that he had not reoffended, and reference made to protective factors.

50. As set out in the applicable legislation, and case law, if the appellant meets Exception 2, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment or any balance of the factors. Parliament has pre-determined that in the circumstances the specified the public interest in the deportation of medium offenders does not outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms. Thus if an appellant is able to establish that the impact of deportation would be unduly harsh on his children and/or his partner his or her appeal falls to be allowed under Article 8.

51. I accept the submission made by Ms Young that paragraph 35 does not address the relevant legal question in order to provide any evaluation of the unduly harsh test.

52. Ms Cleghorn relies upon paragraph 36 which states: "bearing in mind the significant absence of any father or partner figure in the lives of [partner's] children and herself, and also bearing in mind the clear evidence before me that the appellant is genuinely involved in all aspects of parenting the four children, and making a substantial contribution to their upbringing, I am satisfied that the public interest does not require him to be deported. This is particularly the case in relation to the children." However that paragraph does not set out any evaluative assessment of how the unduly harsh test is met . Whilst the FtTJ refers to the appellant's involvement in all aspects of parenting the children and the nature of his contribution, there is no analysis or reasoning as to how that meets the unduly harsh threshold.

53. Ms Cleghorn further submits that this paragraph should be read with the earlier paragraphs and in particular paragraph 32 and that it is not necessary for the FtTJ to set out those findings again or refer to them. It is therefore necessary to consider those paragraphs.

54. In seeking to establish that he met Exception 2 (s117C (5)), the appellant was required to demonstrate that he had a genuine and subsisting parental relationship with the children and in relation to the appellant's partner, he was required to

establish that he had a genuine subsisting relationship with her. The respondent's case is set out in the decision at paragraph 19, 21 and 22 principally based on the lack of evidence of the parties cohabitation, the lack of extraneous evidence relating to the circumstances of the children from independent sources (see paragraph 21) and the summary at paragraph 29.

55. Whilst the FtTJ considered the lack of evidence from family, friends and schools to be of "greater significance" (para 30) the judge was satisfied that the appellant had a genuine and subsisting parental relationship with the children and a genuine subsisting relationship with his partner (see reasoning at paragraph 33). Those were carefully reasoned findings which were reasonably open to the FtTJ to make.

56. In reaching that assessment the FtTJ set out the evidence principally at paragraph 32 based on his partner's evidence and the activities that he had carried out with the children. This had been set out at paragraph 12 when reciting the evidence, that he acted as a father figure for the elder children, had a close relationship with them that he would get up with them and play with them and take them to school. Reference is made to the activities that they would undertake and also the care and feeding and bathing of the youngest child. The FtTJ referred to the background her relationship with her former partner and the judge considered that the background put the appellant's involvement into context and that "his role assumed a greater level of importance". The conclusion was reached at paragraph 33, was that there was a genuine subsisting parental relationship with the children and that he had a genuine subsisting relationship with his partner.

57. As set out those factual findings were made in the context of that particular factual issue and did not address the relevant legal test imposed by section 117C (5) and as identified in HA (Iraq). Whilst they have relevance in establishing the nature of the relationship in the sense of the appellant having established a "parental relationship" those findings as they stand alone do not address the relevant legal test, which is not applied at paragraphs 35-36. In HA (Iraq) the Supreme Court gave authoritative guidance as to the approach to the question posed by section 117C(5) of the 2002 Act and that when considering whether the effect of deportation will be unduly harsh, the decision maker, should adopt the following self-direction that the consequences"... '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." Whilst there is no "notional comparator" which provides the baseline against which undue harshness is to be evaluated, as explained by Underhill VP at [56], there is no self-direction to the test or that the test involved an appropriately elevated standard so as to make a valid judgement as to the effects of deportation (see paragraphs 41 and 44 of HA (Iraq)).

58. Whilst Ms Cleghorn in her submissions has properly referred to the sufficiency of reasoning and extent of the duty to give reasons and what is required to fulfil its duty depends on the nature of the case. Nonetheless the judgement needs to make clear not only to the parties but to the appellate court the reasons given by Judge for his or her conclusions on the critical issue. Not every factor has to be identified but the issues and resolution of which were vital to the judge's conclusion should be identified and addressed and the manner in which they are resolved, applying the correct legal test, should be explained. It is accepted and recognised that whilst the current thinking is toward shorter more focused decisions, in which it is unnecessary to record in detail the evidence given or submissions made, it is still

an important principle that a reader of a decision must know why they won or lost and that the relevant legal test has been applied.

59. It is evident that there are findings in the decision which were carefully reasoned (as have been set out earlier in this decision), however for the reasons given above, the respondent's grounds have been established that the decision of the FtTJ involved the making of a material error on a point of law on the key issue of whether or not it would be unduly harsh for the appellant's partner or children to remain in the UK without the appellant.

60. I therefore set aside the decision for material error of law. As to the further consideration of the appeal, as a result of the nature of the error of law identified it is likely that further fact-finding on the circumstances of the parties and in particular each of the individual children will be necessary with any updating evidence. In that evaluation the best interests of the children will also require evaluation and addressing. It also likely that there will be further evidence given. When exercising discretion, I am satisfied that the level of fact-finding is such that the appeal should be remitted to the FtT for a rehearing in accordance with the practice direction, the matter should be remitted to the First-tier under section 12 (2) (b) (i) of the TCE 2007 and paragraph 7.2 (a) of the Presidential Practice Statement (*Begum (remaking or remittal) Bangladesh*[2023]UKUT 0046 (IAC) considered). In fairness to the appellant and his partner the evaluative exercise may be affected by the assessment of the factual findings and the hearing of the evidence and that those two things should be considered together and that this is best achieved in fairness to the appellant and his partner by a fresh hearing.

61. However the finding is preserved that the appellant has a genuine and subsisting parental relationship with the children and a genuine and subsisting relationship with his partner. The finding also made as to the appellant's nationality is preserved. Whilst Ms Young submits that paragraph 37 should be preserved, I do not consider that any finding was made in that paragraph as to private life; the appellant did rely upon some aspects of his private life as set out within paragraph 13. Furthermore Part 5A and the Rules provide the structure of the decisions involving Article 8 appeals and "medium offenders" and that they also can rely upon S117C (6).

Notice of Decision

The decision of the First-tier Tribunal involved the making of an error on a point of law; the decision is set aside. The appeal is remitted to the FtT for a fresh hearing on the first available date.

Upper Tribunal Judge Reeds

Upper Tribunal Judge Reeds
11 /7/ 2024