IAC-FH-CK-V1

Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/20975/2018**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On the 1st September 2021	**On the 11th October 2021**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR DIPESHKUMAR KRUSHNAKANT PATEL
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr A Blake, Counsel instructed by AKL Solicitors
For the Respondent: Mr T Lindsay, Home Office Presenting Officer

DECISION AND REASONS

The appellant appeals with permission against the decision of the First-tier Tribunal promulgated as long ago as 2018 to dismiss his appeal. There is a long history to the proceedings since that decision and I will turn to those in due course.

The appellant is a citizen of India who entered the United Kingdom in 2009 with entry clearance as the dependant of his wife, who was then a work permit holder. In 2012 he was granted indefinite leave to remain in the United Kingdom but on 19 May 2017 he was convicted before Lewes Crown Court of an offence of defrauding HM Revenue & Customs, offences for which he was

sentenced to a term of imprisonment of three years and two months. As a result of that he was served with a decision to make a deportation order against him pursuant to Section 32(5) of the UK Borders Act 2007. In response he made a human rights claim and that was rejected.

It is sufficient at this stage to record that the appellant's application for permission to appeal to the Upper Tribunal was rejected first by the Upper Tribunal and then on a renewed application before the Upper Tribunal on 26 February 2019. An application for judicial review was then made which was successful and following that the application for permission to appeal was remitted to the Upper Tribunal and on 3 January 2020 the Vice President gave permission to appeal. That appeal was initially considered by the President, Mr Justice Lane, and ultimately the matter then came before Upper Tribunal Judge Jackson, who in a decision promulgated on 2 September 2020 dismissed the application, finding no material error of law.

Permission was then sought to appeal to the Court of Appeal against the decision of Upper Tribunal Judge Jackson and for the reasons she gave in her decision of 28 October 2020, she indicated her preliminary view that her decision should be reviewed and set aside in light of the Court of Appeal's decision in HA (Iraq) v SSHD [2020] EWCA Civ 1176 to which I will turn later. Eventually, that decision was set aside on 23 November 2020, and it is on that basis that this appeal comes before me today, albeit a substantial time after Judge Jackson set aside her decision. It is, to say the least, unfortunate that it has taken some three years nearly since the decision of the First-tier Tribunal for this oral hearing to take place.

I am grateful to both advocates in helping me to narrow the issues. In substance, it is argued that the First-tier Tribunal Judge erred in her approach to the issue of undue harshness in respect of the appellant's two children. The judge found in her decision that the appellant had two children born in 2009 and 2016 and that the appellant had a genuine and subsisting relationship with them and also with his wife. She also found despite the fact that the appellant was then still in prison that it would be unduly harsh to expect the appellant's wife to accompany him to India. She also found that it would be unduly harsh to expect the children to go to live in India with him.

The judge did, however, at paragraph 38 of her decision direct herself that when having had regard to Rule 399 of the Immigration Rules and Section 117C(5) of the 2002 Act that she would have to have regard to all of the circumstances including the deportee's criminal and immigration history, noting that the more pressing the public interest in removal, the harder it was to show that the effects of deportation would be unduly harsh.

The judge also went on to say:

> "I take account of **AJ and VH [2016] EWCA Civ 1012** and the comments at paragraph 14 from **CT [2016] EWCA Civ 488**:
>
> > 'Neither the British nationality of the respondent's children nor their likely separation from their father for a long time is exceptional circumstances which outweigh the public interest in

> his deportation. Something more is required to weigh in the balance.'
>
> I am satisfied that there is not something more and find that the exceptions in 399(a) and (b) do not apply."

It is common ground between the parties that the judge did at this stage misdirect herself in law. There is a failure, it would appear, to consider KO (Nigeria) [2018] UKSC 53. It is also evident in light of the subsequent decision of the Court of Appeal in HA (Iraq) as summarised in TD (Albania) [2021] EWCA Civ 619 from paragraph 20 onwards, that there has been a failure properly to consider the position of the children. At paragraph 22 in TD (Albania) the court held:

> "The decision in HA (Iraq) does no more than explain that what is required is a case-specific approach in which the decision-maker addresses the reality of the child's situation and fairly balances the justification for deportation and its consequences. It warns of the danger of substituting for the statutory test a generalised comparison between the child's situation and a baseline of notional ordinariness. It affirms that this is not what KO (Nigeria), properly understood, requires."

The issue then is whether the error was material.

Mr Blake submits that in this case the error was material, relying on three primary bases, first, in seeking to rely on a report produced by an independent social worker which the appellant sought to adduce in 2020, second, that it was necessary for the Tribunal to make its own enquiry if there was insufficient material before it, relying on the jurisprudence of the Upper Tribunal primarily from the former President Mr Justice McCloskey in that enquiries ought to have been made and also that in any event the judge in not asking the right questions had not properly evaluated the material.

Mr Lindsay for the Secretary of State submits that the judge whilst misdirecting herself did not err materially in that there was insufficient material on which the judge or indeed any judge could have concluded that there was undue harshness, even taking into account the material from the social work report.

The difficulty with this case is as always the case when a judge has misdirected herself in law. What follows from that inevitably is that the judge may not have asked herself the correct questions and not considered matters which are material. when evaluating the evidence.

To my mind, there are two problems with the judge's approach in this case. First, there is the self-direction as to the law at paragraph 38 which is admittedly wrong. Second, the self-direction with regard to what exceptional circumstances are likely to be is not in line with the approach in HA (Iraq), which makes it much more a child-centred approach. That is particular the case also when looking at Lord Justice Jackson's speech in that appeal at paragraph 154.

There is an added dimension in this case which is that the judge must have reached some findings with regard to the position of the children in order to find that their removal to India would be unduly harsh; but what there is not

here is any consideration of the specific facts of the case. Whil I would not go so far as Mr Blake would like me to do in suggesting that enquiries ought to have been made which would, one would have thought, in this case have resulted in the judge of his own motion adjourning the matter for further written evidence to be adduced which would be not something I consider was required on the facts of this case where ostensibly the appellant was legally represented, where he was in detention and where the children were outside.

I bear in mind the submission from Mr Lindsay that there were simply no basis on which a different conclusion could be reached. That involves a degree of speculation whereas here the judge has not asked the right questions and not approached the subject matter properly. The judge has not focussed or indeed made findings about the situation of the children, albeit that the younger child was very young at the time, and there is merit in Mr Blake's submission that the evidence was that things would have got worse and that the arrangements which were in place were temporary.

Taking all of these factors together, I am persuaded, viewing the decision and evidence as a whole, that the error in this case was material, given in particular that the incorrect questions were asked and that the focus of the judge's approach when saying something more is required to weigh in the balance is unclear. The implication from the passage cited is that the something more that the judge was looking for in this case was the baseline of notional ordinariness which is impermissible and that in shutting her mind out to the proper questions, the judge has not answered the questions and another judge asking those questions could on the material I consider just have concluded that there was undue harshness in the circumstances of this case and for these reasons, I find that the decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

Having had regard to the length of time that has elapsed since the First-tier Tribunal handed down its decision, and given that the appellant is no longer in detention but lives as part of his family, that it would be appropriate for a fresh fact-finding exercise to be undertaken. They children are now significantly older; the younger is now 5, no 2 and may be at school. The older child is now 12. On that basis, I consider that, having had regard to the relevant guidance, that it would be appropriate to remit the appeal to the First-tier Tribunal for a fresh hearing on all matters.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remit the appeal to the First-tier Tribunal for a fresh decision on all issues; none of the findings of fact are preserved.

Signed Date 3 September 2021

Jeremy K H Rintoul

Upper Tribunal Judge Rintoul