Neutral Citation Number: [2023] EWCA Civ 550

Case No: CA 2022 000758

IN THE COURT OF APPEAL (CIVIL DIVISION)
ON APPEAL FROM
THE UPPER TRIBUNAL (IMMIGRATION AND ASYLUM CHAMBER)
UPPER TRIBUNAL JUDGE HANSON
HU/12784/2019

Royal Courts of Justice
Strand, London, WC2A 2LL

Date: 19 May 2023

Before:

LADY JUSTICE SIMLER
LADY JUSTICE WHIPPLE
and
LADY JUSTICE FALK

- -

Between:

MAWANDE SICWEBU	**Appellant**
- and -	
SECRETARY OF STATE FOR THE HOME DEPARTMENT	**Respondent**

- -
- -

David Ball (instructed by **Mordi & Co Solicitors**) for the **Appellant**
Zane Malik KC (instructed by **Government Legal Department**) for the **Respondent**

Hearing dates: 27 April 2023

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Approved Judgment

This judgment was handed down remotely at 10.30am on [date] by circulation to the parties or their representatives by e-mail and by release to the National Archives.

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Lady Justice Simler:

Introduction

1. This appeal concerns the application of the "unduly harsh" test in the case of a foreign national offender, Mr Sicwebu, convicted of a serious criminal offence and subject to deportation in consequence. The appellant's case throughout has been that it would be both unduly harsh for his British wife and dependent children to relocate to South Africa with him; *and* unduly harsh for the family as a whole to be separated from him, as husband and father, breadwinner and support provider, were he to be required to relocate to South Africa, where there are significant obstacles to his reintegration. Although anonymity has been lifted in relation to the appellant and his wife, I shall refer to the children, where necessary, by initials.

2. The appeal has a lengthy procedural history. The original deportation decision was appealed. First-tier Tribunal Judge O'Callaghan held that it would be unduly harsh for Mrs Sicwebu to relocate to South Africa, but that, on balance, (and wrongly taking into account, inter alia, the seriousness of the offence) it would not be unduly harsh for her (and the children) to remain in the UK without him. Following consideration of further representations, the Secretary of State for the Home Department ("the SSHD") made a fresh deportation decision which was appealed. First-tier Tribunal Judge Khan allowed the appellant's appeal on article 8 grounds on the basis that deportation was disproportionate in his case. That decision was set aside as wrong in law by the Upper Tribunal on appeal by the SSHD. Upper Tribunal Judge Hanson re-made the decision, holding that it was not unduly harsh or disproportionate for the appellant to be deported to South Africa. This is the decision under appeal.

3. There is a single ground of appeal. The appellant contends that Judge Hanson's decision is wrong in law because (i) it failed to take into account material factors including the appellant's wife's lack of any support network and the imminent arrival of a third child; (ii) the judge erred in his treatment of the expert evidence; and (iii) he failed to provide sufficient reasons and/or applied the wrong test, by applying a baseline of ordinary harshness, in concluding that deportation was not unduly harsh in the circumstances of this case.

4. The SSHD resists the appeal, contending that it amounts to no more than a disagreement with the merits of the decision and discloses no material error of law. All relevant factors were considered. Further, although legitimate criticism might be made of Judge Hanson's approach to the expert evidence and the research he conducted, neither was material to his reasoning. Finally, the correct test was applied, and the reasons given, while short, were adequate in the circumstances and context of this case.

5. The appeal was well and concisely argued by David Ball for the appellant and Zane Malik KC for the SSHD. We are grateful to them both.

The factual and procedural background

6. The appellant is a South African national. He arrived in the UK as a dependent child (aged 15) in 2004. He was granted indefinite leave to remain on 21 July 2006. He worked as a support officer with people sectioned under the Mental Health Act 1983

and before the index offence, intended to embark on a degree course in social and political science.

7. In 2012 the appellant married a British citizen. The couple have three girls, now aged 10, seven and two (the youngest daughter was born on 18 December 2020). The appellant also has a son from a previous relationship who lives with the boy's mother.

8. Mrs Sicwebu has a number of health conditions and is being treated for ulcerative colitis, a chronic relapsing and remitting disease. Her drug treatment regime increases the risk of skin cancer.

9. On 20 January 2017, the appellant pleaded guilty at Ipswich Crown Court to offences of taking a child without lawful authority, and assault by beating. The child, an 11 year old (referred to as child A), was walking with a friend in Chelmsford. The appellant approached the two children, told the other child to go elsewhere. He said "come with me or I'll kill you" to child A and led child A to the back garden of a house. Once there, he grabbed her by the wrist, punched her in the chest and stomach which winded her, and slapped her round the face. The incident ended when child A's father phoned her. She managed to answer the phone, crying and he told her to run, which she did. The ordeal lasted about 40 minutes and had a traumatic effect on child A.

10. The appellant had been drinking and was having difficulties with his alcohol consumption. The judge who sentenced him, on 14 February 2017, concluded that culpability was lower than in other cases of this kind because this was an impulsive or spontaneous act. A PSR recorded that the appellant displayed good victim empathy and was visibly distressed by his convictions and ashamed and shocked by what he had done. The judge sentenced the appellant to a total sentence of 32 months' imprisonment (after credit of 20% for his guilty plea). While in prison the appellant took steps to address his alcohol misuse and has abstained from alcohol since.

11. In consequence of the convictions and sentence, on 1 March 2017 the SSHD served the appellant with a stage 1 deportation decision letter dated 27 February 2017. The appellant made representations, including relying on article 8 of the European Convention on Human Rights ("the Convention"). The SSHD signed a deportation order and gave reasons for doing so by letter dated 27 April 2017. This letter was subsequently withdrawn (following the lodging of a judicial review application) and a letter dated 15 August 2017 was issued in its place. The appellant appealed.

12. By a decision dated 30 July 2018, the First-tier Tribunal ("the FTT") (Judge O'Callaghan) dismissed the appellant's appeal. Judge O'Callaghan found that the offence was not sexually motivated and that the appellant had been suffering from "negative thinking just prior to the offence, exacerbated by having worked consistently for two days. He was feeling inadequate, questioning his role as the provider for the family and having feelings of anger."

13. In relation to the appellant's wife and children, the judge found that there was a genuine and subsisting relationship with both the appellant's wife, formed when the appellant's immigration status was not precarious, and his daughters (both British and under 18). He found that the "family unit is a loving one …" He held that it would be unduly harsh for Mrs Sicwebu to have to live in South Africa because of compelling circumstances over and above those identified in Appendix FM: she is British and suffers "long-term

from a chronic relapsing and remitting disease that has on a number of occasions lead to flare-ups." The judge found that relocating to South Africa would increase anxiety such that hospitalisation was likely. He noted that her medication also led to a heightened risk of skin cancer. He found there would be an adverse impact on her day to day life were she to have to live in South Africa. In terms of the daughters, the judge found that the oldest, N, suffers from separation anxiety such that she had required specialist help, and that continuation of a close relationship between the appellant and the then youngest daughter, S, would be ineffective due to S's very young age. The judge found that it would be unduly harsh for the children to live in South Africa without their mother.

14. There was one remaining question: whether it would also be unduly harsh for the wife and the children to remain in the UK without the appellant. On balance the judge found that this would not be unduly harsh. In reaching that conclusion (and contrary to guidance given shortly afterwards in *KO (Nigeria) v SSHD* [2018] UKSC 53, [2018] 1 WLR 5273 at paragraphs 23 and 32) the judge took into account the seriousness of the offence (and the fact that the appellant had not addressed his alcohol issues) when determining the question of undue harshness.

15. The appellant's applications for permission to appeal that decision were refused and he became appeal rights exhausted on 23 November 2018.

16. Thereafter, the appellant requested reconsideration by the SSHD and submitted further representations by letter dated 27 December 2018. By a decision with reasons dated 25 July 2019, the SSHD considered the further submissions amounted to a fresh human rights claim with a realistic prospect of success within paragraph 353 of the Immigration Rules. However, having considered all the material, the SSHD concluded that the appellant did not qualify for leave to remain in the UK on any basis; and further concluded that there were no grounds on which to revoke his deportation. The appellant's human rights claim was not certified.

17. The appellant exercised his fresh right of appeal to the FTT against the SSHD's decision by an application dated 29 July 2019. FTT Judge MA Khan heard his appeal on 22 November 2019 and allowed it by a decision promulgated on 13 January 2020, holding that his deportation would be incompatible with article 8.

18. By application dated 7 January 2020 the SSHD successfully sought permission to appeal to the Upper Tribunal ("the UT"). UT Judge Hanson considered the SSHD's appeal on the papers on 16 June 2020 and concluded that FTT Judge Khan had erred in law. Judge Hanson set aside the decision, but ordered that the following were preserved findings:

    i) The appellant's immigration history.

    ii) The appellant's criminal history.

    iii) The Judge's findings "regarding the composition of [the] family unit".

    iv) The Judge's findings "regarding … his attendance at alcohol counselling sessions."

A resumed appeal hearing before the same judge took place virtually on 25 September 2020.

19. By a decision promulgated on 29 October 2020, Judge Hanson upheld the SSHD's decision to deport in this case. The judge held that the private life exception in section 117C (4) of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") was not applicable because there were no very significant obstacles to the appellant's reintegration in South Africa. Further, the effect of the appellant's deportation on his wife and children, who would continue to reside in the UK, would not be unduly harsh, accordingly the family life exception in section 117C(5) of the 2002 Act was also not applicable. Judge Hanson further concluded that there were no very compelling circumstances over and above the two exceptions for the purpose of section 117C(6) of the 2002 Act. The appellant's deportation, in the circumstances, would be compatible with article 8.

20. UT Judge Hanson refused permission to appeal to this court on 14 January 2022. By a decision dated 28 August 2022 Andrews LJ granted permission to appeal limited to the ground of appeal now advanced.

The legal framework

21. Section 32(4) of the UK Borders Act 2007 provides that the deportation of a "foreign criminal", defined as a non UK citizen sentenced to a period of imprisonment of at least 12 months, "is conducive to the public good" and by section 32(5) the SSHD must make a deportation order in respect of foreign criminals. There are exceptions in section 33 of the UK Borders Act 2007, and in particular, at section 33(2)(a), where "removal of the foreign criminal in pursuance of the deportation order would breach … a person's Convention rights".

22. The Immigration Act 2014 introduced sections 117C-117D as Part 5A of the 2002 Act, "expressing the intended balance of relevant factors in direct statutory form" (see *KO (Nigeria)* at paragraph 14). These provisions list the public interest considerations that must be considered by a court or tribunal required to determine whether a person's right to respect for private and family life under article 8 of the Convention is unjustifiably interfered with by the deportation of a foreign criminal: see section 117A of the 2002 Act.

23. Section 117C is the relevant provision for the purposes of this appeal. It 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."

For these purposes, "qualifying child" means a person who is under the age of 18 and who is a British citizen or has lived in the UK continuously for seven years or more: section 117D(1). There is no dispute that the appellant's daughters are all qualifying children.

24. This appeal concerns "Exception 2". Again, there is no dispute that the appellant has a genuine and subsisting relationship with his British wife, and a genuine and subsisting parental relationship with his daughters who are qualifying children. The only issue was (and remains) whether the effect of his deportation on any of them would be "unduly harsh" within the meaning of section 117C(5).

25. The effect of section 117C is substantially reproduced in paragraphs 398-399 of the Immigration Rules, though in more detail. The governing paragraph, paragraph 398, identifies three categories of foreign criminal – described as serious offenders, medium offenders and other qualifying offenders (being those whose offending has caused serious harm or has been persistent). The appellant is a medium and not a serious offender.

26. Paragraph 399, which contains the equivalent to Exception 2, is described as applying as follows:

> "399 This paragraph … 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 seven 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."

In other words, while section 117C(5) poses a single composite question, "is deportation unduly harsh on the partner or child?" paragraph 399 of the Immigration Rules (addressing Exception 2) breaks this down into a two part question: would it be unduly harsh for the partner/child to live in the country to which the appellant is being deported (the "go scenario") and would it be unduly harsh for the partner/child to remain in the UK without the appellant (the "stay scenario"). In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, [2022] 1 WLR 3784 the Supreme Court affirmed that the single question in section 117C(5) should be interpreted consistently with paragraph 399. Accordingly, both scenarios must be addressed, and both must be satisfied for an appellant to be successful.

27. In *HA (Iraq)* the Supreme Court gave authoritative guidance on the approach to the question posed by section 117C(5) 2002 Act. In summary, first, when considering whether the effect of deportation would be unduly harsh, the decision-maker should adopt the following self-direction, namely, that the concept:

> "'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."

When applying this self-direction, decision makers should recognise that it involves an appropriately elevated standard and make an evaluative judgement of the effect of deportation on the qualifying child and/or partner in order to judge whether the elevated standard has been met on the facts and circumstances of the individual case being addressed: see paragraphs 41 and 44.

28. Secondly, the seriousness of the parent's offending is not a factor to be weighed in the balance when assessing the interests of the child in applying the unduly harsh test. The child is not to be held responsible for the conduct of the parent.

29. Thirdly, there is no "notional comparator" which provides the baseline against which undue harshness is to be evaluated. In this regard, the Supreme Court affirmed the approach explained by Underhill VP in this court ([2020] EWCA Civ 1176) as follows:

> "56…if tribunals treat the essential question as being "is this level of harshness out of the ordinary?" they may be tempted to find that Exception 2 does not apply simply on the basis that the situation fits into some commonly-encountered pattern. That would be dangerous. How a child will be affected by a parent's deportation will depend on an almost infinitely variable range of circumstances and it is not possible to identify a baseline of "ordinariness". Simply by way of example, the degree of harshness of the impact may be affected by the child's age; by whether the parent lives with them (NB that a divorced or separated father may still have a genuine and subsisting relationship with a child who lives with the mother); by the degree of the child's emotional dependence on the parent; by the financial consequences of his deportation; by the availability of emotional and financial support from a remaining parent and other family members; by the practicability of maintaining a relationship with the deported parent; and of course by all the individual characteristics of the child."

The decision of Upper Tribunal Judge Hanson

30. In summary, having rejected the contention (not challenged on this appeal) that there would be very significant obstacles to the appellant's reintegration in South Africa, Judge Hanson said that the real issue on the appeal was whether the appellant's deportation would result in unduly harsh consequences for either his wife or their children. As to the "go scenario", Judge Hanson accepted the findings made by Judge O'Callaghan, of a genuine and subsisting relationship with Mrs Sicwebu formed when the appellant's immigration status was not precarious, and that it would be unduly harsh for the appellant's wife to have to go and live in South Africa because she is British, suffering long term chronic relapsing and remitting ulcerative colitis, is at risk of hospitalisation, and taking drugs that lead to a heightened risk of skin cancer.

31. Earlier in the decision Judge Hanson set out paragraph 23 of *KO (Nigeria)* and paragraphs 50 to 53 and 152 of this court's decision in *HA (Iraq)*. When addressing the "stay scenario", the judge reminded himself of *HA (Iraq)* and the factors the court should consider when evaluating undue harshness in relation to the impact on a child, referring expressly to the best interests of the child, emotional as well as physical harm, relationships with other family members in the UK, and the "very significant and weighty" benefits of British citizenship.

32. He set out extracts from Mrs Sicwebu's witness statement including her statement that deportation would be a "disaster" for her and her children; that "there is no way I can raise them on my own" without any support network; and as to the impact on her

children of the period spent by the appellant in prison, and N's specific issues in relation to separation anxiety and other separation stress related problems.

33. The judge also set out a lengthy section of Tamara Licht's report. She is a Registered Psychology and Counselling Psychologist, instructed by the appellant, who reported on N's symptoms. The section recited by the judge reflected her opinion, diagnosis, and dealt with causation and risk.

34. Judge Hanson said that the best interests of N lay in remaining in the UK and receiving treatment to improve her mental health. However, he noted that it was unclear if she had received any treatment to date and that the expert report was dated 20 October 2019, nearly two years earlier.

35. Having observed that the best interests of any child are to be brought up in a loving, stable relationship by two parents, but that this is not the determinative factor, Judge Hanson continued:

> "35. During the time MS was in prison, [Mrs S] was able to care for and provide the required day-to-day support the family needed and access support from outside groups. There are a large number of single parent families in the UK, some with health needs far worse than those suffered by [Mrs S] who manage to parent their children and maintain the family unit.
>
> 36. It is accepted that [Mrs S] may not be able to do all she would want to do for the children but that does not mean her standard of care and parenting will fall below an acceptable standard. There is no suggestion of any need for the intervention of Social Services if the appellant is deported, based upon child protection/neglect concerns.
>
> 37. Although as a result of COVID-19, [Mrs S] has come to depend on MS for support with regards to the school runs I find the evidence fails to support a finding that the degree of dependency from MS's wife and children, and the consequences so his not being able to assist as he has to date, is such that it will result in 'unduly harsh' consequences if MS was no longer able to provide that support.
>
> 38. I accept that deportation will result in harsh consequences for this family unit and that the children will not have the same level of contact with MS and will be limited to contact through indirect means such as Skype, telephone, email and letters.
>
> 39. The children currently reside with their mother and there is no suggestion this will change. It is not made out assistance and interventions will not be available if required for both [N] in helping her deal with her emotional needs or [Mrs S] in relation to any personal or parenting issues. The report of Tamara Licht to a large extent sets out references to texts from the American Psychiatric Association and pontificates on what might happen

> rather that providing a clear indication of what will happen and the consequences of the same.
>
> 40. There is also an issue for which Tamara Licht has been criticised by a judge of this Tribunal before, of referring to issues that have never been at large in an appeal. In this case the reference to risk of suicide is a further example of this as there is no credible suggestion this was a live issue in this appeal.
>
> 41. A more recent development is that [Mrs S] is pregnant with SM's child. It is accepted that the current Covid-19 pandemic is likely to pose a greater risk to her and place her in the vulnerable category, but it is not acceptance that a real risk actually exists. The Government Covid-19 website confirms that pregnant women were said to fall within the vulnerable group as a precaution, not because there is scientific evidence that as a group, they face a greater risk of infection.
>
> 42. I do not find the appellant has made out that if he is removed from the United Kingdom, when considering all the evidence in the round and whilst accepting it will result in harsh consequences for this family unit, will result in what can properly be found on an holistic assessment to be 'unduly harsh' consequences such as to warrant a finding that the appellant is able to succeed in resisting deportation on the basis of either of the exceptions contained in section 117C of the Immigration Rules".

36. Judge Hanson went on to consider article 8 and the proportionality of the deportation decision in light of his findings. At paragraph 48 he concluded that while the appellant had taken steps to deal with his alcohol problems and demonstrated an improvement since the commission of the index offence, he was not satisfied that the strong public interest in deportation was outweighed in this case.

The appeal

37. As already indicated, there is a single ground of appeal. The appellant challenges the remaking decision as wrong in law under three separate headings.

38. As to the first, Mr Ball submitted that despite the lengthy recitation of Mrs Sicwebu's witness statement at paragraph 29 of the judgment, the judge failed to evaluate the evidence she gave or to engage with her concerns about how she was going to cope, emotionally and physically, in the absence of any support network. The judge's finding that because she had coped while the appellant was in prison, she would be able to cope if he is deported, was flawed. It overlooked the harm suffered by N and the fundamental difference between a temporary separation and a permanent one. Further, it failed to have any regard for the physical and mental toll of separation on Mrs Sicwebu, and ignored the additional strain of caring for a third child.

39. As for the treatment of expert evidence, Mr Ball advanced two complaints. The judge undertook his own post-hearing research into COVID-19 and pregnancy. This was

materially unfair. His reasoning in light of this research is confusing and hard to dissect. In relation to the expert report of Tamara Licht, the judge unfairly disregarded her report on the basis of "an issue for which Tamara Licht has been criticised by a judge of this Tribunal before" without providing any further details. There was nothing improper in her report and the judge's comments in relation to it were unfair. It is difficult to discern what weight he attached to the report, and to what extent his unfair criticism affected his consideration of it.

40. In relation to the third heading, Mr Ball submitted that the judge fell into the precise error warned against in *HA (Iraq):* the judge's reference to the common occurrence of single parent families coping in worse circumstances and the fact that social services had not had to intervene in this family wrongly adopted a notional comparator approach, using intervention by social services as a baseline against which to assess the degree of harshness in this case. Mr Ball also contended that the judge should have considered the appellant's rehabilitation when carrying out the assessment of undue harshness. He submitted that common sense required consideration of this obvious factor because it is unduly harsh to deport a parent who is taking steps to address their offending, and particularly harsh to separate parent and child where the parent has done everything possible to rehabilitate himself. Mr Ball relied on *Hesham Ali v SSHD* [2016] UKSC 60, [2016] 1 WLR 4799 at paragraph 38 (relevance of conduct since offence was committed) and *Agyarko v SSHD* [2017] UKSC 11, [2017] 1 WLR 823 at paragraph 41 (whether a fair balance has been struck) to support this submission. To the extent that the judge applied the correct legal test, his reasoning is wholly inadequate.

41. In summary, the thrust of the appellant's argument was that considering the limited reasons provided in the judgment, coupled with some seriously spurious remarks, the UT erred when evaluating undue harshness in relation to the appellant's wife and children. The respondent cannot rely on admittedly erroneous paragraphs in the judgment in support of the judge's consideration of factors, whilst also accepting the errors contained in those paragraphs.

42. For the respondent, Mr Malik contended in summary that the judge did take into account all relevant factors and his subsequent evaluation discloses no material error of law. Mr Malik reminded the court that merely because a relevant point is not expressly mentioned by the tribunal, this court should be slow to infer that it was not taken into account, and should exercise judicial restraint in not assuming that the tribunal misdirected itself just because every step in its reasoning is not fully set out: see *R (Jones) v First Tier Tribunal and Criminal Injuries Compensation Authority* [2013] UKSC 19, [2013] 2 AER 625 at paragraph 25. Furthermore, the basis on which Judge Hanson reached his decision may be set out directly or by inference. Specialist tribunal judges can be taken to be aware of the relevant authorities and to be seeking to apply them without needing to refer to them specifically: see *AA (Nigeria) v Secretary of State for the Home Department* [2020] EWCA Civ 1296, [2020] 4 WLR 145 at paragraph 34.

43. Mr Malik submitted that each of the specific matters relied on as having been overlooked were considered by the judge on a fair reading of paragraphs 35 to 42. Judge Hanson expressly considered Mrs Sicwebu's witness statement in making the decision, quoting her evidence as to the difficulties she faced in relation to her children while the appellant was in prison; and that she said it would not be possible for her to raise the

children on her own following his deportation as her mother and siblings would not be able to assist her. He submitted that while the judge accepted the evidence and Mrs Sicwebu's belief that she would not be able to cope as set out in the quoted part of her witness statement, the judge relied on the fact that she had in fact provided for and supported her family while he was in prison and did not accept that her belief was the reality. It is obvious that the judge knew the appellant's wife would have to look after three children because he made express reference to her pregnancy, and at paragraph 42 he stated that he had considered all the evidence in the round.

44. Mr Malik accepted that the judge's independent research into COVID-19 and pregnancy was unwise but submitted that it disclosed no material error affecting the judge's analysis. His reference to the Government's website was neither unfair nor wrong in law and he agreed with the appellant that his wife fell into the "vulnerable" category because of her pregnancy in any event. Since the appellant does not suggest that she fell into that category because she faced a greater risk of infection, the point made here was uncontroversial.

45. In a similar vein, Mr Malik submitted that although the judge's comments in relation to Tamara Licht's report at paragraph 40 might be viewed as objectionable on a first reading, immediately after this comment, Judge Hanson explained that "in this case the reference to risk of suicide is a further example of this as there is no credible suggestion this was a live issue in this appeal". The judge was simply seeking to point out that it was not suggested by the appellant that the risk of suicide was an issue in this appeal. Likewise, the judge made no error of law in observing that the report "pontificates on what might happen rather than providing a clear indication of what will happen and the consequences of the same". Contrary to the appellant's contention, he was not expecting the expert to "opine in certainties where certainties do not exist".

46. Nor did Judge Hanson reject the expert report on the basis that Tamara Licht had previously been criticised by another UT judge. The judge was simply seeking to point out that in this case, just like in another case, Tamara Licht referred to a matter that was not relevant as such. He plainly considered the expert's evidence in addressing the mental health issues and the best interest of the children and the family's circumstances. He found that "the children currently reside with their mother and there is no suggestion this will change", and that it was "not made out assistance and interventions will not be available if required for both [NS] in helping her deal with her emotional needs or [AS] in relation to any personal or parenting issues". These findings were open to the judge on the evidence. The weight to be given to expert, or indeed any, evidence is a matter for the fact-finding tribunal, here the UT. A decision not to accept the expert's opinion or to deal with it succinctly is not an error of law.

47. Mr Malik submitted that the judge applied the correct test and did not adopt a notional comparator approach. His self-direction in law by reference to *HA (Iraq)* cannot be impugned. He properly considered the best interests of the children as a primary consideration, recognising that it would be better for them to live with both parents. He accepted that the outcome in this case was harsh, but that it was not unduly so. Furthermore, rehabilitation plays no part in the unduly harsh assessment and is only relevant to the proportionality assessment under article 8. Consideration of rehabilitation is irreconcilable with the case law and directly inconsistent with the ordinary reading of section 117C(5). As stated in *KO (Nigeria)*, the seriousness of the offence cannot be considered, and accordingly, nor can the steps taken to address the

behaviour. Mr Malik also dismissed the appellant's reliance on *Hesham Ali* as incorrect based on the legislation at the time of the decision: section 117C was inserted after that decision.

48. Although issue may be taken with the drafting style of the judge, there is no identifiable or material error of law. Judge Hanson's reasoning is adequate and his conclusion as to the facts should be respected. Accordingly, Mr Malik invited this court to dismiss the appeal.

Analysis and conclusions

49. Appeals to this court from the Upper Tribunal are limited to appeals on a point of law: see section 14(1) of the Tribunals, Courts and Enforcement Act 2007. Absent an error of law, the appeal must be dismissed. Furthermore, as a specialist fact-finding tribunal, this court should not rush to find an error of law in the decision of the tribunal simply where it might have reached a different conclusion on the facts: see *AH (Sudan) v Secretary of State for the Home Department* [2007] UKHL 49, [2008] 1 AC 678 at paragraph 30. I have borne these principles in mind when considering the impugned decision in this case.

50. The only issue on this appeal is whether in re-making the decision, Judge Hanson erred in law in concluding that the stay scenario of the unduly harsh test was not made out; in other words, that it would not be unduly harsh for the children and Mrs Sicwebu to remain in the UK without the appellant consequent on his deportation.

51. In relation to that question, the passages set out by Judge Hanson from *KO (Nigeria)* and *HA (Iraq)* underlined the fact that the hurdle representing the unacceptable impact on a partner or child should be set somewhere between the low level applying in the case of persons liable to ordinary immigration removal and the very high level applying to serious offenders, but made clear that there is no objectively measurable standard against which to assess the harshness of the impact. Rather, what is required is an informed evaluative assessment of whether the effect of the deportation of the parent in question on his children and/or partner would be unduly harsh in the context of the strong public interest in the deportation of foreign criminals and giving primary consideration to the children's best interests. Mr Ball accepted that this was an adequate self-direction but submitted that the test was either wrongly applied or the reasoning given by the judge was inadequate.

52. The real question accordingly is whether this court can be satisfied in light of the reasons he gave (both express and by inference), that Judge Hanson correctly applied the test to the facts of this case. An unusual feature of the decision is that Judge Hanson did not make any express findings of fact. Instead, he began his consideration of the stay scenario at paragraph 29 where he simply recited four paragraphs from Mrs Sicwebu's witness statement. Since the judge did not reject the evidence recited there, he must be taken to have accepted it, as Mr Malik agreed. It was to the effect that the appellant's time in prison was terrible for the children because they are so close to their father, with whom they have a unique bond. She continued:

> "If my husband is deported it will be a disaster for me and my children because there is no way I can raise them on my own and

> my mother and siblings will not be able to assist me because they have their own issues."

She described the impact, in particular on N, who she said was "still suffering from separation anxiety", had experienced speech delay attributed to stress and was likely to have similar separation anxiety if the appellant were to be deported.

53. At paragraph 31, the judge recited section 4 of the expert psychology report prepared by Tamara Licht, dated 20 October 2019. This was a lengthy section and it included the following statements by Ms Licht:

> "In my opinion if [N] was to be separated from [the appellant], at this point, her overall quality of life would be significantly affected. …
>
> It is my professional opinion that [N's] difficulty to make friends is related to the fear of losing them. …
>
> In my opinion, it is likely that [N's] ability to learn and concentrate has been and is currently impaired due to moderate anxiety levels. Separation anxiety disorder in children leads to school refusal, which in turn may lead to academic difficulties. …"

Ms Licht concluded that N's behaviours were explained by separation anxiety disorder and that she met the diagnostic criteria for this disorder. She said that left untreated her personal, family, social and academic life could become severely affected and she suggested therapeutic interventions which had not at that stage been offered.

54. Again, the judge did not expressly reject the expert's conclusions. However, he identified a number of criticisms of the report. First, he observed that the report was (at that point) almost two years old (though in fact it may only have been a year old at the time) and had not been updated to take account of the impact of any therapeutic interventions. Those were fair points to make. Secondly, in inappropriately disparaging terms, he described the report as "pontificating" on "what might happen rather than providing a clear indication of what will happen and the consequences of the same." I do not understand the basis of the criticism that Ms Licht's report "pontificated". In any event, this second criticism seems to me to be unwarranted: the expert provided a clear diagnosis and set out N's symptoms. Her prognosis was inevitably couched in terms of what might happen because the appellant had not been deported and N's response to being separated from him for a second time on an indefinite basis, or to possible treatments, was unknown and unknowable at that point.

55. Moreover, I do not consider that there is anything improper in the fact that Ms Licht started her discussion of risk in this case by stating:

> "From a diagnostic perspective the American Psychiatric Association indicates that "separation anxiety in children may be associated with increased risk of suicide" (2013)."

This simply indicates that N was in a cohort at possible increased risk in this regard. The point could have been better contextualised or explained by Ms Licht, but I do not consider it objectionable in and of itself. The expert had already explained, "In my opinion, it is likely that [N's] ability to learn and concentrate has been and is currently impaired due to moderate anxiety levels" and that the separation anxiety disorder might lead to school refusal, which may lead to academic difficulties. These conclusions were entirely within the expert's competence and not arguably objectionable. What appears to have made the reference to risk of suicide objectionable in the judge's mind is the fact that Ms Licht had previously been criticised for referring to issues that were not "at large in an appeal". This statement by the judge is objectionable, as Mr Malik accepted in oral argument. Quite apart from questions of fairness and professional courtesy in relation to the expert herself, if the judge was referring to a reported decision to this effect, he should have said so; if he was referring to an unreported decision he should have provided details and specified the criticism made rather than making such a vague and generalised assertion. Further, he should have afforded the appellant and/or Ms Licht an opportunity to respond.

56. Mr Malik submitted that any criticism of the judge's approach to the expert evidence is immaterial in this case because the judge simply referred to an issue relating to the report that plainly troubled him but did not seek to resolve it. Further, he submitted that the judge did not reject the expert evidence on that basis. Accordingly, however inappropriate or objectionable the judge's statements were, they did not affect his decision.

57. I do not accept this submission. In a decision that is acknowledged to be light on reasoning it is difficult to understand why the judge made these points about Tamara Licht's evidence if not because they led him to attach less (or limited) weight to her report in consequence. It is true that the expert evidence was not expressly rejected by him, but nor did the judge engage with its conclusions in any real sense. The closest he came to doing so (after setting it out) is in his statement that, "It is not made out assistance and interventions will not be available if required for both [N] in helping her deal with her emotional needs or [Mrs S] in relation to any personal or parenting issues." This is opaque. The judge did not explain what assistance and interventions he was referring to as available for N. Furthermore, the statement was immediately followed by the criticism of Ms Licht's report for providing no clear indication of "what will happen". Not only was there evidence from Ms Licht about what was likely to happen, but Mrs Sicwebu's evidence (as recorded by the judge) was that N was *still* suffering from the effects of separation anxiety disorder and the behaviours associated with it, and was likely to experience greater separation anxiety upon the appellant's deportation. Ms Licht's report provided a clear diagnosis and offered a likely prognosis. The judge's treatment of the expert evidence falls short of what would ordinarily be expected. In my judgment, he was wrong to criticise the expert as he did and to attach limited weight to her views for these reasons.

58. The judge set out his essential reasons for concluding that it would not be unduly harsh for the family to remain in the UK without the appellant between paragraphs 35 and 42. I have set out the relevant paragraphs above. Despite Mr Malik's robust defence of Judge Hanson's judgment and notwithstanding the correct legal self-direction Judge Hanson gave, I have come to the conclusion that the judge fell into further material

error when applying the unduly harsh test in this case. My reasons for reaching this conclusion follow.

59. First, I accept Mr Ball's submission that the thrust of the judge's overall reasoning is that Mrs Sicwebu managed when the appellant was in prison and that therefore she will manage again, but that this inference drawn by the judge overlooks a number of materially relevant considerations.

60. The first of these is the evidence of very real harm to N's mental health and schooling whilst separated from her father. Though the evidence relating to N was recorded by the judge, it is difficult to identify any substantive engagement with it in the judge's evaluation. N's disorder had reached the stage of meeting the diagnostic standards of a recognised disorder, and she presented as occasionally withdrawn, finding it difficult to make friends. Separation on a temporary basis had affected her emotional dependence on her father, a factor contemplated as relevant when assessing the question of undue harshness in *HA (Iraq)*. N was older at the time of the appeal, and her mother's evidence (recorded by the judge) was that the bond between her and her father was even stronger. However, beyond saying that "assistance and interventions" would be available to N to help with her emotional needs (and without explaining what these were), the reasoning does not disclose whether or if so how N's greater need for support was actually considered; still less in the context of an assumption that because this family managed without the appellant on a temporary basis when he was in prison, they would manage again.

61. The conclusion that Mrs Sicwebu had managed before and would manage again also failed to engage expressly with the impact her fluctuating health condition might have on her ability to be physically and/or emotionally available to her children as a single parent, and what would happen as a matter of practical reality in the absence of any significant support. FTT Judge O'Callaghan made findings about her ulcerative colitis condition. The preserved finding (recorded by Judge Hanson) was to the effect that it is a long term, "chronic relapsing and remitting disease that has on a number of occasions resulted in her being hospitalised for up to a week." As Mr Ball explained, the finding was based on evidence about her difficulties coping when the appellant was in prison, including the following:

> "On one occasion [when the appellant was in prison], whilst suffering a flare-up, she refused to admit herself to hospital because there was no one to care for the children. She had to take medication to suppress the pain, she was extremely inflamed, and had to run the home at the same time. Such serious flare-ups had occurred before, but the appellant was at home to help provide care and support. On one occasion she required a blood transfusion, but the appellant could step-in and ensure that home and family life was not significantly impacted."

62. While the judge accepted that Mrs Sicwebu had "health needs" and might not be able to do all she would want to do for the children, these generalised statements do not give any indication whether, and if so how, Mrs Sicwebu's ability to manage a flare-up of her chronic condition (possibly leading to the need for hospitalisation) without the appellant's or other support was recognised as a feature to be evaluated by the judge in this context. The condition had already had an impact on her ability to provide constant,

consistent physical and emotional support to her daughters, thereby increasing the family's dependence on the appellant. There was nothing to suggest it would not continue to do so. Yet the judge's only reference to Mrs Sicwebu's dependence on the appellant for support was to the fact she had "come to depend on [him] for support with regards to the school runs". Otherwise, the judge said that the evidence failed to support a finding that the degree of dependency and the consequences of him not being available were such as to meet the unduly harsh threshold.

63. Furthermore, there is an obvious and fundamental difference between the appellant being in prison and the appellant being deported. Prison was temporary and short-lived, and the children could visit easily. Deportation posed a more permanent rupture to this family and the children's relationship with their father. There was nothing to suggest that this single mother of three would be able to afford to make a trip (still less more than one) to South Africa with her children, as opposed to the prison visits she could more easily manage within the UK. Indeed, the judge recognised that contact with the appellant would be limited to indirect contact through social media, and that this would be harsh. He did not, however, engage with how permanent separation from the appellant was likely to affect N who was already vulnerable and had particularly acute needs for support (and her younger sister, S).

64. Finally, the conclusion that Mrs Sicwebu would manage failed to engage with the fundamental difference between raising three children as a single mother, as compared with only two when the appellant was in prison. Mr Malik's first response to this point was to say that the judge's task was to consider the impact of deportation as at the time of the appeal, on Mrs Sicwebu and her two daughters. That is correct as far as it goes. However, the evaluative judgment to be made should be conducted in the light of the real world facts, as paragraph 75 of *HA (Iraq)* makes clear. Mrs Sicwebu was heavily pregnant at the time of the appeal. Barring tragedy her baby would be born in December 2020, within months of the decision under appeal. It would be entirely unrealistic to ignore this fact. Mr Malik next submitted that the judge was not required to identify each factor considered, and that he plainly had in mind the fact of the pregnancy because it featured in the context of the Covid discussion. It is true that the judge made reference to Mrs Sicwebu's pregnancy at paragraph 41 in the context of his reference to Covid risks posed to pregnant women. Leaving aside the unfortunate fact and potential unfairness of a judge conducting his own private research (without any reference to the parties), the judge's reasoning in that paragraph is difficult to follow and I remain unsure of the point he was seeking to make. The issue he was required to address was whether deportation would be unduly harsh. This is why the observation "it is not acceptance that a real risk actually exists" is hard to follow. What is clear however, is that the judge did not expressly consider anywhere in his reasons the imminent birth of a third child and the great impact that might have on Mrs Sicwebu's ability to cope in her husband's absence. The fact that she would be looking after a new born baby alone was also plainly relevant to the assessment of the impact of the appellant's absence on the other children and whether this would be unduly harsh.

65. While as a matter of generality I accept the submission made by Mr Malik that this court should be slow to conclude that a specialist judge has overlooked relevant factors in reaching his decision, in this case I am far from confident that Judge Hanson took these materially relevant factors into account. His task was to decide whether the effect of this particular appellant's deportation on his wife and children would be unduly harsh

in light of all the evidence. In the context of this particular family, which depended entirely on the appellant for financial support, where there are genuine and subsisting relationships between the appellant and his wife and daughters, I would have expected the reasoning to reflect some recognition and evaluation of the degree of their emotional dependence on him (having regard to their particular individual characteristics and needs), the impact of their likely inability to travel to South Africa to maintain a genuine and subsisting relationship with him and of the financial consequences of his deportation. I would also have expected the reasoning to reflect engagement with the question of how Mrs Sicwebu would be able to care and provide for her daughters at the same time as having to look after a new born baby, on a long term, permanent basis, notwithstanding her chronic illness and the absence of any support network. It is not implicit in the judge's mere references to the fact of Mrs Sicwebu's health needs and pregnancy, or to the fact of N's mental health needs, that he conducted an evaluation of their dependency and the harm likely to be suffered by them if separated from the appellant. Read fairly and as a whole, I do not think the reasoning supports a conclusion that he did so.

66. A further error emerges from paragraph 35. Judge Hanson drew an apparent comparison between Mrs Sicwebu's ability to care and provide for her family while the appellant was in prison, and single parent families in the UK, some with health needs far worse than those suffered by Mrs Sicwebu, who manage to parent their children and maintain the family unit. He made the point that social services had not been involved in her case. If by the reference to the fact that others manage in harsh circumstances, a comparative approach was adopted, that would plainly be wrong as *HA (Iraq)* makes clear. The test does not involve an assessment by reference to the impact that can ordinarily be expected from the deportation of a parent because this risks the court or tribunal ignoring the actual impact of deportation on the particular partner or child. What is required is an appropriate focus on the specific factors in the particular case that might affect the degree of harshness of the impact upon the deportee's family. I have identified at least some of those factors above. They do not appear to have been addressed. Instead, it appears that the judge wrongly focussed on a search for something more than the hardship experienced by a large number of single parent families in the UK who nonetheless manage to parent their children and maintain a family unit.

67. Mr Ball also submitted (albeit the argument was not pressed) that evidence of the appellant's rehabilitation (including the steps taken to address his alcohol problems) is a relevant factor and should have been considered as part of the unduly harsh assessment, and not limited to the proportionality assessment under article 8. I do not accept this submission and agree with Mr Malik, for the reasons he gave, that while rehabilitation can be of relevance in relation to the proportionality assessment under section 117C(6) of the 2002 Act, it is of no relevance to the unduly harsh assessment.

68. The cumulative errors I have identified in the judge's application of the unduly harsh test are material. I do not think it can be said that his ultimate conclusion would inevitably have been the same had he not made these errors. It might be the same; it might not. In those circumstances, the appeal must be allowed and the judge's decision set aside.

69. My conclusion means that the case will have to be remitted for a yet further rehearing. This is regrettable given the long delay caused by the number of hearings that have already been required (through no fault of the parties), and the strain that living with

the prospect of imminent deportation must inevitably have had on this family. It was common ground that the case should be remitted to the Upper Tribunal rather than the FTT, with a direction that it should be dealt with by a different judge. I think it best to leave questions of case management and preserved findings of fact to the specialist tribunal.

70. For all these reasons, I would allow the appeal and remit the case to a differently constituted Upper Tribunal.

Lady Justice Whipple:

71. I agree.

Lady Justice Falk:

72. I also agree.