Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/14113/2019**

THE IMMIGRATION ACTS

Heard at Birmingham CJC	**Decision & Reasons Promulgated**
On the 29th June 2021	**On the 5th July 2021**

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

RS

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr M Trevelyan, instructed by Jasvir Jutla & Co Solicitors
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

DECISION AND REASONS

1. An anonymity direction has previously been made by the First-tier Tribunal and the Upper Tribunal. For the avoidance of any doubt that direction continues. Unless and until a Tribunal or Court directs otherwise, RS is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This

direction applies amongst others to all parties. Failure to comply with this direction could lead to contempt of court proceedings.

Background

2. The appellant is a national of India. He arrived in the UK on 8th July 1999 and claimed asylum. That claim was refused by the respondent in August 1999 and following an unsuccessful appeal to the First-tier Tribunal, the appellant had exhausted his rights of appeal on 22nd February 2000. Nevertheless, the appellant remained in the UK, and in July 2011, he was granted discretionary leave to remain, initially, until 11th July 2014, and later extended until 19th September 2017. On 18th September 2017, he applied for indefinite leave to remain, and provided further grounds in support of his application in October 2017.

3. On 28th May 2005 the appellant was arrested following a domestic dispute with his then partner, SK, although no charges followed. On 7th October 2011, he was convicted at Leicester Magistrates Court of "making false relevant record/entry kept for community recording equipment Regulations" for which he was fined and ordered to pay costs. On 2nd June 2015, he was convicted at Leicester and Rutland Magistrates Court of property damage relating to SK's mobile phone for which he was fined and ordered to pay costs. On 18th May 2016, the appellant was convicted at Leicester Crown Court of sexual assault on SK and received a ten-month sentence of imprisonment. A number of other charges were to 'lie on the file'. He was also convicted of assault by beating, for which he received a sentence of five months imprisonment, to run concurrently. The sentencing judge also imposed a restraining order on the appellant, and he was automatically placed on the Sex Offenders Register for 10 years.

4. On 17th June 2019 the appellant was served with a Notice of Decision to Deport informing him of the respondent's intention to begin deportation proceedings under s3(5) Immigration Act 1971. The appellant responded

on 24th June 2019 and 12th July 2019 making representations, and in particular, claiming that his deportation would be in breach of Article 8 ECHR. The respondent refused the appellant's human rights claim for reasons set out in a decision dated 31st July 2019. Referring to appellant's convictions for sexual assault and battery, the respondent concluded that the appellant's deportation is conducive to the public good and in the public interest because he has been convicted of an offence which has caused serious harm. The respondent also considered the application made by the appellant on 18th September 2017 for indefinite leave to remain in the UK. The application was refused under paragraph 322(5) of the immigration rules because of his convictions for sexual assault and battery.

5. The appellant's appeal was allowed on human rights grounds by First-tier Tribunal Judge Chamberlain for reasons set out in a decision promulgated on 30th October 2020. He said:

> "The appeal is allowed on human rights grounds. The exception to deportation set out in paragraph 399(a) of the immigration rules, and the exception set out at section 117C(5), apply to the appellant."

6. The respondent was granted permission to appeal by First-tier Tribunal Judge McClure on 19th February 2020. The decision of First-tier Tribunal Judge Chamberlain was set aside by Upper Tribunal Judge Blum for reasons set out in his decision promulgated on 7th October 2020. Upper Tribunal Judge Blum was satisfied that the judge's application of the 'unduly harsh' test was legally flawed. He also found that the judge had failed to give adequate reasons for finding the appellant to be an honest and credible witness, and for accepting his claim that his children had no contact with their mother.

7. Upper Tribunal Judge Blum directed that given the relatively narrow issues in contention, the decision should be remade in the Upper Tribunal at a resumed hearing. The matter was listed for a resumed hearing before me on 29th June 2021.

The issues

8. There are two children of the appellant's relationship with SK. The appellant's daughter, who I shall refer to as S, was born on 11th March 2007 and is now 14 years old. His son, who I shall refer to as T, was born on 13th February 2008 and is now 13 years old. Both children are British citizens. The respondent accepts the appellant and a genuine and subsisting parental relationship with the children. The respondent made that concession "*... by only the smallest of margins on a limited basis".* The respondent noted the appellant's children are in foster care, and the subjects of Care Orders in favour of Leicester City Council. The respondent referred to the limited contact enjoyed by the appellant but also noted that the appellant does care for his children and has made a substantial effort to continue his limited access to them. She noted the appellant has never missed a visitation event and the social worker commented that both children seem to enjoy their time with the appellant. The respondent also noted the appellant successfully appealed a decision to place the children into adoptive care and the appellant had taken the necessary steps to complete courses such as the 'Understanding your child's behaviour' course.

9. The respondent also accepted it would be unduly harsh for the children to live in India primarily because the appellant is not their primary carer, but also because they have never previously lived in India. The respondent noted the children are at very sensitive ages and at the formative years of their secondary education. However, the respondent did not accept that it will be unduly harsh for the children to remain in the UK without the appellant. The respondent referred to the Care Orders made by the Family Court and the limited contact the appellant has with the children.

10. Mr Trevelyan accepts that the sole issue to be determined in the appeal before me is whether deportation of the appellant would be in breach of Article 8. The applicant claims that he meets the requirements for the exception to deportation set out at paragraph 399(a) of the Immigration Rules and/or Exception 2 set out at s117C of the Nationality, Immigration and Asylum Act 2002. In particular, the appellant claims it would be unduly harsh for the children to remain in the UK without him.

The evidence

11. At the hearing before me, I heard evidence from the appellant with the assistance of a Punjabi interpreter. Both the appellant and interpreter confirmed that they understood each other without any difficulty. I have before me:

i) The respondent's bundle.

ii) The appellant's 'supplementary bundle'

iii) The appellant's 'supplementary bundle 2'

iv) The appellant's consolidated bundle comprising of 56 pages that was filed and served in accordance with directions made by me on 25th May 2021.

The appellant's criminal behaviour

12. The appellant's offending history is uncontroversial. I have set it out in paragraph [3] above. Mr Trevelyan accepts it is also accurately referred to in the respondent's decision of 31st July 2019 and at paragraph [3] of the 'error of law' decision of Upper Tribunal Judge Blum. The respondent has provided a copy of the appellant's PNC record dated 14th June 2019 and Mr Bates confirmed that a recent check did not reveal any further offending. For present purposes it is sufficient to refer to the transcript of the sentencing remarks that are to be found in the respondent's bundle,

that put in context the sentences imposed on 18th May 2016. The Judge said:

> "This defendant, at trial, has pleaded guilty to count 1 of assault and count 3 of sexual assault on his partner and I have got to decide what sentence to impose. I should say the remaining counts, that is count 1 of rape,… and count 5 of sexual assault are to lie on the file on usual terms, and I fully understand the reason why the Crown have accepted these pleas.…
>
> [SK], the complainant was in a relationship with the defendant, [the appellant] for about 11 years. They were not married but they have two children, one aged 9, one aged 8. The background is that in May 2012 the children were removed by social services, and the children have remained in foster care ever since. In July 2013, there was a care order, whereby the children remained in foster care. The issue of contact, I think, is up in the air.
>
> The parties remain living in Tudor Road but in separate bedrooms, and that was the situation on 29 November 2015, when the assault took place. There had been an altercation, unpleasant words were said by him to her, he pushed her, and her head hit a boiler, leaving a lump on her head. Later, he returned to the house, kicked the door to try and get in, police were called, and he was arrested.
>
> She was then interviewed by an ABE on 30 November 2015, and she described amongst other things, an incident when he had grabbed her naked breast, this being without her consent. She thought that had taken place probably a month before the ABE interview. What is apparently clear is that, whilst he has been on remand in custody, she has visited him on about nine occasions.
>
> The defendant is 39, he has got two convictions: one is for a road traffic matter, which is of no concern; and in June 2015, for criminal damage, that relates to, I understand, the complainant's mobile phone. He was fined. It is accepted by both sides this relationship is over, and I am invited to make a restraining order, which I will do.
>
> I am going to turn now to the mitigating factors. He has pleaded guilty at trial, but I am asked to bear in mind, this was the first time a compromise was discussed. He is anxious that the sentence that is passed should not be 12 months or more, because he is on a visa and he is anxious to remain in the United Kingdom, and I understand that point, because if it is 12 months or more, he is likely to be deported.
>
> In her ABE, she described the incident which has just been outlined by the Crown, an incident about a month earlier, but in an earlier statement, in November, she described grabbing her breast, but over clothes.
>
> So I turn now to sentence. The maximum for common assault is six months and I have got to give him credit for the late plea of guilty, albeit at trial. So far as section 3 sexual assault is concerned, it is common ground that, it is a category 2B, starting point on a trial, 12 months, with a range of community orders up to twenty-four months. He has been in custody now 5 and a half months, which is the equivalent of an eleven-month sentence. So, on a trial, if I can say, in relation to the assault it would have been six months on a trial, five months for the late plea. The sexual assault, on a trial it would

> have been 12 months, but for the late plea, it is going to be 10 months, that will be concurrent, so it is a total of ten months. You will serve half of that sentence, giving credit for the remand days. I do not have to spell that out, it is likely he will be on licence….. I am going to make a restraining order…. The Sex Offenders Register applies automatically and that is 10 years….”

The appellant’s evidence

13. The appellant adopted his witness statement dated 18th May 2021, in which he sets out developments that have occurred since his previous statement signed in August 2018. He states that previously, the Family Court ordered that he has supervised contact with his children three times a year. Since then, his contact has “greatly increased”. He confirms the children continue to live with their foster carers and in paragraph [4] of his statement, he claims that he was assessed during a six-week course and found to be competent to look after the children. He states that contact was extended to every month, and he now has weekly sessions. He describes in his witness statement how the measures introduced by the government to prevent the spread of Covid 19 impacted upon his contact with his children and his ability to have face-to-face contact. At paragraph [6] of his statement, the appellant refers to the difficulties caused because he was overzealous with buying presents for the children. He refers to his daughter wanting a mobile phone, but the foster carers view that that would upset the younger children who do not have a phone. He believes that to be the reason contact was decreased. The appellant confirms that he wishes to continue his contact with the children and the intends to play an active part in their upbringing. The appellant describes being very close to his daughter, S and sets out the activities that he enjoys with the children. The appellant states that he is supported by his cousin, with whom he lives, and that in his spare time, he regularly attends and volunteers at the local Sikh temple where he participates in charity work in the kitchens. He also describes the activities he has been involved in to assist the homeless and those who could not cope due to the pandemic. He claims that the fundamental problem with his return to India is that

his children are in the UK and he cannot leave them because it would be unbearable for him. He claimed he could not maintain the same level of parenting from India as he does in the UK and he would never be able to see his children face-to-face. The appellant claims that he does not have a home, job or any business assets in India. He confirms his mother lives with his brother, sister-in-law and their child. He states he has no intention to live in India as this would greatly distress his children.

14. The appellant maintains that he did not sexually assault his ex-partner, who continued to visit him whilst he was in prison. He claims the children have contact with their mother three times a year.

15. In his oral evidence before me, the appellant confirmed that the frequency of his contact is now reduced to monthly but remains under review. He last had contact with both children on 19th May 2021, at the foster carers home. He is waiting to hear from the social worker as to when contact will next take place. I asked the appellant whether this contact is supervised. He said that the arrangements keep changing and although he said that the contact on 19 May 2021 was unsupervised, he confirmed that the foster carers had remained in the living room throughout contact, and they were present when the appellant had a meal with his children. He said that as far as he is aware, the children have contact with their mother three times a year. In cross-examination, the appellant confirmed that the children have now lived with their current foster carers for over five years. He has not asked the foster carers to provide a letter or evidence regarding his contact, but he had told the children he was attending court and asked them to state their feelings, so that he could show that to the judge. He confirmed his daughter has provided a letter, but there is nothing from his son because he had become distracted by a PlayStation that the appellant had brought for him. He accepted that following an assessment the local authority concluded that it was not in the children's best interests to return to his care. He said that was a decision taken by the social worker

and not the children. He said they had not explained why it was not in the children's best interests to return to his care and he has been told that a meeting will be arranged, but arrangements have not yet been confirmed. The appellant was referred to an email from the social worker that was sent to his solicitors on 7th June 2021, in which the social worker states that issues arose during the appellant's separate phone contact with his children, which had a detrimental impact on the children and his daughter in particular. The appellant claimed that his daughter had demanded a telephone and when the appellant refused, she became angry and upset with him. He maintains he has a good and close relationship with his children, but they are at an age where they are demanding and get upset if they do not have what they want. The appellant claimed that the letter written by his daughter, in which she states that she has not had that good a relationship with her father, but would like to stay in contact, is written in those terms, because she was upset that he had not got her a phone. The appellant was also referred to the addendum report completed by the independent social worker, in which the appellant is said to have informed the social worker that he has unsupervised contact with his children once a week at his home. The appellant explained that he informed the social worker of the arrangements in place at that time, but the arrangements have subsequently changed. He said that before 18th May 2021 he had contact via a video call every week, with each of the children separately. He does not know whether the foster carers were present during those contact sessions. The appellant confirmed that he does not speak to the children about their mother or how often they have contact with her. His focus is upon their schooling, education and well-being. He confirmed the children are doing well at school and other than S suffering from asthma, neither child has any health issues. The appellant said that if he is returned to India, he will try to continue his contact with the children, but he does not believe that contact will occur because of the time difference, and the children believing their father is so far away. He said the children may or may not talk to him. The appellant confirmed that he

has managed to continue contact with the children until now and that contact is going very well. They all live in the hope that they are going to see each other face-to-face.

The information from Leicester City Council

16. At page 12 of the appellant's consolidated bundle, there is a letter dated 18th May 2021 from the allocated social worker employed by Leicester City Council. Mr Sebit-Berridge confirms the children became subject to interim care orders on 21st May 2012 and full care orders on 18th February 2015. They have remained in the care of Leicester City Council since. The children's Care Plan is to reside in long-term foster care with their current foster carers. He confirms the children have regular supervised face to face contact with the appellant "which currently takes place monthly". It is said that the frequency of the face-to-face contact between the appellant and his children can increase or decrease and that is dictated by the children's wishes and feelings, what is felt to be in their best interests at the time, and the children's care plans. The social worker confirms that at its peak, the appellant had weekly face-to-face contact with his children during periods in 2019 and 2020 when assessments were conducted to assess the viability of returning the children to their father's full-time care. It was concluded that that was not in the best interests of the children and the frequency of contact subsequently reduced. Insofar as the children's contact with their mother is concerned, Mr Sebit-Berridge states:

> "The children also have ongoing face-to-face contact with their mother which is very positive. As with [the appellant], the frequency of her contact with [S] and [T] can increase or decrease. Based on the children's wishes and feelings, what is felt to be in their best interests at the time and the children's care plans."

17. In a subsequent email dated 7th June 2021 *(page 13 of the consolidated bundle)*, Mr Sebit-Berridge states that in early 2021 the face-to-face contact changed to phone contact as a result of the country re-entering lockdowns. He states:

> "… Unfortunately issues arose during [the appellant's] separate phone contact with his children, which had a detrimental impact both children *(sic),* but his daughter in particular. As a result of this, face-to-face contact will be supervised, reduced to once a month, but will continue to take place separately.
>
> In relation to your second query, I am unsure what you are asking for clarification on. But as I set out in the letter I forwarded to you. *(sic)* The frequency, duration and type of contact that either parent has with their children depends on the children's wishes and feelings, and what is felt to be in their emotional best interests at the time. If issues and/or incidents arise during the contacts, which result in a detrimental impact on the children's emotional and mental well-being, then social care would consider whether adjustments need to be made, in the best interests of the children.
>
> Equally, if contact between the children and their parents had been particularly positive over a sustained period of time, and the children or one of the parents requested in *(sic)* increase and/or adjustment to the contact arrangements, then this would also be considered.."

The reports of the Independent Social Workers

18. At pages 29 to 42 of the appellant's consolidated bundle, I have been provided with a report prepared by Angeline Seymour, an Independent Social Worker. She met with the appellant on 8th August 2018 for two hours. She refers to the appellant's account of his relationship with his children and the care that he provided whilst they lived together as a family unit. He described himself as being the main carer for the children and referred to the diagnosis of depression made in respect of his partner, and the impact that had upon their family life. Angeline Seymour refers to the limited contact the appellant had with the children following his release from prison. She saw many photographs of the children with the appellant in which their body language was relaxed, and she noted many of the photographs involve the children hugging their father. She also had sight of several letters written by the children to the appellant. She considered that although the contact was only for a limited amount of time, the interaction between the appellant and his children indicated to her that the appellant is a strong and meaningful person in their lives. She stated it is important to remember that children thrive in stable and nurturing environments where they have a routine and know what to expect. In her experience, major disruptions and

changes affect children's stability and have a devastating impact on their mental health. She concluded:

> "… From what I was informed and witnessed in photographs, [S] and [T] have an established relationship with their father. Given the evidence and research I have used in my assessment of the best interests of these children, in my opinion it would not be appropriate to disrupt their lives any further by their father being removed from the UK.…
>
> Finally, in my experience as a mental health practitioner and on the basis of my assessment of the current immigration issues [the appellant] is currently experiencing, if this situation is not resolved in a positive way, his removal would lead to deterioration in the emotional well-being of [S] and [T]. I am of the view that the permanent removal of [the appellant] from his children's lives is likely to cause significant detriment to [S] and [T]."

19. I have also been provided with an addendum report prepared by Alex Darko, a Social Work Consultant. He met with the appellant on 18th May 2021, via a 'Zoom' video call. In section 1 of his report, setting out the "current and up-to-date social circumstances", Alex Drako noted the children had been with their current foster carer for the past five years and said:

> "…. Of their birth parents, their mother sees them three times a year with [the appellant] being the regular and consistent parent who has worked hard to maintain contact arrangements agreed with the local authority. [The appellant's] contact with the children has progressed from three times a year supervised contact to once a week unsupervised contact.
>
> When I met with [the appellant] on Tuesday 18.05.21, he advised me that he had unsupervised contact with his children once a week in his house. He picks them up from their foster placement in the morning and returns them in the evening. Due to the national Covid locked down in March 2020, contact with the children changed to weekly indirect contact by video calls. This continued until October 2020. From October 2020 to December 2020 he resumed face-to-face contact with them. During this time, he was seeing the children in the town centre or at the park. Contact returned video calls from December to March 2021. [The appellant] did not see the children from March 2021 until 17th May 2021 due to a house and school move by the children and their foster parents. [The appellant] however saw them on 18 May 2021 for about 45 minutes when he attended the foster home to drop some presents for them. He then advised that he is now waiting for the new contact schedule from the local authority.
>
> [The appellant] confirmed that he has been working well with the local authority around his contact with the children. He remains the most consistent and attached parent to the children since they were taken into care. He remains available to them physically, emotionally and psychologically. Aside from contact, he is also involved in their childcare

> reviews, educational reviews, and any school meetings. The school also remains in contact with him to send in reports of their progress and anything that he needs to know about their education. He agrees and understands that he is not the first point of contact by the school and is happy with the level of communication between him and the foster carer."

20. Alex Darko also sets out in the addendum report, the appellant's account of his relationship with his children and the activities that they engage in together. He states in his professional analysis that the appellant is committed to his children and has a strong desire to be part of their growing up. It is said that the appellant's efforts need to be acknowledged as contributing to the children's development and progress and although he is not the primary caregiver, a lack of support and contribution can lead to negative outcomes for the children. Alex Darko notes that an assessment carried out regarding the possibility of returning the children to their father's care concluded that that was not in their best interests. However he is of the professional opinion that whatever decision is taken about the children's future, their father's involvement in their lives should not be discounted. It is said that the appellant's continuous stay in the UK should be an important consideration for the continuous stability of the children's emotional, mental and psychological well-being as well as their placement. Alex Darko states:

> "[The appellant's] contact has progressed from three supervised visits a year to once a week unsupervised session. This is an indication of the trust the local authority has in his ability to keep the children safe in his care. In continuing to have contact with the children is a demonstration of the children's wishes and willingness to see their father."

21. Alex Darko acknowledges that he has been unable to see or interview the children for their comments, but it appears the children are very close to the appellant and treasure the time they spend together. At section 3 of the report, Alex Darko refers to the concerns expressed by the appellant regarding the adverse impact his deportation may have on the children's development and mental health. Alex Darko states:

> "[The appellant] describes himself as the main person within the family that his children are attached to. This allows them to freely relate and share their concerns without being worried about others. They are also confident that their father will always be there for them and will support them where needed. Attachment theory therefore provides the foundation for understanding objectively that a relationship with a significant adult is essential for healthy emotional and cognitive development for children and young people. Severing the children's attachment from their father through deportation, in my view, risk *(sic)* having a negative impact on the children's emotional health and cognitive development. In essence, various studies referred to in this report all highlight the importance of positive attachment figures in the emotional, mental and psychological development of young people. Based on this, I feel it is professional appropriately and, in the children's best interest to suggest that [the appellant] is made to remain the UK so he can continue to remain relevant in his children's life and development."

22. In his final summary and conclusion, Alex Darko states:

> "From my interaction with [the appellant], I was able to observe the emotional and psychological stress that this present uncertain future is placing on him. My professional opinion is that if he is unable to remain in the UK I would expect his relationship with his children to suffer and its stabilising quality to decrease further. This shift in stability would then begin to interfere in the children's education, emotional development, stability of their placement, and social relationships as well as discipline problems. The children are likely to move from placement to placement due to emotional and behavioural challenges. Currently the local authority is considering separating the children during contact with their father due to their behaviour in their foster placement post contact. This behaviour is likely to escalate should the *(sic)* lose contact with their father through deportation.
>
> [The appellant's] presence in the UK supports the children to understand their cultural background and religious beliefs. His presence and contact with the children will help them to develop their sense of identity and belonging which is helpful for them in their life story/personal narrative considering their mother is mostly absent. Studies have shown that developing a positive personal identity and sense of personal history is associated with high self-esteem and emotional well-being…. Listening to [the appellant] I could infer that he is the main contact for the children in truly connecting to their family, heritage and religious belief. [The appellant] is and will continue to play a vital role in this very important part of the children's life and story. The life story work involving their father will help them to make sense of their family history and life outside the care system."

Other evidence

23. I have been provided with a copy of a manuscript letter said to have been written and signed by the appellant's daughter, S. She states; "… *I know I have not had that good relationship with my dad, but I would like to still*

stay in contact. Also when I'm 18 I would like to go to my dad's house and be close to him, because I have not been with him for most of my life. I think it would be easier for me and my brother…".

24. Finally, I have a letter from Raj Manvinder Singh, President of the Guru Tegh Bahadur Gurudwara, Leicester, confirming the appellant is a regular worshipper and does voluntary work at the Gurudwara. He considers the appellant to be an honest, reliable and trustworthy individual. I also have a number of photographs of the appellant with others and undertaking voluntary work.

25. I heard submissions from both Mr Travelyan and Mr Bates that are set out in my record of proceedings and which I have carefully considered. I have also had regard to the skeleton argument settled by Mr Travelyan dated 24th May 2021.

26. I have only heard evidence from the appellant. Neither Angeline Seymore nor Alex Darko was called to give evidence and the opinions they set out have not been tested in cross-examination. Equally, there has been no attempt to call the children's allocated social worker to give evidence and the information that I have before me regarding the proceedings before the Family Court is extremely limited. There has been no attempt to seek the permission of the Family Court for the Care Plans to be disclosed. It is of course entirely impractical for me to refer in this decision to all the evidence that is set out in the bundles before me. I do however make it clear that in reaching my decision I have had regard to all of the evidence whether that evidence is expressly referred to or not, in this decision.

The Legal Framework

27. The Immigration Rules set out the approach to be followed by the Secretary of State where a foreign criminal liable to deportation claims that the deportation would be contrary to the United Kingdom's obligations

under Article 8 ECHR. So far as relevant to this appeal, the immigration rules state:

> **Deportation and Article 8**
>
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and
>
> …
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.
>
> 399. This paragraph applies where paragraph 398 (b) or (c) 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 7 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
>
> …

28. Part 5A of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act") also informs the decision making. Section 117A in Part 5A provides that, when a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches a person's right to respect for private and family life under Article 8, and, as a result, would be unlawful under section 6 of the HRA 1998, the court, in considering the public interest question, must (in particular) have regard to the considerations listed in section 117B and, additionally, in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C. So far as is material to this appeal, the following provisions set out in s117C are relevant:

"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."

29. As I have said before, the issue in this appeal is whether the effect of the appellant's deportation on his children would be unduly harsh. In his skeleton argument, Mr Trevelyan draws my attention to the guidance given by the Court of Appeal in TD (Albania) v SSHD [2021] EWCA Civ 619.

Findings and conclusions

30. The respondent accepts the appellant has a genuine and subsisting parental relationship with his children, albeit they are the subject of Care Orders. It is accepted by the appellant that the children remain in foster care and that the Care Plan is that the children will continue to remain in foster care. I accept that the appellant maintains contact with the

children. I also accept that the love and care the appellant expresses towards his children is genuine.

The best interests of the children

31. S55 of the Borders, Citizenship and Immigration Act 2009 requires the respondent to make arrangements for ensuring that her functions in relation to immigration, asylum or nationality are discharged having regard to the need to safeguard and promote the welfare of children who are in the UK. The children are both British citizens and have been placed in the care of Leicester City Council. The respondent accepts, and I find it is in the best interests of the children that they remain in the UK. Here, the children are living with foster carers who provide for their day-to-day care and there are constraints upon the extent to which the parents are able to maintain contact with the children, because the children will remain in foster care and the contact arrangements are managed by the local authority. I acknowledge the views expressed by S that she would like to stay in contact with her father and that when she reaches the age of 18, she would like to go to her father's house and be close to him. The appellant informed Alex Darko that his children have expressed wanting to travel with him to India one day, to meet with the appellant's mother. They have video calls with her when they visit the appellant. He also said the children want to visit the many interesting sights they have heard about in India. I have no doubt that both children have an affectionate relationship with their father and that they would wish to maintain contact with him. They have been able to maintain contact remotely during the recent pandemic and manage to maintain contact with their paternal grandmother through video calls. There can be no doubt that it is in the best interests of children to continue to have a good and stable relationship with both their parents. This is a primary consideration although it is not the primary consideration and can be outweighed by other factors; ZH (Tanzania) v SSHD [2011] UKSC 11.

The contact arrangements

32. I have already referred to the evidence of the appellant and independent social workers. Neither Angeline Seymore nor Alex Darko have witnessed the appellant's interaction with the children. Equally, neither of them has spoken to the foster carers to get further background information regarding the appellant's relationship with the children or how they present both before, and after contact. Neither appears to have spoken to the children's allocated social worker to gain any independent insight into the arrangements for contact or to consider the accuracy of the information provided by the appellant. They each rely in large measure upon the appellant's account of his relationship with the children, his account of the contact that he has, and his account of the children's contact with their mother. That inevitably impacts upon the wight I attach to their evidence.

33. In section 1 of his report, Alex Darko states the appellant informed him that he has unsupervised contact with his children once a week, in his house. He said that he picks them up from their foster placement in the morning and returns them in the evening. He also notes the appellant did not see the children from Mach 2021 until 17th May 2021 due to a house and school move by the children and their foster parents. He was told the appellant saw the children on 18th May 2021 for about 45 minutes when he attended the foster home to drop some presents for them. He was told that the appellant is waiting for a new contact schedule from the local authority. The information provided by the appellant to Alex Darko regarding his contact is at odds with the information set out in the letter from the childrens' allocated social worker. In his letter dated 18th May 2021, *(the same date upon which the appellant spoke to Alex Darko and upon which the appellant signed his witness statement)*, Mr Sebit-Berridge states that the children "*have regular supervised face-to-face contact with their father, [the appellant] which currently takes place monthly…".* It is said in that letter that the

frequency of face-to-face contact can increase or decrease, and the arrangements are dictated, inter alia, by the children's wishes and feelings. In his oral evidence before me, the appellant claimed the information provided to Alex Darko was based upon the arrangements in place as at the date of their meeting. I reject his explanation. Alex Darko states that he was told by the appellant that he saw the children on 18th May 2021 for about 45 minutes. In his oral evidence before me, the appellant said that he last saw the children on 19th May 2021. Whatever the date of the most recent contact, the contact arrangements must have been planned in advance and in my judgment, it must have been obvious to the appellant by 18th May 2021 that the arrangements are, as set out in the letter from the allocated social worker of that date, that the appellant has supervised face-to-face contact with the children which takes place monthly. Contrary to what the appellant told Alex Darko; the contact is supervised. Furthermore, it must have been obvious to the appellant by 18th May 2021 that the arrangement was not that he has unsupervised contact "in his house". It must also have been obvious to him that the arrangement was not that he would pick up the children from their foster placement in the morning and return them in the evening. I find the appellant exaggerated the extent of, and the arrangements for, his contact with the children when he provided information to Alex Darko. In section 1 of his report, Alex Darko refers to the appellant's contact having progressed from three supervised visits a year to once a week, unsupervised. Alex Darko considered that to be an indication of the trust the local authority has in the appellant's ability to keep the children safe in his care, and also a demonstration of the children's wishes and willingness to see their father. Alex Darko also refers to the appellant as a safe, consistent and significant adult in the life of the children. That view is expressed in a paragraph in which he records being told by the appellant that he is a very protective father and that is a reason why the local authority trusts him and allows him to have unsupervised contact with his children. He was told by the appellant that the local authority has given the appellant responsibility to pick up and

drop off the children for contact. The inaccurate information provided by the appellant has impacted upon the conclusions reached by Alex Darko and impacts upon the weight that I attach to his overall conclusions.

34. In my judgment, the appellant has also sought to marginalise the extent of the children's contact with their mother. In his witness statement the appellant claims the children have contact with their mother three times a year. Alex Darko proceeds upon the premise that of the birth parents, it is the appellant who has been the regular and consistent parent who has worked hard to maintain contact through arrangements agreed with the local authority. The appellant described himself to Alex Darko as the main person within the family that his children are attached to. The appellant's description of the children's relationship and contact with their mother, is, I find, inconsistent with what is said by the allocated social worker in his letter dated 18 May 2021. He states:

> "The children also have ongoing face-to-face contact with the mother which is very positive. As with [the appellant], the frequency of her contact with [S] and [T] can increase or decrease"

35. I reject the submission made by Mr Trevelyan that there is no inconsistency between what is said by the appellant and the allocated social worker because it is perfectly possible to describe contact that occurs three times a year, as "on-going face to face contact". If the contact was limited in the way described by the appellant, in my judgement, it would not have been described by the allocated social worker as "ongoing face to face contact with their mother which is very positive". There is no suggestion in the letter, or the subsequent email provided by the allocated social worker that the contact between the children and their mother is 'supervised' or limited. In fact, the frequency of both parents contact can increase or decrease based upon the wishes and feelings of the children and what is felt to be in their best interests at any relevant point. The allocated social worker describes the children's contact with their mother as "very positive", but in his subsequent email refers to issues regarding the appellant's separate

phone contact with his children, which appears to have had a detrimental impact upon both children, and in particular, the appellant's daughter. Unlike their 'very positive' contact with their mother, it appears to be for that reason that the appellant's face-to-face contact is supervised and has been reduced to once a month. Again, in my judgment, the inaccurate information provided by the appellant regarding the childrens' contact with their mother and the extent of her relationship with them has impacted upon the conclusions reached by Alex Darko and impacts upon the weight that I attach to his overall conclusions.

36. Having carefully considered the evidence before me, I am satisfied that there is a close bond between the appellant and each of his children. That is plainly apparent from the way in which the appellant described his relationship to the social workers. I am also satisfied that the children enjoy a positive relationship with their mother. I am quite satisfied that the appellant does his best to provide emotional and physical support whenever he is able to do so, within the constraints of the current Care Plans and the arrangements for contact.

37. The deportation of the appellant will clearly have an impact upon those arrangements. Alex Darko refers to the appellant saying that his children are living in fear and worry of the unknown as to what will happen to them should he be deported. He expresses the opinion that living in a heightened state of anxiety and nervousness is not good for the emotional and mental well-being of the children as children suffering from anxiety problems can go on to exhibit further behavioural problems, and issues that can follow them into their adult lives. Other than what is said by the appellant, who I find has sought to exaggerate his claims, there is no evidence before me that the children are suffering from anxiety. The letter written by S does not give the impression that the children are living in fear and worry of the unknown. Equally there is nothing in the evidence before me that even begins to suggest that the

children are exhibiting serious behavioural problems or exhibiting signs of mental health problems that may require intervention.

38. Alex Darko concludes that the appellant's presence in the UK supports the children to understand their cultural background, and religious beliefs. It is said that the appellant's presence in contact with the children will help them to develop their sense of identity and belonging which is helpful for them in their life story and personal narrative, considering their mother is mostly absent. That again, in my judgement, fails to have regard to the positive contact that is enjoyed by the children and their mother and fails to appreciate the support she also provides.

39. In reaching my decision I have regard to all the evidence before me and carried out an evaluative assessment of whether the effect of the appellant's deportation on the children would be unduly harsh in the context of the strong public interest in the deportation of foreign criminals. Here, the appellants children have the benefit of the stability provided by their foster carers. In my judgement the children have a support network that will be able to assist during any initial transitional phase following removal of the appellant. I am quite satisfied that the help and support the children currently receive from their foster carers and the Local Authority will continue and they will receive the support required to maintain contact remotely, as they have for a period of several months in the recent past. The appellant will be able to promote the contact that the children have with his family and in particular their paternal grandmother, by video calls.

40. I must take into account the Article 8 rights of the appellant, his children and the public interest in deportation as expressed in the immigration rules and s117C of the 2002 Act. I have carefully considered whether there is anything within the evidence and in particular, the reports of the independent social workers, that establishes that the effect of the appellant's deportation on his children would be unduly harsh, reminding

myself that it is an elevated threshold denoting something severe or bleak to be evaluated exclusively from the effect on the child. Having carefully considered the evidence, in my judgment there simply is not the evidence on which I can properly conclude that the threshold is met. The appellant's children might well initially feel a sense of loss because of their relationship with the appellant. The consequences of the appellant's deportation might just be described as harsh, but the 'commonplace' distress caused by separation from a parent is insufficient to meet the test. The appellant's children will continue to receive the love, care and support that they need from their current foster carers and the support network they have in the United Kingdom. They will be able to continue contact, albeit remotely, with the appellant and they will continue to benefit from the positive contact they enjoy with this mother. In the fullness of time, there will be nothing preventing the children from travelling to India to visit their father.

41. I accept that reliance upon modern means of communication is no substitute for physical presence and face-to-face contact. However, I do not accept that in the event of the appellant's deportation, contact between the appellant and his children would not be possible or will end as the appellant claims in his evidence, albeit it is unlikely to be physical contact. It would in my judgement be entirely possible for the appellant to maintain contact with his children via regular communication. In the end, looking at the evidence in the round, in my judgment the evidence simply does not provide a basis upon which the appellant can establish Exception 2 under s.117C(5) of the 2002 Act and paragraph 399(a) of the Immigration Rules.

42. In NA (Pakistan) -v- SSHD [2016] EWCA Civ 662, Lord Justice Jackson held that the fall back protection set out in s117C(6) also avails those who fall outside Exceptions 1 and 2 and that on a proper construction of section 117C(3), the public interest requires the person's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling

circumstances, over and above those described in Exceptions 1 and 2. Mr Trevelyan, quite properly in my judgment, accepts that if the appellant cannot avail himself of Exception 2, he could not realistically establish that there are “very compelling circumstances” over and above those described in Exceptions 1 and 2. He acknowledges that “very compelling circumstances” is a demanding test. I have already referred to the judge’s sentencing remarks and although the appellant entered a guilty plea, he nevertheless maintains he did not sexually assault his partner. I accept the appellant has not had any further convictions.

43. The best interests of the appellant’s children certainly carry weight but nevertheless, it is a consequence of criminal conduct that an offender may be separated from their children for many years, contrary to the best interests of the child. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. As Rafferty LJ observed in SSHD -v- CT (Vietnam) [2016] EWCA Civ 488 at [38]:

> "Neither the British nationality of the respondent's children nor their likely separation from their father for a long time are exceptional circumstances which outweigh the public interest in his deportation."

44. I acknowledge that the public interest in the deportation of a foreign criminal is not set in stone and must be approached flexibly, recognising that there will be cases where the person's circumstances outweigh the strong public interest in removal. I have had regard, inter alia, to the appellant’s length of residence in the UK, the close ties that he retains with his cousin and his partner, and the contribution that the appellant has made to the community from his voluntary work. I have also had regard to the appellant’s immigration history, and the family circumstances described in the report of the independent social worker. However, there are in my judgment no very compelling circumstances which make his claim based on Article 8 especially strong.

45. In my final analysis, I find the appellant's and his children's' protected rights, whether considered collectively or individually, are not in my judgement such as to outweigh the public interest in the appellant's deportation. It follows that in my judgement, the deportation of the appellant is in the public interest and not disproportionate to the legitimate aim.

46. I dismiss the appeal.

Decision

47. The appeal is dismissed.

Signed **V. Mandalia** Date 30th June 2021

Upper Tribunal Judge Mandalia