IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2021-000180
First-tier Tribunal No: HU/07545/2020

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 July 2024

Before

UPPER TRIBUNAL JUDGE MANDALIA

Between

Zahid Zaman
(NO ANONYMITY DIRECTION MADE)

Appellant

and

Secretary of State for the Home Department

Respondent

REPRESENTATION

For the Appellant: Mr R Islam, instructed by UK Migration Lawyers
For the Respondent: Ms R Arif, Senior Home Office Presenting Officer

Heard at Birmingham Civil Justice Centre on 12 March 2024

DECISION AND REASONS

INTRODUCTION

1. The appellant is a national of Pakistan. He arrived in the United Kingdom in December 2004 as the spouse of a person present and settled in the UK with leave valid until 4 November 2006. He was subsequently granted indefinite leave to remain on 5 January 2007.

2. On 23 January 2020 the appellant was convicted at Birmingham Crown Court of threats to kill. He received a 21-month sentence of imprisonment and was made the subject of a restraining order for a period of five years. On 27 May 2020 the appellant was served with a decision to make a Deportation order against him in accordance with section 32(5) of the UK Borders Act 2007 ("the 2007 Act"). He made a human rights claim on 17 July 2020. That claim was refused by the respondent for reasons set out in

a decision dated 7 August 2020. The respondent rejected the appellant's claim that he falls within the exceptions set out in section 33 of the 2007 Act.

3. The appellant's appeal against that decision was dismissed by First-tier Tribunal Judge Thapar ("the judge") for reasons set out in a decision promulgated on 22 June 2021. Permission to appeal was granted by Upper Tribunal Judge Owens on 7 January 2022. The decision of the Judge Thapar was set aside for reasons set out in my 'error of law' decision issued on 12 December 2023. I directed that the decision will be remade in the Upper Tribunal. I directed that the judge's finding that Exception 1 set out in s117C(4) of the 2002 Act does not apply can be preserved. The following findings of the judge are preserved:

   i) The appellant's evidence in his witness statement that at no time has he ever physically harmed his wife in the past or tried to kill her, does not accord with the account provided within the sentencing remarks. The appellant took no ownership of his actions and minimised the incident to an argument. The Appellant does not believe he has done anything wrong. The Appellant has not been rehabilitated despite the time he has spent in prison and on balance, there is a reasonable chance that he would commit further offences against his wife in the future. The appellant does not accept that he physically assaulted his wife, given his oral evidence and his statement despite him entering a guilty plea. (Paragraph 14)

   ii) The appellant is the biological father of his four children. (Paragraph 16)

   iii) The appellant's wife would be able to care for the children if the appellant returns to Pakistan.

   iv) The appellant's parents are living in Pakistan. The appellant has made at least four visits back to Pakistan, the last being in 2019. (Paragraph 23)

   v) The Appellant's circumstances do not meet the requirements in Exception 1, at s117C(4) of the 2002 Act. He has been residing in the UK for 16 years and although he has held lawful status during this time, he has not been lawfully resident in the UK for most of his life. The appellant has not produced any evidence of his social or cultural ties in the UK. The appellant has family in Pakistan, he speaks at least one of the languages spoken in Pakistan, he has previously worked in the Pakistani forces and has visited Pakistan in 2009, 2016, 2018 and 2019. The appellant is of good health and he has provided no evidence to demonstrate that he cannot rely on family support in Pakistan or obtain employment. The appellant has maintained links in Pakistan and there are no significant obstacles to his integration is Pakistan. (Paragraph 28)

4. I identified the remaining issues in the appeal as follows:

a. Whether Exception 2 set out in s117C(5) of the 2002 Act applies; if not

b. Whether there are very compelling circumstances over and above those described in Exceptions 1 and 2

THE HEARING OF THE APPEAL BEFORE ME

5. The appellant attended the hearing and was assisted throughout by an interpreter. In readiness for the hearing before me I was provided with a composite bundle. Mr Islam informed me that the appellant has made a further witness statement dated 8 March 2024 that was not previously before the FtT, but sets out a change of circumstances since the previous hearing before the FtT.

6. The appellant was called to give evidence. He adopted his witness statement dated 8 March 2024. The certificate of translation is unsigned and undated. The appellant explained the statement was read to him by his solicitor with the assistance of a Pasho interpreter. He confirmed the content of the statement is true and correct. In answer to questions put to him by Mr Islam the appellant said his mother and father-in-law do not now assist him with contact with his children because the appellant is in a new relationship. Asked whether he has made any application to the Family Court to secure contact with his children, the appellant said that is something that he would like to do, but he has not been made aware by anyone that he can do that. The appellant said that if he is deported to Pakistan he will be unable to have any contact with his children. His mother and father-in-law will not now assist with contact arrangements, even by way of telephone contact.

7. There was no cross examination. To clarify matters I asked the appellant when he had last spoken to his children. The appellant confirmed he last spoke to them and had contact with them between 1 and 1½ years ago. During that time he has not taken any steps to secure contact via the Courts. He maintained he was not aware of any application he could make to the Family Court.

8. The appellant's partner, Sandra Arelas was also called to give evidence. She adopted her witness statement dated 8 March 2024. She confirmed the content is true. She said that she does not want the appellant to be deported because he is a 'good man'. She explained that she is a British citizen and came to the UK about 22 years ago from the Philippines to work. She said that her relationship with the appellant would come to an end if he were deported.

9. There was no cross examination. To clarify matters I asked Ms Arelas about the appellant's contact with his own family in Pakistan. Ms Arelas said that she could not remember the last time the appellant visited his parents in Pakistan, but it was before he went to prison. He had remained in Pakistan for approximately 4 weeks. When asked about the evidence set out in paragraph [3] of her statement that when the appellant was in prison he kept in regular contact with his children and continued to spend quality time with them, she explained that what she had meant, was that

the appellant maintained contact with his children by telephone. She said that she had gone to the house when the appellant had contact with his children about a year ago.

10. At the conclusion of the evidence, I heard submissions from Ms Arif and Mr Isam the set out in the record of proceedings.

11. In summary, Ms Arif adopted the respondent's decision and submits the appellant no longer has any contact with his children. She submits Exception 2 set out in s117C(5) of the 2002 Act cannot be met. The appellant's children remain in the day-to-day care of their mother and on any view of the evidence the effect of the appellant's deportation on his children would not be unduly harsh. The appellant has, Ms Arif submits, failed to establish that there are very compelling circumstances over and above those described in Exceptions 1 and 2.

12. Mr Islam submits the appellant has been in a relationship with Ms Arelas and her evidence is that they have lived together since October 2023. She would be unable to live in Pakistan and Mr Islam invites me to find that the effect of the appellant's deportation on Ms Arelas would be unduly harsh.

13. The appellant accepts he has not seen his children for twelve to eighteen months. He was previously allowed contact with the assistance of his in-laws. He no longer has contact with his children. Mr Islam accepts the appellant does not have a subsisting parental relationship with his children. Mr Islam submits the appellant has not properly been advised about contact with his children and his evidence is that he intends to explore contact with the children through the Family Court. Mr Islam accepts the appellant cannot now establish that the effect of the appellant's deportation on his children would be unduly harsh.

14. However, Mr Islam submits there are very compelling circumstances, for the purposes of s117C(6) of the 2002 Act. The appellant had a loving relationship with his children before his conviction and he was able to maintain a relationship with his children following his release from prison with the assistance of his mother and father-in-law. Mr Islam submits there is no evidence that the appellant is a bad father and his deportation would mean the children are denied contact with their father and he would be denied the opportunity to take any steps to establish contact. The appellant is moving forward with his life and has previously worked in the UK. He has no further convictions and his conviction must be viewed in the context of the difficult relationship he had with his wife and alcohol abuse at the time.

THE LEGAL FRAMEWORK

15. Part 5A of the Nationality, Immigration and Asylum Act 2002 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. Section 117C specifically deals with the weight to be attached to the public interest in deporting foreign criminals and provides a structure for conducting the necessary balancing exercise, dependent in part, on the length of sentence imposed.

16. It is uncontroversial that the appellant is a foreign criminal, as defined in s117D(2) of the 2002 Act. The appellant has been sentenced to a period of imprisonment of at least 12 months and is therefore a 'foreign criminal' as defined in s117D. By operation of s117C(3), in the case of a foreign criminal who has not been sentence to a period of imprisonment of four years or more, the public interest requires their deportation unless Exceptions 1 or 2 apply. Applying s117C(6) of the 2002 Act, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

17. In *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22, Lord Hamblen referred to the 'very compelling circumstances' test. He cited the judgement of Sales LJ in *Rhuppiah v Secretary of State for the Home Department* [2016] 1 W.L.R 4203, at [50], that the 'very compelling circumstances' test "provides a safety valve, with an appropriately high threshold of application, for those exceptional cases involving foreign criminals in which the private and family life considerations are so strong that it would be disproportionate and in violation of article 8 to remove them".

18. In *Yalcin v Secretary of State for the Home Department* [2024] 1 WLR 1626, Lord Justice Underhill explained:

> "53. The starting-point is to identify the basic structure of the law in this area. At para. 47 of his judgment in *HA (Iraq)* Lord Hamblen approved the summary which I gave at para. 29 of my judgment in this Court:
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> > "(A) In the cases covered by the two Exceptions in subsections (4)-(5), which apply only to medium offenders, the public interest question is answered in favour of the foreign criminal, without the need for a full proportionality assessment. Parliament has pre-determined that in the circumstances there specified the public interest in the deportation of medium offenders does *not* outweigh the article 8 interests of the foreign criminal or his family: they are, given, so to speak, a short cut. The consideration of whether those Exceptions apply is a self-contained exercise governed by their particular terms.
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> > (B) In cases where the two Exceptions do not apply – that is, in the case of a serious offender or in the case of a medium offender who cannot satisfy their requirements – a full proportionality assessment is required, weighing the interference with the article 8 rights of the potential deportee and his family against the public interest in his deportation. In conducting that assessment the decision-maker is required by section 117C(6) (and paragraph 398 of the Rules) to proceed on the basis that 'the public interest requires deportation unless there are very compelling circumstances over and above those described in Exceptions 1 and 2'."
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> > ...

> 57. *NA (Pakistan)* thus establishes that the effect of the over-and-above requirement is that, in a case where the "very compelling circumstances" on which a claimant relies under section 117C(6) include an Exception-specified circumstance ("an Exception-overlap case")[9] it is necessary that there be something substantially more than the minimum that would be necessary to qualify for the relevant Exception under subsection (4) or (5): as Jackson LJ puts it at para. 29, the article 8 case must be "especially strong". That higher threshold may be reached either because the circumstance in question is present to a degree which is "well beyond" what would be sufficient to establish a "bare case", or – as shown by the phrases which I have italicised in paras. 29 and 30 – because it is complemented by other relevant circumstances, or because of a combination of both. I will refer to those considerations, of whichever kind, as "something more". To take a concrete example, if the Exception-related circumstance is the impact of the claimant's deportation on a child (Exception 2) the something more will have to be either that the undue harshness would be of an elevated degree ("unduly unduly harsh"?) or that it was complemented by another factor or factors – perhaps very long residence in this country (even if Exception 1 is not satisfied) – to a sufficient extent to meet the higher threshold; or, as I have said, a combination of the two.
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> …
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> 62. … I agree that it would in principle conduce to transparent decision-making if the tribunal identified with precision in every case what the something more consisted of; but that will not always be straightforward. The proportionality assessment is generally multi-factorial and requires a holistic approach. A tribunal must of course in its reasons identify the factors to which it has given significant weight in reaching its overall conclusion. It is no doubt also desirable that it should indicate the relative importance of those factors, but there are limits to the extent to which that is practically possible: the factors in play are of their nature incommensurable, and calibrating their relative weights will often be an artificial exercise. It would in my view place an unrealistic burden on tribunals for them to have to decide, and specify, in every case whether the something more consists of the Exception-specific circumstance being present to an elevated degree, or of some other circumstance or circumstances, or a combination of the two. There may be cases where for some reason peculiar to the case this degree of specificity is necessary; but I do not believe that there is any universal rule. We should not make decision-making in this area more complicated than it regrettably already is."

THE SENTENCING REMARKS

19. To put the appellant's conviction in context, I have been provided with the sentencing remarks of His Honour Judge Laird QC. In sentencing the appellant on 23 January 2020 he said:

> "…You fall to be sentenced for an offence of making a threat to kill. The victim of that offence is your former wife. You had been married for 15 years and have four children together. But at some stage in 2017 you separated and you have found that a difficult process. In 2017, you were convicted of

what appears to have been a less serious offence of making a threat to kill. A threat issued to police officers, about your ex-wife.

On this occasion, you let yourself into the family house which you were not living in, sometime close to midnight. Your wife and children were upstairs asleep. She came down from upstairs to go to the lavatory. She noticed that you had entered the house. You were sitting in the living room, you were smoking cannabis and you were drinking from a bottle of Jack Daniels. An argument began between you. She was critical of you in your lifestyle choices and you began to shout and swear. You accused her of having an affair and you said that you would kill her and petrol bomb the house. You pushed her against the wall and spat in her face, punched both her arms and swung a kick towards her which did not connect. You then went into the kitchen and you returned into the living room with a knife and once again, you threatened to kill her and the children. She was able to get hold of her mobile telephone and called the police. You then began to apologise but again, then repeated the threat. It was clear that your emotions had overtaken you at that time and you were in drink.

That is set against the background of your previous conviction for a similar, but as I said, less serious offence….

In mitigation you are a man of 36 years of age and you only have that one conviction and I accept that outside the volatility and emotion of this relationship you would not commit any criminal offence. You have spent time in the Pakistani forces and other than these events that I have described in 2017 and 2019, you have lived a good and productive life. You have worked, you have supported your children and no doubt you love your children very much and I accept all of those things.

I am required to start with a starting point of two years. Some courts would move up from that to take account of your previous conviction, but I recognise that pleading guilty in a case such as this when emotions are strained, should be recognised and it will be recognised. I will not move from the starting point of two years upwards, and I will indeed come downwards to reflect your guilty plea. The least sentence that I could pass upon you in relation to this offence is one of 21 months imprisonment.

… I will make the restraining order in the proposed terms. I am satisfied that it will permit you to see your children, because I would not wish to prevent you from doing that, and I will make the order for five years…"

DECISION

20. The appellant has appealed the respondent's decision to refuse his human rights claim under s.82 of the Nationality, Immigration and Asylum Act 2002 on the ground that the decision is unlawful under s.6 of the Human Rights Act 1998. The appellant must satisfy me on the balance of probabilities that Article 8 ECHR is engaged. If it is, the burden shifts to the respondent to establish that the decision is proportionate.

21. In reaching my decision I have had regard to all of the evidence before me whether it is referred to or not. Although I accept the evidence of the appellant's partner, Sandra Arelas, in so far as her evidence relates to her relationship with the appellant, I attach little weight to her evidence

regarding the appellant's connections to the UK, his relationship with his children, and the impact of the appellant's deportation upon his children.

22. I accept the appellant has established a private life in the UK given his length of residence and his current relationship with Ms Arelas, even if there may now be some doubt as to whether he continues to have a family life with his former partner and children. I accept that any interference with the appellant's Article 8 rights would be prescribed by law and in pursuit of a legitimate aim for the purposes of Article 8(2) ECHR. The only remaining issue for the Tribunal therefore is whether the deportation would be proportionate in all the circumstances.

23. The appellant's evidence is that he is still married to Siaqa Tara, but they are no longer in a relationship. The appellant is now in a relationship with his current partner Sandra Arelas. The appellant claims the relationship is a serious one and that they intend to marry in the future. He claims he met Sandra Arelas approximately 10 years ago and they were initially friends but their relationship developed and they are now living together. The appellant claims he wishes to continue his relationship in the UK and if he is deported, it would be the end of that relationship. Ms Arelas states she first met the appellant in June 2006 through mutual friends and their relationship began in June 2019. They have lived together at the same address since October 2023. She claims she cannot relocate to Pakistan because she has never lived there before and has lived the majority of her life in the UK. She describes herself as a retired health care professional.

24. Although I am prepared to accept the appellant has a genuine and subsisting relationship with Ms Arelas, I do not accept that the effect of the deportation on her would be unduly harsh. . In a decision of the Supreme Court in HA (Iraq) v SSHD [2022] UKSC 22, Lord Hamblen (with whom Lord Reed, Lord Leggatt, Lord Stephens and Lord Lloyd- Jones agreed) said:

> "41. Having rejected the Secretary of State's case on the unduly harsh test it is necessary to consider what is the appropriate way to interpret and apply the test. I consider that the best approach is to follow the guidance which was stated to be "authoritative" in KO (Nigeria) , namely the MK self-direction:
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> > "… 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

25. The relationship began shortly before the appellant was convicted on 23 January 2020 and has developed and strengthened since the appellant's release from imprisonment. The appellant and Ms Arelas began living together in October 2023 in the full knowledge that the appellant was the subject of a decision to make a Deportation order, and that he may not be permitted to remain in the UK. Ms Arelas makes the broad assertion that she cannot relocate to Pakistan because of the length of time she has spent in the UK. The appellant and Ms Arelas may wish to continue their family life together in the UK, but that does not equate to the right to do

so. The relationship developed and endured whilst the appellant was in prison and it was not until some time after his release that they began living together. There is no evidence before me to establish that Ms Arelas would be unable to cope without the appellant or that she has any particular needs that can only be met by the appellant. The deportation of the appellant may be inconvenient or uncomfortable for Ms Arelas but the evidence before me does not in my judgement establish that the effect of the appellant's deportation on Ms Arelas would be unduly harsh.

26. As far as the appellant's children are concerned, the appellant's evidence is that he last had contact with his children about 1 to 1½ years ago. In his witness statement he claims that he hopes to resolve his immigration status so he may resume having consistent contact with his children and continue his relationship with them. He claims in his witness statement that the documentation he has regarding his children is limited and that if he is deported, it will have a devastating impact on his children in particular. He claims in paragraph [9] of his witness statement that he is striving to see his children more regularly. That is at odds with his oral evidence before me in which he accepts that despite the passage of time, he has taken no steps to establish contact with them. The appellant refers to his relationship with Sandra Arelas and claims that although he is "happy to an extent", he cannot be truly happy until he sees his children regularly and consistently.

27. In reaching my decision, I have throughout had regard to the best interests of the appellant's minor children as a primary consideration. The leading authority on section 55 remains *ZH (Tanzania) v Secretary of State for the Home Department* [2011] UKSC 4. In her judgment, Lady Hale confirmed that the best interests of a child are "a primary consideration", which, she emphasised, was not the same as "the primary consideration", still less "the paramount consideration". As a starting point, I readily accept that the best interests of a child are usually best served by being with both or at least one of their parents.

28. It is clear, and I find that the appellant has not played any part in the lives of his children for a period of twelve to eighteen months. During that time despite his claim that he is "striving to see his children", the appellant has not taken any steps whatsoever to try and establish contact, if necessary, via an application to the Family Court. I reject the appellant's claim that he is not aware that he could make such an application. He has the benefit of legal representation and I have no doubt that if the appellant had any genuine interest in rekindling and maintaining contact with his children, he would have taken at least some steps to establish contact with them. His failure to do so demonstrates a lack of any real commitment towards his children. Beyond the vague assertions made by the appellant and Ms Arelas in their witness statements that the appellant's deportation will have a detrimental impact on the appellant's children, there is no evidence before me that the absence of the appellant from their lives for the past twelve to eighteen months has had any impact on the children at all. They remain in the day-to-day care of their mother and are surrounded by their immediate family. They have no contact with the appellant and there is no evidence before me that even begins to suggest

that the effect of the appellants deportation on his children would be unduly harsh.

29. There is a preserved finding that the appellant fails to meet the first exception to deportation. I find therefore that Exceptions 1 and 2 as set out in s117C(4) and (5) do not apply. The test in s117C(6) is a proportionality test, balancing the rights of the appellant against the public interest in his deportation. The scales are nevertheless weighted heavily in favour of deportation.

30. In his witness statement the appellant highlights that he did not physically harm Siaqa, and he states that the words spoken were a mistake. The offence was caused by drinking excess alcohol. As I have recorded at paragraph [3(i)] of this decision, the appellant's evidence in his witness statement that at no time has he ever physically harmed his wife in the past or tried to kill her, does not accord with the account provided within the sentencing remarks. His Honour Judge Laird QC noted the appellant pushed his wife against the wall and spat in her face, punched both her arms and swung a kick towards her which did not connect. He then went into the kitchen and he returned to the living room with a knife and once again, the appellant threatened to kill her and the children.

31. I accept, as Mr Islam submits, there has been no further offending by the appellant. As the Supreme Court highlighted in *HA*, the time that has elapsed since the index offence was committed and the appellant's conduct during that period is a relevant consideration. I accept that very much to the appellant's credit, there is no evidence before me that the appellant has engaged in criminal activity and he has not been convicted of any further offending since his release. The appellant has demonstrated that he is able to abstain from offending and I attach due weight to that in my proportionality assessment.

32. I accept the appellant was unable to contact his wife regarding the arrangements for contact with his children because of the order made by His Honour Judge Laird QC when sentencing the appellant. Although Mr Islam submits there is no evidence to establish the appellant is a bad father, and I have no reason to doubt that general claim, the threat to kill made by the appellant was directed to his wife and children. Nevertheless, the appellant was initially supported by his mother and father-in-law with the contact arrangements, but as I have already said, the appellant has since demonstrated no commitment to establishing contact with his children for some considerable time. Mr Islam also submits the appellant's children would be denied the opportunity of establishing contact with the appellant if he is deported. The difficulty with that submission is that the status quo is that the appellant currently has no contact with the children. The two eldest children are almost at an age when they will decide for themselves whether they wish to establish or have contact with the appellant and there will be nothing preventing the eldest children from visiting the appellant and their extended paternal family in Pakistan should they wish to do so.

33. In reaching my decision I have had regard to all of the factors that are relied upon by Mr Islam to support his submission that the appeal should be allowed because there are very compelling circumstances over and above those described in Exceptions 1 and 2. In my final analysis, I find the appellant's protected rights, whether considered collectively with rights of others that he has formed associations with, or individually, are not in my judgement such as to outweigh the public interest in the appellant's removal having regard to the policy of the respondent as expressed in the immigration rules and the 2002 Act. Even giving credit to the appellant for his conduct since his release, and the factors that weigh in his favour, I am not satisfied that the public interest is weakened to the point where it is capable of being outweighed by the appellant's Article 8 claim. I am satisfied that on the facts here, the decision to deport the appellant is not disproportionate to the legitimate aim and I therefore dismiss the appeal on Article 8 grounds.

NOTICE OF DECISION

34. The appeal is dismissed.

V. Mandalia
Upper Tribunal Judge Mandalia

Judge of the Upper Tribunal
Immigration and Asylum Chamber

2 July 2024