Press Summary

20 July 2022

HA (Iraq) (Respondent) *v* Secretary of State for the Home Department (Appellant)

RA (Iraq) (Respondent) *v* Secretary of State for the Home Department (Appellant)

AA (Nigeria) (Respondent) *v* Secretary of State for the Home Department (Appellant)

[2022] UKSC 22
On appeal from: [2020] EWCA Civ 1176 and [2020] EWCA Civ 1296

Justices: Lord Reed (President), Lord Hamblen, Lord Leggatt, Lord Stephens, Lord Lloyd-Jones

Background to the Appeal

These three conjoined appeals concern the statutory regime governing the deportation of foreign criminals under section 117C of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"). A "foreign criminal" for the purposes of these appeals is a person who is not a British citizen, is convicted in the UK of an offence, and who is sentenced to a period of imprisonment of at least 12 months. The 2002 Act divides foreign criminals who have been sentenced to terms of imprisonment into two categories. Those sentenced to at least 12 months, but less than four years ("medium offenders"), can avoid deportation if they can establish that its effect on a qualifying child or partner would be "unduly harsh" ("the unduly harsh test"). This is known as Exception 2. Exception 1, which relates to length of lawful residence and integration, is not in issue in this appeal. Those sentenced to at least four years ("serious offenders") can avoid deportation if they establish that there are "very compelling circumstances, over and above those described in Exceptions 1 and 2" ("the very compelling circumstances test"). Whether deportation would produce unduly harsh effects for a qualifying partner/child is relevant there too.

It was common ground before the Court that a medium offender who cannot satisfy the unduly harsh test can nevertheless seek to show that the very compelling circumstances test

is met. The very compelling circumstances test requires a full proportionality assessment to be carried out, weighing the interference with the rights of the potential deportee and their family to private and family life under article 8 of the European Convention on Human Rights against the public interest in their deportation. This proportionality assessment will be carried out in all foreign criminal cases unless the medium offender can show that either of Exceptions 1 or 2 apply.

HA and RA were medium offenders, whilst AA was a serious offender. In each appeal, the Secretary of State ordered deportation and the First-tier Tribunal allowed the appeal from that decision. The First-tier Tribunal's decision was then set aside by the Upper Tribunal, which remade the decision and dismissed the appeal. The Court of Appeal allowed the appeal from the Upper Tribunal's decision. The Secretary of State now appeals to the Supreme Court.

Judgment

The Supreme Court unanimously dismisses all three appeals. Lord Hamblen gives the judgment with which all the other members of the Court agree.

Reasons for the Judgment

The Unduly Harsh Test

The meaning of the unduly harsh test was previously considered by the Supreme Court in *KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53* **[6, 17-22]**, which the Secretary of State submitted the Court of Appeal failed to follow in HA/RA. In particular, it was submitted that the court wrongly disapproved of comparing the degree of harshness experienced by a qualifying child to that which would necessarily be involved for any child – the "notional comparator" baseline against which undue harshness is to be evaluated – and wrongly lowered the threshold approved in *KO (Nigeria)* **[23-29]**.

Lord Hamblen rejects these submissions for, amongst others, the following reasons. The judgment in KO *(Nigeria)* considered as a whole makes clear no notional comparator test was intended. Such a suggested baseline read literally would include children for whom a parent's deportation would be of no real significance, despite having a real and subsisting relationship with that parent, leading to a low baseline level of "due" harshness, contrary to the high standard envisaged in *KO (Nigeria)*. There are too many variables in the suggested baseline characteristics for any comparison to be workable. Such an approach is potentially inconsistent with the statutory duty to have regard to the "best interests" of the affected child **[30-40]**.

The correct approach is to follow the guidance which was stated to be "authoritative" in *KO (Nigeria)*, namely the direction in the Upper Tribunal case of *MK (Sierra Leone) v Secretary of State for the Home Department* [2015] INLR 563 ("MK"). That direction said: "… '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". This recognises both that the level of harshness which is "acceptable" or "justifiable" is elevated in the context of the public interest in the deportation of foreign criminals and that "unduly" raises that standard still higher. It is then for the tribunal to make an evaluative judgment as to whether that elevated standard has been met on the facts and circumstances of the case before it **[41-45]**.

The Very Compelling Circumstances Test

With regards to the very compelling circumstances test, the principal legal issues concern the relevance and weight to be given to rehabilitation and the proper approach to assessing the seriousness of the offending. In general, the very compelling circumstances test requires all the relevant circumstances of the case to be considered and weighed against the very strong public interest in deportation. Relevant factors will include those identified by the European Court of Human Rights as being relevant to the article 8 proportionality assessment, although the weight to be given to the factors falls within the margin of appreciation of national authorities **[46-52]**.

The relevant statutory scheme explicitly requires the court to consider the seriousness of the offence in the proportionality assessment. The Secretary of State criticised the Court of Appeal's judgment in *HA/RA* for placing undue emphasis on the sentence imposed as the criteria for establishing seriousness.

A sentence imposed by a court may well reflect various considerations other than the seriousness of the offence. Where, however, an immigration tribunal has no information about an offence other than the sentence imposed, that will be the surest guide to the seriousness of the offence. Even if it has the remarks of the sentencing judge, in general it would only be appropriate to depart from the sentence as the touchstone of seriousness if the remarks clearly explained whether and how the sentence had been influenced by factors unrelated to the seriousness of the offence. In relation to credit for a guilty plea, that will or should be clear. If so, then in principle that is a matter which can and should be taken into account in assessing the seriousness of the offence, contrary to the view of the Court of Appeal **[60-69].**

The other issue raised in relation to the seriousness of the offence is whether it is ever appropriate to place weight on the nature of the offending in addition to the sentence imposed. Whilst care must be taken to avoid double counting, in principle this can be a relevant consideration and this is supported by the Strasbourg jurisprudence **[70-71].**

HA (Iraq)

HA is a citizen of Iraq born in 1980. He arrived in the UK clandestinely in July 2000 and claimed asylum. His asylum claim was refused, and he exhausted his appeal rights in February 2004. HA nonetheless continued to live here unlawfully. In 2006 he began a relationship with a British citizen, NT. They have since had three children together, born in 2011, 2014, and 2016. HA, NT and their three children live together. In May 2010 HA was convicted of offences including assisting unlawful immigration and sentenced to 16 months' imprisonment. In May 2017, the Secretary of State made a deportation order **[73-76**].

The Secretary of State accepted that HA has a genuine and subsisting relationship with his partner and children. The issue was whether it would be unduly harsh for them to remain in the UK without him. Having analysed the decisions of the Upper Tribunal and the Court of Appeal, Lord Hamblen agrees with the Court of Appeal that the Upper Tribunal applied the notional comparator test. For the reasons set out above, that is not the appropriate test. The Upper Tribunal therefore erred in law in deciding whether the unduly harsh test was satisfied, and the case will have to be remitted for fresh consideration **[77-82]**.

RA (Iraq)

RA came to the UK clandestinely in 2007, aged 14. His claim for asylum was refused in October 2009, but he was given discretionary leave until 1 September 2010. After an application to extend his leave was refused in July 2011, he remained in the UK without leave. In 2012, RA married a British citizen, and they have a British daughter. In August 2016, RA was convicted of an offence for presenting a forged Iraqi passport when trying to visit his mother in Iraq and he was sentenced to 12 months' imprisonment. In September 2016, the Secretary of State made a deportation order **[83-86]**.

The Upper Tribunal and the Court of Appeal considered both the "go" (RA's daughter lives with him in northern Iraq) and "stay" (RA deported and his wife and daughter stay in the UK) scenarios. The Court of Appeal was right that there was an error of law in relation to the very compelling circumstances test. The Upper Tribunal wrongly stated that the sentencing judge had described the offence as "serious" and rehabilitation was not addressed, although it was a relevant factor. Given that the overturning of the Upper Tribunal's decision on the "go" scenario has not been challenged, it will have to be reconsidered, and findings made in relation to it may impact on whether there are very compelling circumstances **[87-100]**.

AA (Nigeria)

AA is a citizen of Nigeria, born in 1988. He arrived in the UK in 1999 (aged 11) with his mother, who abandoned him shortly thereafter, leaving him with an aunt. In 2010 he was issued with a residence card based on his marriage to an EEA national that was valid until July 2015. AA was convicted in November 2013 of two counts of conspiracy to supply class A drugs and sentenced to four and a half years' imprisonment. At the time of his sentence, AA had met his current partner, C, who is a British citizen. Before this relationship, AA had a daughter, K, born April 2006 with a previous partner. The daughter lives with AA's former partner. AA and C have a son, A, born February 2014, who lives with them. Another child was born in February 2019. The Secretary of State made a deportation order in June 2017 **[101-105]**.

The First-tier Tribunal made no error of law, and it was rationally entitled to conclude that the effect of AA's deportation on C and the children would be unduly harsh, and that there were very compelling circumstances that outweigh the public interest in AA's deportation. The Upper Tribunal therefore erred in setting the First-tier Tribunal's decision aside and the Court of Appeal was correct to restore it **[106-120]**.

References in square brackets are to paragraphs in the judgment