Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/01921/2014

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons promulgated**
On 8 May 2018	**On 10 May 2018**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

KAMAL [A]
(anonymity direction not made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Vaughan of NBS Solicitors.
For the Respondent: Mr D Mills Senior Home Office Presenting Officer

DECISION AND REASONS

1. This appeal has been remitted to the Upper Tribunal by the Court of Appeal. An earlier hearing listed for 1 March 2018 had to be adjourned due to the adverse weather conditions in the region at that time.

Background

2. It is not disputed the First-tier Tribunal erred in law in (i) failing to interpret and apply the deportation Rules correctly including failing to consider whether it will be unduly harsh for the respondent's children to remain in the United Kingdom without him, an express requirement under paragraph 399(a) of the Rules, (ii) in failing to properly balance the factors relevant to assessment under Article 8 including failing to properly direct itself as to the weight that should be given to the public interest in deportation foreign criminals. The Court of Appeal also find an error in the decision of the Upper Tribunal being considered by them in the tribunal finding the Secretary are State made a concession before the First-tier Tribunal which undermined the Secretary of States grounds of appeal, when no such concession had been made.
3. The decision of the First-tier Tribunal is set aside permitting the Upper Tribunal to substitute a decision to either allow or dismiss the appeal.

Discussion

4. The appellant is an Iranian national born on [ ] 1980 who came to the United Kingdom in March 2003 and claimed asylum. The appellant is a foreign offender following his conviction on 27 June 2005 at the Newcastle Crown Court for an offence of unlawful wounding for which he was sentenced to 18 months imprisonment.
5. The appellant was made subject to a deportation order dated 17 September 2007 pursuant to section 3(5)(a) of the Immigration Act 1971.
6. The appellant married his wife, an Iraqi national, on 1 July 2008 in Bradford. They have 2 children H born 10 June 2009 and K born on 20 June 2012. The children are British citizens and hold no other nationality.
7. The family dynamics are that the appellant cares for the children which permits his wife, a national of Iraq who became a British citizen in 2012, to work full-time as a pharmacist in order to support the family.
8. Mr Mills confirmed he had checked the Police National Computer and that there is no record of the appellant coming to the attention of the authorities in the UK for any other offences since his conviction in 2005.
9. Even though the original decision was a conducive deport decision in relation to an offence committed prior to the coming into force of the UK Borders Act, by virtue of the decision in *YM (Uganda) [2014] EWCA Civ 1292*, I must apply the legal rules currently in force.
10. It is accepted that a foreign criminal's deportation is conducive to the public good.
11. The appellant has not offended further indicating a successful period of rehabilitation within the United Kingdom.
12. Pursuant to paragraph 391 of the Rules, whether the deportation order should be maintained requires a case-by-case analysis.

13. Relevant provisions of the Immigration Rules relating to revocation of a deportation order are:

> '390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
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> (i) the grounds on which the order was made;
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> (ii) any representations made in support of revocation;
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> (iii) the interests of the community, including the maintenance of an effective immigration control;
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> (iv) the interests of the applicant, including any compassionate circumstances.
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> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
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> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors.
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> 391A. In other cases, revocation of the order will not normally be authorised unless the situation has been materially altered, either by a change of circumstances since the order was made, or by fresh information coming to light which was not before the appellate authorities or the Secretary of State. The passage of time since the person was deported may also in itself amount to such a change of circumstances as to warrant revocation of the order.
>
> 392. Revocation of a deportation order does not entitle the person concerned to re-enter the United Kingdom; it renders him

eligible to apply for admission under the Immigration Rules. Application for revocation of the order may be made to the Entry Clearance Officer or direct to the Home Office.'

14. In *Smith (paragraph 391 (a) – revocation of deportation order) [2017] UKUT 00166 (IAC*) it was held that (i) In cases involving convictions for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, the Secretary of State's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of a deportation order after a period of ten years has elapsed; (ii) However, paragraph 391(a) allows the Secretary of State to consider on a case by case basis whether a deportation order should be maintained. The mere fact of past convictions is unlikely to be sufficient to maintain an order if the 'prescribed period' has elapsed. Strong public policy reasons would be needed to justify continuing an order in such circumstances; (iii) Paragraph 391(a) will only be engaged in a 'post-deportation' case if the person is applying for revocation of the order from outside the UK. Nothing in the strict wording of the rule requires the ten-year period to be spent outside the UK. However, the main purpose of deportation is to exclude a person from the UK. Any breach of the deportation order is likely to be a strong public policy ground for maintaining the order even though a period of ten years has elapsed since it was made;(iv) In 'post-deportation' applications involving sentences of less than four years made before the end of the ten-year period, and 'post-deportation' applications involving sentences of four years or more, appropriate weight should be given to the Secretary of State's policy as expressed in the 'Conventions exception' and 'sweep-up exception' with reference to paragraphs 398-399A and 390A of the Immigration Rules.
15. In this case, the offence was committed over 12 years ago and the deportation order was signed on 17 September 2007 indicating that the 10 year period expired on 16 September 2017.
16. There is no indication the appellant poses an ongoing risk to the public within the United Kingdom as evidenced by Mr Mills enquiries.
17. The appellant's children are British nationals and so are qualifying children. It is not disputed the appellant has a genuine and subsisting parental relationship with the children.
18. This is a family splitting case if the deportation decision is maintained, in that it is accepted that neither the mother nor the children can live in Iran with the appellant. The question is therefore whether it would be unduly harsh for the children to live in the UK without their father in such circumstances.
19. There is clear evidence of a settled established family unit in which the children's mother is able to work as a result of the role played by the appellant in providing care for the children. If the appellant was not present she could not work as she currently does.
20. This is a case in which it would be unduly harsh the children to remain in the United Kingdom without their father who clearly plays a considerable role in their day-to-day lives.

21. Balancing the public interest in the appellants removal from the United Kingdom in accordance with the deportation order, on the basis he is a foreign criminal, against the protected family and private life relied upon in this appeal, and in particular noting the time that has expired since the making of the deportation order and the absence of strong countervailing factors relevant to the weight given to the public interest sufficient to warrant the continuation of the deportation order at this time, I find the appellant has made out that the continuation of the deportation order will be unreasonable or unduly harsh in all the circumstances.
22. I find maintaining the deportation order and the refusal to discharge the order on the facts of this case to be a disproportionate interference with the protected family and private life of this family unit. I allow the appeal.

Decision

23. **The Immigration Judge materially erred in law. I set aside the decision of the original Immigration Judge. I remake the decision as follows. This appeal is allowed.**

Anonymity.

24. The First-tier Tribunal did not make an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

    I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed……
Upper Tribunal Judge Hanson

Dated the 8th of May 2018