Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/03190/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 13 March 2018	**On 26 April 2018**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SABIRBHAI IBRAHIMBHAI PATEL
(anonymity direction not made)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr Z Jaffeji, Counsel instructed by Direct Public Access
For the Respondent: Ms J Isherwood, Senior Home Office Presenting Officer

DECISION AND REASONS

1. I see no need for and do not make an order restraining publicity about this appeal. Some of the submissions touch on the welfare of children but I have no reason to suspect that publicity would do them harm.

2. The appellant is a citizen of India. He is the subject of a Deportation Order and on 11 August 2008 he was deported. On 18 December 2015 he applied for that order to be revoked. The application was refused on 24 January 2017 and, in a Decision and Reasons promulgated on 6 June 2017,

the First-tier Tribunal dismissed an appeal against that decision that was brought on human rights grounds.

3. He has appealed that decision to the Upper Tribunal. I have decided to dismiss that appeal and I give my reasons below.

4. I begin by considering the decision made by the Secretary of State.

5. This shows that the appellant came to the attention of the Immigration Authorities at Heathrow Airport in October 1999. He claimed asylum on arrival. The application was refused and he appealed. The appeal was dismissed on 4 January 2002 and his appeal rights were exhausted on 22 January 2002.

6. For some time he remained in the United Kingdom. He made further representations on 25 April 2002 which were rejected on 28 April 2002.

7. On 12 August 2004 he married a British citizen and on 23 November 2004 he applied for leave to remain as the spouse of a person settled in the United Kingdom. However, on 18 October 2005, whilst his application was still being considered, he told the Border and Immigration Agency that he wanted to withdraw his application and return to India and then make an out of country application.

8. The respondent's records are unclear but the First-tier Tribunal Judge was shown, and accepted, evidence of entry clearance in the appellant's passport dated 4 January 2006 and an entry stamp into the United Kingdom dated 30 January 2006.

9. On 5 October 2006 the appellant was clearly in the United Kingdom because he was arrested for his involvement in a people smuggling network to facilitate illegal entrants into the United Kingdom. On 12 October 2007 at the Crown Court sitting at Leicester, he was convicted of conspiracy to do acts facilitating the commission of breaches of immigration law by individuals who are not citizens of the European Union. On 21 January 2008 he was sentenced to two years and six months' imprisonment and recommended for deportation.

10. On 22 January 2008 he was classified as an overstayer and served with a notice to an illegal entrant and on 22 July 2008 he was served with a signed Deportation Order and on 11 August 2008 he was deported to India.

11. On 23 June 2011, by his then representatives, he applied for that Deportation Order to be revoked. On 3 May 2012 the application was refused. He appealed and the appeal was dismissed so that his appeal rights were exhausted on 21 December 2012.

12. As stated above, on 18 December 2015 he again applied from India for the revocation of his Deportation Order. That application was refused on 24 January 2017 and that decision led to the present appeal.

13. The application was considered, appropriately, on human rights grounds because the Rules are clear that a Deportation Order can only be revoked under the Rules if continuing the order would be contrary to the United Kingdom's obligations under the European Convention on Human Rights.

14. The Secretary of State set out the appellant's circumstances. In particular she noted that the appellant was married and had a son born in April 2006 who lived with his mother (the appellant's wife) in the United Kingdom. He had been apart from his son for seven years but contact had been preserved.

15. The respondent recognised too that the appellant expressed remorse for his offence and the pre-sentence report dated 29 October 2007 considered the risk of re-offending to be low.

16. It was the appellant's case that his wife and son could not relocate to India where they would not be able to adapt to the life there. His wife enjoyed full-time employment in the United Kingdom and had a "good job" and his son was in full-time education.

17. Evidence about the appellant's means and statement from his wife was considered.

18. The respondent recognised that the appellant has a son in the United Kingdom who has been residing there for at least seven years before the date of decision but the Reasons for Refusal Letter notes that it is "not accepted you have a genuine or subsisting relationship with him in the United Kingdom". In the respondent's view a:

> "... genuine and subsisting relationship means more than a biological relationship and more than presence in a child's life. It requires a significant and meaningful positive involvement in a child's life with a significant degree of responsibility for the child's welfare."

19. No authority is given for that statement of the law.

20. Mindful of the requirements of paragraph 399(a) of HC 395 the respondent was concerned lest it would be "unduly harsh" for the appellant's son to live in India or to remain in the United Kingdom without his father.

21. It was noted that the appellant's son had travelled to India in 2008 and again in 2013 and the Respondent found no reason why some contact could not be preserved with similar visits.

22. The letter then analyses a possible claim based on the appellant's relationship with his wife considering paragraph 399(b) of HC 395 which provided for relief when:

    (i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported".

23. It was not accepted that the appellant had a genuine and subsisting relationship with his wife and it was noted additionally that when they were married there was no valid leave to remain in the United Kingdom.

24. The appellant appealed and the case came before the First-tier Tribunal at Sheldon Court on 16 May 2017.

25. The judge recorded the main documents in the case and in particular a substantial bundle provided by the appellant.

26. Additionally, the appellant now has another child a second son born in December 2016.

27. It was the Appellant's case that the older son does not like India, finding it hot and cramped and he does not speak Gujarati the way that it is spoken in that part of India. He struggled to understand the local accent.

28. In paragraph 12 of her decision the judge noted the distress the appellant's wife experienced managing on her own. The appellant's wife said that she lived with her mother and two brothers who did what they could to give a male influence to the boys. She said that the oldest child "is withdrawn and becoming socially nervous".

29. The judge also noted a letter from the child which is before me.

30. The judge then noted other evidence about the appellant's general character and particularly a letter from the Leicester Muslim Society noting that the oldest child "had been psychologically impacted by the loss of his father".

31. The judge then considered the respondent's case.

32. Mr Jafferji represented the appellant before the First-tier Tribunal although he had not been involved earlier. He presented the case.

33. The judge then set out the "legal position" and here she has directed herself by giving lengthy quotations from Section 32 of the UK Borders Act 2007 and paragraphs 390-392 of HC 395. From this she, uncontroversially, distilled the "statutory exception" which showed that the application to revoke could not be allowed unless sustaining the decision would be contrary to "the appellant's human rights". It is regrettable that the judge referred only to "the appellant's human rights" because that is too limiting. The obligations under the Human Rights Convention extend beyond the obligations to the appellant and indeed in my experience on the few occasions when an appeal against deportation

or failure to revoke a Deportation Order is allowed properly it is because of the impact of the decision on people other than the appellant. That said nothing seems to have turned on that error here.

34. The judge clearly and correctly looked for things that would make it "unduly harsh" for the child to live in the country to which his father was deported or to remain without him.

35. Concerning the appellant's relationship with his wife the judge said:

> "Because the appellant and his wife formed their relationship at a time when the appellant was in the UK unlawfully I cannot consider whether the Convention exception laid down in paragraph 399(b) applied to Mrs Patel, namely that her moving to India would be unduly harsh or her managing without her husband in the UK would be unduly harsh. I need to consider the position at the date of the hearing."

36. I find that this is an erroneous simplification. Paragraph 399(b) applies when the relationship was formed at a time when the person (deportee) "was in the UK lawfully and their immigration status was not precarious". The First-tier Tribunal accepted that the appellant had left the United Kingdom and returned to India before making an application for entry clearance which was granted. It seems clear that the marital relationship was formed, if not started, when the appellant was in the United Kingdom lawfully but his position was still precarious and so although the judge may have compressed the test the apparent error is not material.

37. The judge's consideration began at paragraph 40. She directed herself, correctly, that the two children involved were "wholly blameless for the criminal behaviour of their father and its consequences for them" but added, also correctly "that their best interests can be outweighed by other factors."

38. The judge's attention was drawn to a decision of this Tribunal known as **Smith (paragraph 391(a) – revocation of Deportation Order) [2017] UKUT 116 (IAC)**. This concerned an approach to take in cases involving revocation and deportation and noted the Tribunal's finding that the public interest does not require continuation of a deportation order after a period of ten years has elapsed. I do not understand why the case of **Smith** was thought to be so particularly relevant. As the judge pointed out, correctly, in **Smith** the Deportation Order was issued more than ten years before the application to revoke had been made and that was not the case here.

39. In paragraph 43 the judge said:

> "I move to consider paragraph 399(a) and (b), the 'Convention exceptions' in respect of the appellant's family life. I am leaving U to one side because of his very young age and because on that basis and the fact that he and his father have never met and cannot have had meaningful communication he cannot have established a subsisting

> relationship with his father, although I have no doubt the appellant loves his son very much."

40. The judge then noted that the appellant's wife and sons are British citizens and noted that there was evidence in addition to the arrival of U to show that the family had maintained "genuine and subsisting relationships" although the arrival of the second child is itself strong evidence that there is a subsisting relationship between the appellant and his wife.

41. The judge took particular interest in the letter from the "Leicester Muslim Community" which referred to the appellant's eldest son "being psychologically impacted by the loss of his father". The judge noted that the letter purported to come from the head teacher of the Madrasah but did not indicate the author had any professional qualifications entitling him to diagnose psychological damage. The judge went on to say:

> "I cannot give weight to the letter beyond it saying what A himself says and which is not disputed; and that he misses his father and wants him to come to the UK."

42. She noted evidence that A did not wish to go to India.

43. The judge then reminded herself of the strict meaning of "unduly harsh" confirmed by the Court of Appeal for example in the case of **ZP (India) v SSHD [2016] 4WLR 35**.

44. At paragraph 55 of her Decision and Reasons the judge confirmed her finding that "A clearly misses his father dreadfully and it is difficult for him to be without his father". She then went on to find, as is very often the case, that the best interests of the child lay in his being brought up by both of his parents in a stable environment but she did note that A was able to find other male role models and had visited his father.

45. At paragraph 56 the judge made an observation purporting to draw parallels between this case and cases where families could not be united because the spouse in the United Kingdom could not earn sufficient money. I am not sure that this is a helpful diversion but neither do I see how it affects the reasoning on the points of matter.

46. At paragraph 58 the judge said:

> "In turning to the 'Convention' exception for Mrs Patel, she cannot benefit from it. This is because the relationship, on the accounts given by each in their statements, was formed in 2002 at a time when she knew her husband was in the UK unlawfully. She therefore cannot benefit from the Convention exception in paragraph 399(b)."

47. The judge went on to find that there were no exceptional circumstances to outweigh the public interest in deportation. She made that finding having accepted that Mrs Patel was working extremely hard to hold together her family and maintain it.

48. The grounds of appeal supporting the application are not signed by a lawyer and do not benefit from having numbered paragraphs. That said, they are cogent and relevant and Mr Jaffeji, wholly appropriately, based his submissions on a close analysis of the points on which leave was granted.

49. The first point taken is the judge did not direct herself properly when considering paragraph 399(b) of HC 395.

50. This has been dealt with above. It is quite clear that the appellant developed his relationship with his wife when he was in the United Kingdom with permission even if as seems the case the relationship *started* when he was in the United Kingdom without permission. The problem for the appellant is the full text of the Rule which provides that the relationship must be formed when the deportee "was in the UK lawfully and their immigration status was not precarious". It follows that being in the United Kingdom lawfully does not answer the point. This appellant's immigration status has never been better than precarious in the sense that it was less than indefinite leave to remain and therefore the judge's finding was correct even if the explanation was streamlined.

51. The next point criticises the judge for finding that there is not a "subsisting relationship" between the appellant and his son U because they have never met although the judge does find that he has "no doubt that the appellant loves his son very much".

52. This is clearly wrong. The relationship is the relationship that could be expected between a child and an absent father. The child is a small baby and not capable of making much contribution to the relationship but the appellant clearly is involved in the life of the child as much as is possible of the distances involved. They have "a relationship" and I do not see how it can be other than subsisting. It may be the case that where contact is possible but does not happen or where there have been positive acts to disengage from the parental relationship created by nature it may be permissible to find that there is no such relationship but a subsisting relationship must mean far more than cohabitation in a nuclear family.

53. The Rules intend to reflect the United Kingdom's obligations under the European Convention on Human Rights and to be compliant with the obligations under the Convention and under the Convention there is something very close to a presumption that relationships between parents and minor children are within the scope of the protection of Article 8(1) unless there is clear contrary evidence.

54. That said it is difficult to see what, from the perspective of a balancing exercise, the relationship with U adds to the relationship with A.

55. The next point criticises the judge for not giving greater weight to the letter from the Madrasah. This requires some consideration. The judge was plainly aware of the letter. Interestingly although it is signed by a person identified as "head teacher" that person gives no indication of his

or her qualifications. The writer does say claim “first-hand experience of seeing A’s development both academically and morally”. I do not read this as the letter writer presuming to make a diagnosis that would only be open to a psychologist but rather I read it as a person experienced in dealing with young people being satisfied that the child A misses his father. The judge’s suggestion of possible mental health issues does, I find, show an overly literal reading of the letter but it does not undermine the points the judge was making. There is no professional expertise claimed by the letter writer. The observations of a person experienced in dealing with young people are not strictly expert evidence and are certainly not medical opinion. However the conclusion of the letter writer is the one accepted by the judge that the chid misses his father. The references to mental health support for young people are not particularly valuable.

56. However, the judge is making the point that there is no evidence here that goes beyond what might be expected of a child missing his father. It is an important point but the evidence does not support a finding that the consequences are particularly severe.

57. The next point of criticism is that the judge has not mentioned the positive factors set out by A and other witnesses that could follow from the appellant being in the United Kingdom.

58. The judge has not done a detailed analysis of all the relevant witnesses. However, it is very hard to see that she has missed anything of importance.

59. I have read the letter from A. As I commented in the hearing room, he has neat handwriting but it is a child’s handwriting and there are a few minor spelling mistakes and other errors which satisfy me that this is indeed the work of an intelligent child writing to help the judge rather than someone who has simply been told what to say. He sets out the things that he can expect his father to do and how he misses him. I cannot see anything to suggest that these points were not understood properly by the judge who was fully aware of the distress caused by the absence of the appellant. She did refer to A using the phrase “tore his heart apart”. She plainly had read the evidence. The faults suggested there is not made out.

60. The next criticism is at paragraph 56 which is described as “entirely flawed”. This is the paragraph where the judge drew analogies between this case and the case where a family was apart because the parent in the United Kingdom did not earn enough money to meet the Rules. As I have indicated this is not a particularly helpful paragraph but I do not see any material error.

61. The same paragraph criticises the judge for not considering the decision of the Supreme Court in **MM and Others v SSHD [2017] UKSC 10** but the point is not developed and I do not understand it. Children are not entitled

to have their best interests met. Best interests are something that have to be considered. This the judge has done.

62. The grounds then criticise the judge for not having regard to paragraph 391(a) which provides that:

> "The continuation of a Deportation Order will be the proper course in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than four years, unless ten 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."

63. That is what the judge has done but has done it in the context of finding, correctly, that the public interest remains in favour of deportation. This is the point at paragraph 54 of the decision where the judge recognises that the appellant's risk of reoffending was classed as low and there was no evidence before her to suggest that the appellant had committed any other crime other that the one that led to his imprisonment and deportation. The judge said:

> "However he committed a crime in respect of which there is a considerable public interest in condemning. The strength of the public interest in the context of the offence committed was, and remains, strong."

64. I do not see how there can be any objection to that. The judge clearly was aware of the impact on the wife and children and what was best for them but that did not change her view that the balancing exercise came down against the appellant.

65. The grounds assert that the impact on A was underestimated but that is not justified. The judge made the point clearly that A was missing his father but it was not a case where there was medical evidence that showed that any distress caused by separation was elevated into a higher category of illness. The points have been considered.

66. The next point is that the judge did not have regard for the passage of time. There is an arbitrariness in determining that Deportation Orders remain in force for ten years but such arbitrariness is necessary to give consistency and predictability to the Rules. Although the grounds rely on a passage in the Tribunal's decision in **Smith** at paragraph 21, I do not accept they make out the intended point. At paragraph 21 the Tribunal said:

> "Whether there are grounds to maintain a Deportation Order will be driven by public interest considerations. However, there will be no point in providing an exception after a 'prescribed period' of ten years if the balancing exercise remained the same. The respondent's policy, as expressed in paragraph 391(a) of the Immigration Rules, is that the public interest does not require continuation of the order after a period of ten years had elapsed. As the court in *ZP (India)* recognised, the

> public interest in maintaining the order will generally diminish with the passage of time. Paragraph 391A also makes clear that the passage of time since the person was deported might amount to a change in circumstance to warrant revocation of the order. The prescribed period would be rendered meaningless if the same public interest considerations that led to the making of the original order were sufficient to continue the order after a period of ten years."

67. Paragraph 391A of HC 395 provides in certain circumstances that "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" but paragraph 391A, following paragraph 391 which applies "In the case of a person who has been deported following conviction for a criminal offence" applies "In other cases". The relevance of paragraph 391A is to make clear that the regulatory effect of 391A permitting the passage of time, in some circumstances, to amount to a reason under the rules to warrant revocation of a deportation order does not apply in cases such as this appeal where the deportation is not following a criminal conviction.

68. Paragraph 391A recognises that, in the intensely fact specific area of a private and family life balancing exercise, the passage of time might justify the revocation of the order. As is perfectly plain this is not a case involving a person who was being subject to the restrictions of a Deportation Order for more than ten years. As I have indicated above there is no basis for saying that the public interest has diminished to the point where it has ceased to exist. That time is likely to come very soon but that is another way of saying it has not come now.

69. I find that the appellant is making too much of the decision in **Smith** which was dealing with the approach after ten years had lapsed.

70. If the appellant is suggesting that there is some sort of sliding scale and that the public interest diminishes close to nothing as a period of ten years is reached then it is a suggestion that I reject it. That is not what the Tribunal decided in **Smith**.

71. The next point is that it is wrong to say that it would be other than unduly harsh for A and or U to remain in the United Kingdom without their father. The children do not deserve anything harsh to happen to them at all. However the appellant has committed an offence for which he has been sent to prison for two and a half years and for which he has been deported because the appropriate authorities have decided, on a statutory basis, that his deportation is in the public good. There is nothing in this case that elevates the distress experienced by A beyond the distress that is to be expected in cases of this kind. Far from being "undue" the harshness is predictable and normal.

72. Finally, there is a complaint that there has been no proper consideration of the Article 8 rights outside the Rules. There would be more merit in that point if it went beyond a technical fault. In my judgment it does not.

73. I record that I have considered Mr Jaffeji's additional submissions although he essentially relied on the Rules.

74. I am satisfied that the judge made errors in the kind that I have indicated but also that they are immaterial.

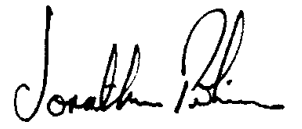
75. I consider particularly the suggestion that the appeal should have been allowed outside the Rules. I find no justification for that. This is a slightly unusual story in that the person who has done wrong and has been subject to deportation left the United Kingdom very soon after he realised his appeal had been unsuccessful and who has maintained a meaningful relationship with his wife and child and then their second child over that period. That might be thought to be very much to this credit if marriage is to be regarded as something to respect and to promote but it is not a reason to disapply the Rules. There really is nothing in this case which would justify a finding that the ordinary consequences of deportation do not follow.

76. I am satisfied that the decision taken as a whole is a careful and fair and thorough analysis of the rights of the children and indeed wife of the appellant and that the judge reached a conclusion which was wholly sustainable for the reasons given.

77. It follows that notwithstanding Mr Jaffeji's realistic and properly persistent submissions I dismiss this appeal.

Notice of Decision

This appeal is dismissed.



Signed
Jonathan Perkins, Upper Tribunal Judge Dated: 24 April 2018