Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/08118/2017

THE IMMIGRATION ACTS

Heard at Glasgow
On 21 March 2018

Decision and Reasons Promulgated
On 26 March 2018

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

J A
(anonymity direction made)

Respondent

Representation:
For the Appellant: Mrs M O'Brien, Senior Home Office Presenting Officer
For the Respondent: Miss K Stein, Advocate, instructed by MT UK, Solicitors, Twickenham

DETERMINATION AND REASONS

1. The parties are as above, but for continuity the rest of this decision refers to them as they were in the FtT.

2. The SSHD's decision dated 18 July 2017 is structured thus:

   Immigration history;

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Criminal history;

Legal context – articles 8 (1) and (2) ECHR, immigration rules ¶A362, A398 – 399D, 2002 Act part 5A;

Evidence submitted by appellant;

Offending considered to have caused serious harm, therefore deportation required under ¶398, subject to exceptions under 399 and 399A;

Family and private life – wife and 5 children, all UK citizens;

Duty on best interests of children under s. 55 2002 Act;

¶399(a) – genuine and subsisting parental relationship accepted; not accepted 2 younger children would have difficulty adapting to Pakistan; accepted unduly harsh to expect 3 older children to live in Pakistan; not accepted unduly harsh for any of the children to remain in the UK without appellant;

¶399(b) – genuine and subsisting family life with wife accepted; relationship not formed while appellant in UK, but in Pakistan; not unduly harsh for wife to live in Pakistan if she chose, due to both having extensive family ties there; not unduly harsh for wife to remain in UK without appellant;

¶399A, private life – appellant not lawfully resident most of his life; not socially and culturally integrated; no very significant obstacles to integration into Pakistan;

No exceptions to deportation therefore apply;

No very compelling circumstances, over and above the exceptions; offending as taxi driver against two young lone females under influence of alcohol; no acceptance of responsibility; medium risk of reconviction; nothing to outweigh the public interest in deportation.

3. The appellant's grounds of appeal to the UT disagree on undue harshness and assert that the children's best interests would be to remain in the UK with both parents; the public interest is "not as strong as in most deportation cases"; although the offences were serious, the sentence was "relatively low"; the history is "not that of a prolific offender"; he is not liable for "automatic deportation" because his sentence was not in excess of 12 months; the public interest is important but not a trump card.

4. FtT Judge Kempton allowed the appellant's appeal by a decision promulgated on 24 November 2017.

5. The SSHD has permission to appeal to the UT on 2 grounds.

6. Ground 1 is that the judge misdirected herself by placing undue weight on rehabilitation above more pressing aspects of the public interest such as deterrence and public abhorrence.

7. Ground 2 is that the judge failed to identify any unduly harsh circumstances to outweigh the public interest in deportation – nothing beyond separation and emotional upset, and no compelling circumstances.

8. Mrs O'Brien relied upon the grounds and made further submissions. The points I noted were these:

    (i) The judge took too narrow a view of the nature of the public interest and how it could be diminished.

    (ii) Although the decision set out the legal scheme of deportation, its critical parts showed misunderstanding of it. At ¶34 – 35, the judge thought that the appellant had to show that both the family and the private life exceptions applied, when those are alternatives.

    (iii) The respondent's decision was based on ¶398 (c) of the rules, offending which had caused serious harm, and which had involved breach of trust. The judge failed to appreciate the nature of the offending, and the evidence before her which reflected no change in the appellant's attitudes, shown by non-acceptance of guilt.

    (iv) At ¶38 – 42 the judge looked at the matter almost entirely in terms of accepting rehabilitation, which became her principal reason for allowing the appeal, when that was inconsistent with the evidence and her own findings.

    (v) ¶40, "requires to become rehabilitated and to avoid such opportunistic circumstances again", was contrary to not in favour of effective rehabilitation.

    (vi) ¶41, no risk "as long as he is not put into circumstances where he could take advantage of vulnerable females", similarly went against the appellant not in his favour.

    (vii) Such reasoning as there was did not support the conclusion at ¶41 that the appellant had learned from his mistakes and his behaviour was unlikely to be repeated.

    (viii) Even if the low risk finding had been justified, that was only part of the public interest, and should not have been thought decisive. Revulsion and deterrence were also relevant.

    (ix) The narrow view of the public interest taken by the judge suggested that it was tolerable to engage in sexual abuse of vulnerable young women.

    (x) There was no basis for the finding that separation of the children from the appellant would be unduly harsh. The test was a serious one. Nothing in the evidence went beyond the fact of separation or could meet the threshold. The factors set out at ¶34 were only those standard in any case.

    (xi) The decision of the FtT should be reversed.

9. The appellant filed a rule 24 response to the grant of permission, in summary on these lines:

'The public interest does not automatically outweigh all other considerations. The case law does not state that public revulsion and deterrence are the most important facets of the public interest. It is one factor in a fair balancing exercise, which the judge carried out. Ground 1 is only disagreement.

VC (Sri Lanka) [2017] EWCA Civ 1967 and Home Office Guidance are cited on the best interests of children in cases involving criminality. Relationships and emotional ties are key but not the only factor. The judge had regard "to the developmental progress of the children as affected by the appellant's absence" at [11], their schooling [14] and nursery [23], financial stressors in absence of the breadwinner [24], the health impact on the younger children [24] and documentary evidence from Glasgow City Health and Social Care [24]. Proper consideration was given to all the evidence and circumstances in concluding at [37] and [42] that removal would be unduly harsh. The position of the appellant was included in the balancing exercise as required by *Mirza* [2015] CSIH 28 and *Khan* [2015] CSIH 29. The judge gave appropriate weight to the correct factors. Ground 2 also is only disagreement.'

10. Ms Stein relied upon the foregoing. In oral submissions she dealt firstly with ground 2. The further points which I noted were these:

(i) There had to be some sets of circumstances which met the criterion of serious hardship. This case was one of them.

(ii) There had been evidence before the FtT to justify the conclusions based on the well-being of the children. Most significantly, this came in a letter from a health visitor dated 23 October 2017, and so was very up to date at the time of the hearing. The judge refenced this at ¶6, 33, 34 and 37.

(iii) The appellant's wife gave evidence along similar lines.

(iv) The judge thus identified evidence going over and above the usual emotional impact of separation.

(v) It might have been proportionate for the appellant to have to put up with separation, but not for his wife and children to have to do so.

(vi) The threshold was high, but it had been met, not just by lip service, as the respondent submitted, but specifically, at the paragraphs cited in the response.

(vii) The undue harshness finding was sound. It is well established that children are not to be penalised for the faults of their parents.

(viii) The decision was also justified by the inevitable effects of separation on the appellant's wife. She would be left alone to look after five children and deprived of financial support.

(ix) On ground 1, the judge had taken a painstaking approach to the public interest. The elements of serious harm and revulsion were built in.

(x) The seriousness of the crime was to be taken as exactly measured by the 9 months sentence, only 6 of which were served before release.

(xi) The essence of the judgement was that the seriousness of the offending was outweighed by the needs of spouse and children.

(xii) The judge dealt correctly with the risk of reoffending. A low level of risk was a significant starting point. That was confirmed by all 3 of the reports which had been before the FtT, including the most recent one, which came after the respondent's decision.

(xiii) The judge's finding was justified by evidence she recorded at ¶21, which showed that the appellant was avoiding risky situations.

(xiv) The decision was reached through a thorough balancing exercise, and should stand.

(xv) If the decision was set aside, the case was apt for the UT to make a fresh decision based on all the materials. For all the reasons advanced on his behalf, any fresh decision should be in favour of the appellant.

11. I reserved my decision.

12. Although cases are cited in the pleadings of both sides, neither representative referred in submissions to any particular passage, and neither suggested that the case law is in any state of controversy.

13. In *Ali v SSHD* [2016] UKSC 60 Lord Reed JSC, with whom the rest of the Court agreed, said at ¶50:

> "The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest in the deportation of the offender … the article 8 case claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed – very compelling, as it was put in the *MF (Nigeria)* case – will succeed."

14. The FtT's decision sets out the rules and statute about deportation, but then appears to engage in a broad balancing exercise, rather than saying where its findings fit within the legal framework.

15. The judge's reasons appear at ¶37, unduly harsh consequences of separation of children from appellant; 38, more recent risk assessments in low ranges; 39, despite some evidence directed to the contrary, the fact of guilt was "the starting point in this appeal"; 40, need for appellant to become rehabilitated and "avoid such opportunistic circumstances again"; 41, appellant's children not at risk from him; no further risk "as long as not put into circumstances where he could take advantage of vulnerable females"; has learned from his mistakes and behaviour unlikely to be repeated; 42, appellant had benefited from "his incarceration and rehabilitation programme"; a supportive family, who would be the ones who would suffer if he had to leave; not easy for any of them to pick up their lives in the UK or make new lives in Pakistan if he were deported.

16. There is a rather flimsy basis for the judge's eventual view of little risk. It was contradicted by the matters she set out immediately before. In the statement which

formed his evidence-in-chief the appellant said at ¶40 that he was "entirely remorseful" but in the next sentence that he believed he "was not involved in any wrong doing in the last sexual offence." He does appear to have accepted guilt in his oral evidence, as recorded at ¶22.

17. The SSHD in ground 1 cites cases on the limited weight to be given to rehabilitation. The principles relied upon have been applied and approved in many reported instances, most recently in *Olarewaju v SSHD* [2018] EWCA Civ 557:

> 17. The Court of Appeal addressed the significance of rehabilitation in *Taylor v Home Secretary* [2015] EWCA Civ 845. Moore-Bick LJ, with whom McCombe and Vos LJJ agreed, said (in paragraph 21):
>
> > "I would certainly not wish to diminish the importance of rehabilitation in itself, but the cases in which it can make a significant contribution to establishing the compelling reasons sufficient to outweigh the public interest in deportation are likely to be rare. The fact that rehabilitation has begun but is as yet incomplete has been held in general not to be a relevant factor: see *SE (Zimbabwe) v Secretary of State for the Home Department* [2014] EWCA Civ 256 and *PF (Nigeria) v Secretary of State for the Home Department* [2015] EWCA Civ 596. Moreover, as was recognised in *SU (Bangladesh) v Secretary of State for the Home Department* [2013] EWCA Civ 427, rehabilitation is relevant primarily to the reduction in the risk of re-offending. It is less relevant to the other factors which contribute to the public interest in deportation."
>
> 18. With regard to that last sentence, in *OH (Serbia) v Home Secretary* [2008] EWCA Civ 694, [2009] INLR 109, Wilson LJ (as he then was) derived (in paragraph 15) the following propositions from earlier case-law:
>
> > "(a) The risk of reoffending is one facet of the public interest but, in the case of very serious crimes, not the most important facet.
> >
> > (b) Another important facet is the need to deter foreign nationals from committing serious crimes by leading them to understand that, whatever the other circumstances, one consequence of them may well be deportation.
> >
> > (c) A further important facet is the role of a deportation order as an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes.
> >
> > (d) Primary responsibility for the public interest, whose view of it is likely to be wider and better informed than that of a tribunal, resides in the respondent and accordingly a tribunal hearing an appeal against a decision to deport should not only consider for itself all the facets of the public interest but should weigh, as a linked but independent feature, the approach to them adopted by the respondent in the context of the facts of the case. Speaking for myself, I would not however describe the tribunal's duty in this regard as being higher than 'to weigh' this feature."

In *Ali v Home Secretary*, Lord Wilson JSC said (at paragraph 70) that he now regretted his reference in sub-paragraph (c) to society's "revulsion" (that being, he considered, "too emotive a concept to figure in this analysis"), but he adhered to the view that he was "entitled to refer to the importance of public confidence in our determination of these issues".

18. Miss Stein submitted that the weight attached by the judge to low risk of re-offending was within her scope, but I am unable to agree. Ground 1 shows that in giving this matter significant or even near-decisive weight, the judge went against the well-settled case law. There was nothing to make this one of those rare instances where rehabilitation weighed significantly in the appellant's favour.

19. I turn to ground 2.

20. The appellant's case turned on showing that it would be unduly harsh for his children or his wife to remain in the UK without him – ¶399 (a) of the rules, or exception 2 of s.117C.

21. The SSHD cites *AJ (Zimbabwe) v SSHD* [2016] EWCA Civ 1012:

> 16. More recently, this court considered a number of appeals together in *NA (Pakistan) v Secretary of State for the Home Department* [2016] EWCA Civ 662. In some of the cases sentences of between 12 months and four years had been imposed. Jackson LJ, delivering the judgment of the court (Jackson, Sharp and Sales LJJ) made this observation with respect to the interests of the children in the context of "exceptional circumstances" (paras.33-34):
>
>> "….. it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.
>>
>> The best interests of children certainly carry great weight, as identified by Lord Kerr in *HH v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. 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..."
>
> The court then cited with approval the observations of Rafferty LJ in para. 38 of the *CT (Vietnam)* case, reproduced in para.14 above.
>
> 17. These cases show that it will be rare for the best interests of the children to outweigh the strong public interest in deporting foreign criminals. Something more than a lengthy separation from a parent is required, even though such separation is detrimental to the child's best interests. That is commonplace and not a compelling circumstance. Neither is it looking at the concept of exceptional circumstances through the lens of the Immigration Rules. It would undermine the specific exceptions in the Rules

> if the interests of the children in maintaining a close and immediate relationship with the deported parent were as a matter of course to trump the strong public interest in deportation. Rule 399(a) identifies the particular circumstances where it is accepted that the interests of the child will outweigh the public interest in deportation. The conditions are onerous and will only rarely arise. They include the requirement that it would not be reasonable for the child to leave the UK and that no other family member is able to look after the child in the UK. In many, if not most, cases where this exception is potentially engaged there will be the normal relationship of love and affection between parent and child and it is virtually always in the best interests of the child for that relationship to continue. If that were enough to render deportation a disproportionate interference with family life, it would drain the rule of any practical significance. It would mean that deportation would constitute a disproportionate interference with private life in the ordinary run of cases where children are adversely affected and the carefully framed conditions in rule 399(a) would be largely otiose. In order to establish a very compelling justification overriding the high public interest in deportation, there must be some additional feature or features affecting the nature or quality of the relationship which take the case out of the ordinary.

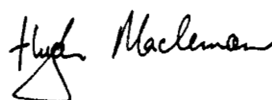
22. The height of the evidence to which Miss Stein referred was a report of a home visit when the two younger children were quiet, withdrawn and clingy to their mother, who said there had been some regression while their father was in custody, and improvement since his return.

23. The judge made no finding, and indeed there was no evidence, that anything in this case went beyond the usual incidents of family life and of separation from a parent (either in the past, while the appellant was imprisoned, or looking ahead).

24. Ground 2 demonstrates, again by reference to well settled case law, that in this respect also there was no lawful basis for the conclusion reached by the FtT.

25. The SSHD's appeal to the UT is upheld on both grounds. The decision of the FtT is set aside. The case discloses no compelling claim. There is nothing which significantly diminishes the weight to be given to the public interest. There is no additional feature affecting the nature and quality of the family relationships. The appeal, as originally brought by the appellant to the FtT, is dismissed.

26. The anonymity direction made by the FtT is preserved.



Upper Tribunal Judge Macleman

22 March 2018