Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13455/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5th March 2018	**On 21st March 2018**

Before

UPPER TRIBUNAL JUDGE MARTIN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MH
(ANONYMITY DIRECTION CONTINUED)

Respondent

Representation:
For the Appellant: Ms J Isherwood (Senior Home Office Presenting Officer)
For the Respondent: Mr A Alexander (instructed by Rashid & Rashid Law Firm)

DECISION AND REASONS

1. This is an appeal to the Upper Tribunal by the Secretary of State in relation to a decision of First-tier Tribunal Judge Clarke promulgated on 18th November 2017 following a hearing at Taylor House on 23rd October 2017, in which he allowed the appeal. On that occasion the judge was not helped by the absence of a representative from the Secretary of State.

2. However, the circumstances of the appeal were that the Appellant was a national of Pakistan born in January 1972 who had applied for leave to remain on the basis of his family and private life.

3. That application had been refused on 9th May 2016, the main reason being that he had entered the UK illegally on 28th January 2016 and therefore could not meet the suitability requirements. The Secretary of State did not accept that the Appellant had a family life with his spouse because they had lived together for less than two years.

4. The judge heard from the Appellant and it was drawn to his attention that there had been a previous appeal by this Appellant in relation to deportation. The Secretary of State had sought to deport him in 2014 on the basis of a criminal conviction in Croydon Crown Court in May 2012 where he had been sentenced to three years' imprisonment after an offence of violent disorder.

5. While serving his sentence he elected to be voluntarily removed to Pakistan and once in Pakistan it appears that he tried to lodge an appeal against the deportation. The Secretary of State treated that application as an application to revoke the deportation order, refused it, and the Appellant appealed. That appeal came before Judge Hembrough and Miss Singer, a non-legal member, at Hatton Cross on 20th October 2014. The findings of that Tribunal were made after hearing from three witnesses, the Appellant's wife and two of their children. The Appellant's wife is a naturalised British citizen and their four children are all British citizens also. The evidence was that the Appellant had taken a significant role in the upbringing of his children. The evidence was also that since the Appellant's removal to Pakistan the children's behaviour had continued to deteriorate and his daughters were now facing behavioural, social and psychological problems. His wife was unable to cope despite some intervention by social services and his brother, who had been living with the family, had moved out and refused to provide them with any further support.

6. The wife said, when asked why the Appellant had agreed to return to Pakistan, that he would have been anxious to be released from prison because he was being bullied. She was unwell and the children were going off the rails, and it was hoped that the family could all make a fresh start in Pakistan. That however had not proved to be possible and reference was made to the deteriorating security situation in Pakistan and the fact that the family and children all wished to remain in the UK, which of course they are entitled to do, being British.

7. The panel noted at paragraph 49 of the determination that at the date of the making of the deportation order the Appellant was a Pakistani citizen with indefinite leave to remain in the UK and that he had been in the UK for more than 25 years and was employed in a taxi business. He and his wife had been married since 1995 or 1996. She was a British citizen who had been in the UK for more than fifteen years and the Tribunal was satisfied that the relationship was and is genuine and subsisting. They noted the prison records indicated that she and the children had visited him regularly and there were also regular telephone calls. They found that there were and are insurmountable obstacles to family life between the

Appellant and his wife continuing outside the UK, the obvious reason being that they have four minor children, all of whom are British and remain in full-time education. They clearly needed a family member to care for them. They found the Appellant to have a genuine and subsisting parental relationship with his children and that he had provided for their material needs. They found that prior to his imprisonment the children appeared to be thriving and doing well in school. The panel found that it would not be reasonable for them to leave the UK. They were all born in the UK and there was no evidence that they had lived in Pakistan for any significant period. The youngest child was then only 8 years old and had never visited Pakistan. Another child was 17 and had visited five or six years before. They noted this was not a case involving very young children who have the potential to adapt to changed circumstances with relative ease. This was a case involving three teenagers who would find it difficult to adapt to life in Pakistan and they rejected the assertion that simply because they were born of parents of Pakistani origin they would have little difficulty in integrating to life in Pakistan.

8. The panel also noted at paragraph 55 that although the Appellant had been convicted after a trial, correspondence from the prison service indicated that he was something of a model prisoner, being polite, courteous and hardworking. He was not subject to any adjudications, and the NOMS Report, included in the bundle, indicated that he had come to his terms with his offending and was assessed as being a low risk of harm to the public. They also noted there were somewhat unusual circumstances about the index offence and having regard to his antecedents generally they considered the likelihood of reoffending to be low.

9. They considered the situation of the Appellant's wife and the medical evidence and the evidence before them, they said, painted a picture of her as isolated, depressed and frankly inadequate as a parent.

10. They went on at paragraph 78 to say that in light of their findings they found the Appellant would have met the requirements of paragraph 399B of the Immigration Rules had he been appealing the deportation decision from within the UK. They also found that he would have met exception 2 as set out at Section 117C(5) of the 2002 Act had they been in force, namely that he had a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of his deportation on the partner or child would be unduly harsh.

11. That decision was before the First-tier Tribunal who dealt with the appeal, which I am now dealing with, in October 2017.

12. The judge in 2017 did not specifically consider Section 117B(6). That is an error of law. However, if one is to look at the requirements of Section 117B(6) they are considerably less stringent than those of Section 117C relating to deportation.

13. This Appellant had the benefit of findings not, that it would be unreasonable to remove the children from the UK, but that it would be unduly harsh to either remove them or to expect them to remain without him. The situation in relation to his wife was unchanged. She remains unable to care for the children without assistance and therefore, having a finding that it would be unduly harsh, it is difficult to see how it could possibly be reasonable to remove these children. The requirement of Section 117B(6) is reasonableness.

14. The Secretary of State's own policy remains that, absent criminality, it is never reasonable to expect British children to leave the UK. Of course there has been criminality in this case, but the Appellant has had the benefit of positive findings in relation to that at an earlier hearing when the burden he had to overcome was considerably higher. For all those reasons, despite this decision being short and containing an error in not considering Section 117B, I find that error to be immaterial because there could only have ever been one result in this case, and for that reason the Secretary of State's appeal to the Upper Tribunal is dismissed.

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies both to the Appellant and to the Respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed Date 19th March 2018

Upper Tribunal Judge Martin