Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: IA/19373/2013

THE IMMIGRATION ACTS

Heard at Glasgow	**Promulgated on**
17 July 2014	**On 19 September 2014**

Before

MR C M G OCKELTON, VICE PRESIDENT
UPPER TRIBUNAL JUDGE MACLEMAN

Between

WC
(Anonymity granted)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Forrest, instructed by R H & Co Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a national of Pakistan. He came to the United Kingdom in 2010 with entry clearance as a spouse valid until 21 March 2012. Within the currency of that leave, on 1 February 2012, he submitted an application for indefinite leave to remain as a spouse. On 24 April 2012, after a trial, he was convicted of sexual assault on a young child contrary to s 20 of the Sexual Offences (Scotland) Act 2009. On 14 May 2013 the Secretary of State refused his application for leave to remain and decided to remove him by way of directions given under s 47 of the Immigration, Asylum and Nationality Act 2006.

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2. The appellant appealed to the First-tier Tribunal, where Judge Clough dismissed his appeal. He now appeals, with permission, to this Tribunal.

3. The Secretary of State's refusal of the appellant's application was clearly motivated by his conviction. The application was refused by reference to paragraph 287 of the Immigration Rules on the ground that the appellant fell for refusal under the general grounds of refusal. That is, as is common ground before us, an implied reference to para 322(5), which prescribes that such an application "should normally be refused" on the grounds of:

> "The undesirability of permitting the person concerned to remain in the United Kingdom in the light of his character, conduct or associations or the fact that he represents a threat to national security."

4. The appellant's family life was separately considered under paragraph A277B and Appendix FM of the Immigration Rules, and the ground for refusal was that the appellant did not meet the requirements in relation to "suitability".

5. S-LTR.1.6 of Appendix FM gives, as a reason for refusing such an application, that:

> "The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3 to 1.5), character associations or other reasons make it undesirable to allow them to remain in the UK."

6. There was further consideration of the appellant's case under paragraph 276ADE of the Immigration Rules. It is clear that the appellant has not been in the United Kingdom for a sufficiently long time to qualify under that paragraph, but in any event there is a similar inhibition on granting leave to a person who falls for refusal under the paragraph of Appendix FM that we have set out above.

7. Following the appellant's conviction, he was sentenced on 10 July 2012. The sentence was a Community Payback Order lasting three years, including supervision for that period, a requirement to undertake 250 hours of unpaid work, and a conduct requirement preventing the appellant to have any contact with children under the age of sixteen years without the prior permission of his supervising officer. As an automatic result of that sentence, the appellant is required to be on the Sex Offenders Register for three years. On 11 September 2013 the order was varied by the Sheriff Court enabling the appellant to have contact with his stepson provided that this was supervised by his wife. The order remains in force in relation to any other children under the age of sixteen. The reasons given by the Sheriff included his consideration that "a return to some degree of normal family life would be desirable to assist in reducing the prospects of any further offending by the applicant". Although recent assessments had concluded that the appellant's stepson was not at

significant risk from the appellant, "that conclusion must be seen in context... [the appellant] has been convicted of a sexual offence against a very young child and there will always remain a degree of risk in such circumstances". It is clear from the Sheriff's decision that he was strongly motivated by the fact that the appellant's wife "is aware of the potential risks to [the child's] welfare and ... has his interests before her at all times".

8. What is set out above is, however, all that is before the Tribunal in relation to the appellant's offence. He admits that he was convicted (although it appears that he and his wife both say that he was not guilty of any offence); he has not, however, given any details at all of the conduct amounting to the offence. Before the First-tier Tribunal and before us, his position, presented by his representative, is that it is for the Secretary of State to prove the details of any conviction upon which she relies for the purposes of the exclusionary provisions of the Immigration Rules.

9. The Immigration Judge said this:

> "14. The Appellant has been convicted of a sexual offence against a child. I do not have the details of the offence. The details of the offence were not before me despite my asking the Appellant's representative for them. The Appellant's representation did not enlighten me when asked, as he considered it was for the Respondent to produce any necessary details. [She then set out the details of the conviction, sentence and the variation of the original order, and continued] .... Any semblance of normal family life for the Appellant with his wife and her youngest two children still at home has only started to regularise since September 2013. It was accepted that the Appellant was not considered a risk to his wife's youngest child.
>
> 15. The Appellant came to the UK on 14 January 2010. Any normal family life he has had with her and her family dates from January 2010 – 10 July 2012.... Even this is not certain as I was not told of the terms of the Appellant's bail while waiting for his trial date nor do I know the date the offence was committed or what behaviour the charges against the Appellant entailed."

10. After noting the terms of the refusal decision, the judge said this:

> "17. On the facts established before me, I find that the Appellant's behaviour and conduct concerning his conviction is of such seriousness as to justify the decision to deport him."

11. The judge went on to deal with family life outside the rules. She wrote as follows:

> "20. The Appellant married his wife in Pakistan on 30 July 2007 but did not come to the UK as her husband until 14 January 2010. He entered with leave to remain as a spouse until 21 March 2012. On 24 April 2012 he was convicted of a sexual offence against a child on summary

complaint at Ayr Sheriff Court. This disrupted the life he led with his wife and her children by her late husband. I do not know when any family life in the UK was disrupted because the Appellant's representative refused to give me details of the offence, the date it was committed or details of any time the Appellant spent on bail or in custody. I can only assume the Appellant was barred from living with his family from the date of his arrest. The Appellant's wife's eldest child, a son, left the family home in July 2012. Of the two daughters over 18, one now lives in London, but the other remains in the family home and is a student. Her brother, born on 5 May 2000, is at school. It was in September 2013 that the Appellant was allowed to stay overnight in the family home. This child is unaware of the details of the Appellant's offence and the Appellant is only allowed to return to the house if his wife supervises the visit. The Appellant remains restricted from having unsupervised contact with children under the age of 16 years without the consent of his supervising officer.

21. I consider it a difficult decision as to whether the Appellant's position at present constitutes a family life. As noted above the details provided for me to make a decision as to the Appellant's conviction and the time leading up to it are scant. I can only assume they were deliberately withheld. Because of this I find I am unable to find the Appellant has established a family life in the UK.

22. If I am wrong about this I consider removing the Appellant would undoubtedly disrupt what family life he has here, but doing so would be in accordance with the law and in the furtherance of protecting the rights of others and upholding the UK's Immigration laws, not least the Immigration Rules.

23. However, I must consider whether removing the Appellant would be proportionate in all the circumstances here. His wife has relatives in the Appellant's home village and has visited on several occasions with members of her family. She is familiar with the area, speaks the local language and by virtue of her relatives and past visits, will be familiar with local customs. Moreover, according to the Appellant, her late husband built a house there. It would be open to the Appellant and his wife to maintain their family life in Pakistan. Her three older children are over 18 and could remain in the UK to continue their lives and pursue their careers. They have close relatives here. Maintaining contact with the Appellant's wife's children would not be a problem with Skype, e-mails and other inventions, such as texting, and, of course, by visits to Pakistan. However, the youngest child of the family is now in his second year of senior school and is doing well there according to his school reports. The Sheriff, when modifying the Appellant's restrictions on visiting his family in Pollockshields specifically took into account when doing so the fact that normal family life is clearly in the child's best interests. I, too, have to consider the child's best interests and find that it would not be disproportionate to remove the Appellant, having regard to the personal and recent circumstances of his wife's youngest child, the fact the Appellant was convicted of an offence of a sexual nature against a child and because at best the Appellant lived with his wife and her children from the date of his entry to the UK on 14 January

> 2010 until the date of his conviction in April 2012. It is highly likely the Appellant was not living with the family until his conviction because of the nature of the offence. He stated in his application form for leave to remain as a spouse dated 20 January 2012 that he faced assault charges that were to call (in court) on 22 March 2012. His offence must have been committed therefore before January 2012. From the date of his conviction he was not allowed to stay overnight in the family home until after 18 September 2013. I cannot find on this information that it would be in the youngest son's interests that the Appellant remains in the household because any family life experienced by the child was short lived and from September 2013 highly artificial as his mother has to be present when the Appellant is in the house. Should the Appellant's wife wish to maintain her family life with the Appellant it is open to her to wait until her young son is an adult and she could then live with him in Pakistan or maintain her relationship with him by visits there in the interim. As this determination involves a minor child I make an anonymity direction."

12. She accordingly dismissed the appellant's appeal.

13. Before us, the grounds of appeal are first, that there was no (or insufficient) evidence supporting the conclusion that the appellant's conduct justified the decision; the second principal ground is that the article 8 decision was erroneous in law because, given the error in the application of the Immigration Rules; the judge was not entitled to reach the view that the appellant's removal would not be disproportionate. In order to establish what is therefore the principal ground, the appellant seeks to rely upon the decision of the Upper Tribunal in Farquharson v SSHD [2013] 00146 (IAC). That decision, relying also upon Bah v SSHD [2012] UKUT 196 (IAC) is authority for the proposition that where the facts underlying any conviction are disputed, it is for the Secretary of State to establish them at a Tribunal hearing if she depends on the facts in order to justify an immigration decision. That, however, is not the position here. The fact of the appellant's conviction is not disputed. The Tribunal was not invited to entertain any dispute about whether the appellant was guilty, and indeed could not properly do so. Even if it could have done so, there was simply no evidential basis upon which such a conclusion could have been reached. The only material before the Tribunal was the appellant's conviction, his sentence, and the somewhat guarded remarks by the Sheriff who made the variation order.

14. So far as the application of the rules to the appellant's case is concerned, two questions arise, or may arise. (We have put it like that because it is very far from clear that the nature of the appellant's case on this point was put with any clarity to the Immigration Judge, or that the appellant's professionally-drafted grounds of appeal properly raised these issues at all.) The first question is whether the Secretary of State was entitled to reach the discretionary decision she did on the material before her. If she was not so entitled, the decision might one which was "otherwise not in accordance with the law" (see s 84(1)(e) of the 2002 Act). The second

question is whether, on an appeal, the Tribunal is persuaded that "a discretion confirmed by immigration rules" should have been exercised differently (see s 84(1)(f) and s 86(3)(b) of the 2002 Act). Those two questions appear to be to an extent combined in the appellant's first ground of appeal to this Tribunal.

15. So far as the first question is concerned, we have no doubt that the Secretary of State was entitled to reach the decision she did on the material before her. The position was that at the time the appellant made his application he had been charged with a sexual offence against a young child, and by the time the decision was made he had been convicted. Although, as Mr Forrest urged upon us, s 20 includes a range of offences, it seems to us that the Secretary of State is entitled to decide that a recent conviction of any offence under that section is sufficient to fall within the language of paragraph 322(5) and paragraph S-LTR.1.6. We therefore reject the submission that, in the absence of details of the offence, the material before the Secretary of State was insufficient in law to enable her to reach the discretionary decision, within the ambit of the Immigration Rules, which she did reach.

16. When the matter came before the First-tier Tribunal, it was for the appellant to persuade the judge that the Secretary of State's discretion should have been exercised differently. At this point, the circumstances of the offence would have to be relied upon principally by the appellant. It is the appellant's appeal, and it is for the appellant to make his case that (despite the conviction) he is not a person whose departure from the United Kingdom would be conducive to the public good. It is difficult to see how he could do that without himself going into the details of the conviction. In any event, in the present case the appellant chose not to do that. The only material before the Tribunal gave no reason at all to suppose that the appellant was not a continuing danger to children in general (in relation to whom the original order continued); and there was therefore simply no basis upon which the judge could have concluded that the discretion ought to have been exercised differently. For those reasons we regard the decision under the Immigration Rules as wholly unassailable.

17. The appellant is then a person who seeks to establish that, despite his failure to meet the requirements of the Immigration Rules, he should be entitled to remain in the United Kingdom on the basis of his family life. That claim outside the Immigration Rules, is essentially a new claim, made for the first time to the First-tier Tribunal. The appellant seeks to make it on the basis that he does not disclose the circumstances of his offence: in other words, he seeks to establish that his circumstances entitle him to remain in the United Kingdom, without being prepared to give a full account of those circumstances.

18. There is no proper basis upon which it could conceivably be said that a person is entitled to assert a right of this sort without being prepared to

give, by credible evidence, the full account of all the circumstances which need to be taken into account in assessing the issue of proportionality. If an appellant is not prepared to do that, it appears to us that he is bound to fail in his claim. In circumstances in which the judge is aware that she does not know important facts relating to the appellant's history and his relation to the community, it would simply be irrational for her to determine that it is disproportionate to remove him. That conclusion relates equally to what may be regarded as the pure claim under article 8, and to that based on the consideration of the best interests of any children affected by the decision. Neither the presence of family life nor even the best interests of children can of themselves prevent a claimant's removal: the question always is whether all the facts, properly weighed together, show that his removal would be disproportionate. The absence of important facts makes that balancing assessment impossible, which means that the person relying upon it cannot succeed.

19. For the foregoing reasons, the appeal against the refusal of leave to remain is dismissed.

20. That leaves the removal decision, made under s 47 of the 2006 Act. It is clear that that decision was unlawful for the reasons given in Ahmadi v SSHD [2012] UKUT 147 (IAC) and Adamally and Jaferi v SSHD [2012] UKUT 00414 (IAC). As Mrs O'Brien acknowledged, the appeal against that decision should have been allowed. We accordingly substitute a decision allowing the appellant's appeal against the removal decision; but, so far as the decision refusing him leave to remain is concerned, we detect in the First-tier Tribunal's decision no error of law justifying its being set aside, and the Secretary of State's decision refusing the appellant further leave to remain therefore stands.

C M G OCKELTON
VICE PRESIDENT OF THE UPPER
TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER
Date: 15 September 2014