Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00406/2014

THE IMMIGRATION ACTS

Heard in Manchester	**Determination Promulgated**
On 5 November 2014	**On 8 January 2015**

Before

UPPER TRIBUNAL JUDGE DAWSON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HARWINDER SINGH

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Presenting Officer
For the Respondent: Mr C Timson, instructed by Amelius Solicitors

DECISION AND REASONS

ERROR OF LAW

1. In my decision dated 20 August 2014 I set aside the determination of the First-tier Tribunal for the reasons set out below.

> "1. The Secretary of State has been granted permission to appeal the decision of First-tier Tribunal Judge Levin and Mrs S Hussain (the panel)

who for reasons given in a determination dated 3 June 2014 allowed the appeal by the respondent (referred to as the claimant) against the decision under s.32(5) of the UK Borders Act 2007 on the basis that removal in pursuance of the deportation order would be in breach of Article 8 of the Human Rights Convention.

2. The conviction giving rise to the decision was on 30 April 2012 at Manchester Crown Court of two counts of money laundering for which the claimant was sentenced on 17 October 2012 to three years' imprisonment concurrently upon each count.

3. The background facts relied on in support of the Article 8 claim are these. The claimant is a national of India and a Sikh. He was born 27 May 1985. He entered the United Kingdom unlawfully in 2008 and came to the attention of the UK immigration authorities following his arrest on 30 May 2011 when he was served with a notice of a decision to remove him as an illegal entrant. That removal was cancelled as the claimant had made application for leave to remain as the spouse of Rama Mall, a Pakistani national who was settled in the United Kingdom and who has since acquired British citizenship. On 25 November 2011 the claimant was granted discretionary leave to remain until 25 November 2014.

4. The offending by the claimant occurred between 30 November 2010 and 3 November 2011 when he was arrested by the Serious Organised Crime Agency who had been carrying out observations at an address in Manchester.

5. In her reasons for the decision that s.32(5) of the 2007 Act applied, the Secretary of State considered the case with reference to paragraphs 398 to 399A of the Immigration Rules. The relationship with Ms Mall was accepted as genuine and subsisting but in the light of the claimant not having lived in the United Kingdom with valid leave for at least fifteen years preceding the date of the decision, the claimant was unable to benefit from the provisions under the Rules.

6. No evidence had been submitted to show that the claimant would be unable to settle in India or Pakistan. Ms Mall's status as a British citizen did not preclude her from travelling to or settling in India, and thus it was considered Article 8 would not be breached.

7. The Secretary of State also considered that the private life provisions under paragraph 399A did not apply in the light of the limited length of time the claimant had been in the United Kingdom and that it was not unreasonable to expect him to be able to readjust to life there. There was additionally a separate but brief consideration under Article 8.

8. A medical issue had been raised by the claimant. However, it was considered that treatment for his depression would be available in India although it might not be of the same standard as available in the UK.

9. The panel were not provided with the sentencing remarks which the Secretary of State had been previously directed to supply. An adjournment was sought but refused. The panel had before them a

psychiatric report which had been prepared for consideration for the sentence and an OASys assessment.

10. The claimant had been previously admitted to hospital with a diagnosis of a first episode psychosis in May 2012. This was followed by a further admission in September that year. The psychiatrist, Dr Bashir, observed there was no evidence of mental disorder before the commission of the serious offences with the onset of symptoms some months after conviction.

11. There was a paucity of reliable collateral background information and Dr Bashir was concerned that Ms Mall was an unreliable informant appearing not to know basic facts which any wife entering into a marriage by choice would know. The current working diagnosis in the hospital appeared to be one of a psychotic disorder. However, Dr Bashir concluded that there were a number of factors to suggest to him that the most likely diagnosis was one of malingering and that ultimately was his conclusion. There was some evidence that the claimant had a dissociative disorder but Dr Bashir did not believe that had any relevance to any sentence which the court deemed appropriate.

12. The OASys Report assessment was completed on 21 November 2012. The author observed that the claimant had not accepted responsibility for the offence in which two others had been involved. Reference is made to the psychiatric report having been completed on 18 October 2012 prior to sentencing. I observe here that it is not at all clear whether the author of the OASys Report actually saw the psychiatric report. The author of the OASys report concluded that the risk of reoffending was low as was the likelihood of serious harm to others.

13. Mr Timson also represented the claimant at the hearing and he accepted that the only basis on which the claimant could succeed was under Article 8.

14. The panel noted the history of the relationship between the claimant and Ms Mall. They had claimed to have lived together since October 2010 and the panel found that they were genuinely devoted to one another. Although the panel referred to them having been together since 2008, this appears to be the year when they met.

15. The panel were satisfied that the claimant would not be at risk of persecution in India by virtue of his faith with reference to the country information before them. They also noted that Dr Bashir had concluded that the claimant was an unreliable witness who had feigned mental illness. Although accepting it credible that the claimant had faced hostility from his family in India as a consequence of his marriage such hostility did not mean that there was real risk that he would either be killed by his family or would suffer serious harm.

16. Having regard to the evidence, the panel thought it highly unlikely that Ms Mall would be granted a visa to settle with the claimant in India and if they were wrong on that, it would be unreasonable and disproportionate to expect her to settle in that country as a Christian

(Roman Catholic) of Pakistani origin. The decision to deport the claimant would therefore mean the end of the couple's family life together as there was no realistic possibility of the claimant obtaining entry clearance to Pakistan to settle there in the light of his conviction and his origins.

17. After providing detailed reasons for these varying conclusions the panel then proceeded to set out its decision on proportionality on these terms:

> '57. In assessing whether the respondent's decision to deport the appellant is disproportionate in circumstances where it will end the appellant's family life with his wife we have had regard to the seriousness of the offence which the appellant committed, to the likelihood of his reoffending, and also to the public expectation that foreign criminals who commit serious offences should be deported from the UK. We have also had regard to the fact that the Immigration Rules carry considerable weight and they have been approved by Parliament and reflect public interest in the deportation of foreign criminals. Against these factors we have weighed the fact that the appellant has been punished for the offence that he has committed by way of a sentence of three years' imprisonment and in the absence of any evidence to show otherwise, it would appear that this was the first offence that the appellant had committed. We have also had regard to the appellant's OASys assessment that he poses a low risk of reoffending and a low risk of harm to the public. We have taken into account the fact that the appellant and Ms Mall were married in a religious ceremony in June 2010 and that they married again in a Roman Catholic Church on 30 September 2011 and the fact that the respondent saw fit to grant the appellant three years' discretionary leave to remain in the UK having regard to that marriage outside of the Immigration Rules and despite the appellant not meeting the requirements of the Rules, and which we find to be cogent evidence that the respondent accepted the strength of their relationship. Last but not least we had regard to the highly unusual circumstances of the appellant being an Indian Sikh and Ms Mall being a Christian of Pakistani origin and our finding that these unusual circumstances will preclude the couple living together either in India or in Pakistan.'

18. And in the following paragraph the panel reached its conclusion:

> 'Having regard to our finding that the deportation of the appellant will effectively end the family life of the appellant and Ms Mall and having weighed up carefully all of the factors set out in the preceding paragraph, we find that on the facts of this particular case the public interest in deporting the appellant is outweighed by the permanent destruction of the family life which exists between the appellant and the sponsor. We find therefore that the respondent's decision to deport the appellant is unreasonable and that it also constitutes a disproportionate breach of his rights of the appellant and Ms Mall to a family life under Article 8. We also find the fact that the appellant is an Indian Sikh and his wife

> is a Christian of Pakistani origin amount to exceptional circumstances which outweigh the public interest in the appellant's deportation.'

19. The challenge by the Secretary of State argues a failure to give reasons or adequate reasons on material matters. As accepted by Mr McVeety, the references to *Gulshan* [2013] UKUT 00640 (IAC) and *Nagre* [2013] EWHC 720 (Admin) were in the circumstances misconceived. He relied on paragraph 4 of the grounds as follows:

> 'Although the judge considered the appellant's risk of harm and reoffending, he failed to engage the seriousness of the offence committed, the deterrent factor and the public's revulsion at such offending behaviour when balancing the proportionality arguments in this case.'

20. There was no Rule 24 response.

21. I have taken into account the submissions of Mr McVeety and Mr Timson in reaching my decision. In essence Mr Timson argued that the Secretary of State was disagreeing with the decision with which she had not found favour and that there was no error of law. It had been open to the Secretary of State to produce the sentencing report and she needed to take the consequences of not having done so. He contended that the judge had taken into account the seriousness of the offence and reminded me of the length of the determination and the care with which the Tribunal had approached the task.

22. I reserved my determination. Both representatives confirmed that it was open to me to proceed to remake the decision based on the findings made by the panel. I should also take account of the fact that Ms Mall now believes she is pregnant although it is too early to identify a due date. I reminded Mr Timson that I would need to have regard to the amended provisions of the 2002 Act with reference to s.19 of the Immigration Act 2014 in such an exercise.

23. It is necessary to unpack the Tribunal's reasoning in particular at paragraph 57 as quoted above. It cannot be doubted that the panel sought to direct itself regarding the legal principles it was required to apply.

24. Earlier in the determination at [44] the panel explained that it had had regard to the decision in *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 referring to a two stage assessment

> '… firstly under the Immigration Rules and secondly if the appellant's [sic] did not meet the requirements of the Rules, whether the appellant can nonetheless succeed under Article 8 outside of the Rules, was not applicable to a deportation case and

> that the issue of proportionality should be considered as part of the consideration as of whether there are exceptional circumstances which outweigh deportation.'

25. Nowhere in the determination does the panel refer to the language of *MF* (Nigeria), in particular that expressed at [42] of the judgment of the Master of the Rolls:

> '… In approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something very compelling (which will be 'exceptional') is required to outweigh the public interest in removal. In our view, it is no coincidence that the phrase 'exceptional circumstances' is used in the new Rules in the context of weighing the competing factors for and against deportation of foreign criminals.'

26. This may not matter if it is possible to glean from the determination that, in substance, the panel approached its enquiry whether there was something very compelling. What appears to have been uppermost on their mind is the inability of the relationship to continue outside the United Kingdom. This appears to have acquired an importance at the expense of a properly reasoned analysis of the public interest. Remaining with [57] I consider that the panel erred by regarding the seriousness of the offence as some how ameliorated by the punishment imposed on the claimant. This was clearly wrong. The scales are heavily weighted in favour of deportation by virtue of the seriousness of the offence as reflected in the sentence the length of which does not reduce that weighting.

27. The panel failed to have any real regard to the seriousness of the offence itself and appears to have been content that this was reduced by the assessment revealing a low risk of reoffending and a low risk of serious harm to others. Whilst the panel may not have seen the sentencing remarks, there was enough in the psychiatric report for them to consider whether the OASys Report assessment on the risk of reoffending was sufficiently reliable. The panel did not ask themselves whether the author of the OASys Report had seen the psychiatric report. Furthermore they did not ask themselves whether the evident readiness of the claimant to malinger and seek to deceive others regarding his mental state might also have had an impact on the quality and reliability of the answers which he gave to the probation officer.

28. The reference in [57] to the decision by the Secretary of State to grant the claimant three years' discretionary leave outside the marriage had no real relevance to the public interest side. There is no indication that the Secretary of State was aware when she granted discretionary leave that the claimant had been arrested.

29. Finally, with regard to the relationship, the weighing exercise required the panel to examine its intensity and duration. They did not address the concerns expressed by Dr Bashir regarding Ms Mall's reliability as a witness when accepting her account of difficulties in seeking to obtain a visa from the Indian High Commission. Pausing there, Mr McVeety withdrew the assertion in the grounds of challenge that it was open to the parties to relocate to Pakistan in the light of this possibility no longer being pursued at the hearing by the Presenting Officer.

30. Even if the panel was entitled to conclude that there was no possibility of Ms Mall settling in India, the determination is inadequately reasoned why. There is a possibility that criminal behaviour can result in the permanent separation of a couple and whether that should be permitted is a proper function of the exercise of proportionality and one which the panel failed to undertake.

31. I therefore set aside the decision of the First-tier Tribunal. I have concerns about aspects of the evidence which mean that I cannot fairly proceed to remake the decision without giving the parties a further opportunity of addressing the aspects that trouble me. It would be helpful to know if the probation officer, the author of the OASys Report, took into account the contents of the report by Dr Bashir. Whether he did so has a potential impact on the reliability of the author's assessment of the risk of reoffending, particularly in the light of the clear indication by the claimant that he did not accept responsibility.

32. I consider also that further evidence is needed regarding the likelihood of the Indian High Commission granting a visa temporary or permanent to Ms Mall as a British citizen of Pakistani origin. The panel accepted her testimony of the difficulties that she had encountered but that evidence needs to be reassessed in the light of Dr Bashir's concerns about her reliability. The test now to be applied under s.117C(5) of the 2002 Act is whether the effect on Ms Mall would be 'unduly harsh'. This requires further submissions and argument.

33. Accordingly the hearing will be adjourned for that purpose on a date to be fixed.

34. I direct that the claimant file with the Upper Tribunal and serve on the SSHD an updated bundle of documents dealing with the above points including any additional statements of evidence relied on within 21 days of the date of the sending out of this decision. The parties are to file with the Upper Tribunal and serve on the other party their skeleton arguments no later than 14 days after receipt of the claimant's bundles.'

REMAKING THE DECISION

2. There was been no compliance with my directions. It is puzzling that the Secretary of State who sets great store by seeking to remove foreign national criminals has not applied her resources to this case. With characteristic candour Mr McVeety acknowledged there was no reason why the directions had not been complied with. It is also unsatisfactory that the claimant's advisors did not bother to comply. All the more so because this case involved consideration of the new provisions identified in my direction at [34] above as well as consideration of changes to the Immigration Rules which Mr Timson acknowledged are applicable to this case following the decision in *YM (Uganda) v SSHD* [2014] EWCA Civ 1202 as affirmed in *ZZ (Tanzania] v Secretary of State for the Home Department* [2014] EWCA Civ 1404. Given the desirability for detailed skeleton arguments I proceeded to hear evidence from claimant and his wife Ms Mall as well as opening submissions on that evidence. I directed that the Secretary of State file within 7 days of the hearing her written submissions and Mr Timson to respond within 7 days of receipt of those submissions. I am grateful to them for their compliance with this direction.

LEGISLATIVE FRAMEWORK

3. Part 5A of the Immigration Act 2014 applies to this case by virtue of the transitional provisions at Section 75. Its terms are as follows:

> "PART 5A
>
> Article 8 of the ECHR: public interest considerations
>
> 117A Application of this Part
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard—
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
>
> (3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).
>
> 117B Article 8: public interest considerations applicable in all cases

(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—

(a) are less of a burden on taxpayers, and

(b) are better able to integrate into society.

(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—

(a) are not a burden on taxpayers, and

(b) are better able to integrate into society.

(4) Little weight should be given to—

(a) a private life, or

(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and

(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part

(1) In this Part—

- 'Article 8' means Article 8 of the European Convention on Human Rights;
- 'qualifying child' means a person who is under the age of 18 and who—
  - (a) is a British citizen, or
  - (b) has lived in the United Kingdom for a continuous period of seven years or more;
- 'qualifying partner' means a partner who—
  - (a) is a British citizen, or
  - (b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, 'foreign criminal' means a person—

(a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc), has not been convicted of an offence.

(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—

(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);

(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;

(c) include a person who is sentenced to detention, or ordered or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time; and

(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

4. Amendments to paragraph 398*ff* came took effect from 28 July 2014 and are relevant to this case:

"Deportation and Article 8

A398. These rules apply where:

(a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under Article 8 of the Human Rights Convention;

(b) a foreign criminal applies for a deportation order made against him to be revoked.

398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

(a) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least 4 years;

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or

(c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law,

The Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, the public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A.

399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(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.

399A. This paragraph applies where paragraph 398(b) or (c) applies if –

(a) the person has been lawfully resident in the UK for most of his life; and

(b) he is socially and culturally integrated in the UK; and

(c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported.

399B. Where an Article 8 claim from a foreign criminal is successful:

(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of State considers appropriate;

(b) in the case of a person who has not been served with a deportation order, any limited leave to enter or remain may be curtailed to a period not exceeding 30 months and conditions may be varied to such conditions as the Secretary of State considers appropriate;

(c) indefinite leave to enter or remain may be revoked under section 76 of the 2002 Act and limited leave to enter or remain granted for a period not exceeding 30 months subject to such conditions as the Secretary of State considers appropriate;

(d) revocation of a deportation order does not confer entry clearance or leave to enter or remain or re-instate any previous leave."

5. The Secretary of State has published a policy s.EX.2 is in these terms:

"for the purposes of EX.1.(b) "insurmountable obstacles" means the very significant difficulties which would be faced by the applicant or their partner in continuing their family life together outside the UK which could not be overcome or would entail very serious hardship for the applicant or their partner."

THE CLAIMANT'S CASE AND THE EVIDENCE

6. In the absence of any skeleton argument before I heard the evidence I asked Mr Timson to clarify the claimant's case which is as follows:

(i) it is accepted that the claimant does not meet Exception 1 in s.117C.

(ii) it is contended that Exception 2 applies. Miss Mall as qualifying partner by virtue of her British citizenship. The effect of the claimant's deportation on her would be unduly harsh.

(iii) Paragraph 399(b) applies on the basis it would be unduly harsh for Miss Mall to live in India and unduly harsh were she to remain in the United Kingdom without the claimant.

7. The new evidence relied on by the parties comprises

   (i) updated statements by the claimant and Ms Mall

   (ii) a bundle of country information, and

   (iii) an exchange of correspondence in relation to the OASys Report.

8. The claimant explains in his new statement that:

   (i) Ms Mall is pregnant with his child and the baby is due 17 April 2015

   (ii) the claimant is extremely remorseful for having committed the crime and had been drawn into it without full knowledge and understanding of what was happening. He has a record of good behaviour in the prison and no other criminal history

   (iii) when the psychiatric assessment was carried out by Dr Bashir the claimant did not deliberately try to mislead him or misrepresent his situation. He has never hurt his wife.

   (iv) throughout their relationship he has tried to obtain a visa for Pakistan and she endeavoured to obtain a visa for India. His wife had even been unable to make an application due to the Indian High Commission not treating individuals of Pakistani origin in the same way as others. They had visited the "Indian Embassy" in Birmingham on six occasions since June 2014. On each, enquiries were made about his wife travelling to India and she was refused an application form on each occasion because of her origins.

   (v) their child would be of mixed race and it would be difficult for the child to be allowed entry into India due to its origins.

9. When asked in cross-examination about the attempts to obtain a visa for Ms Mall for India the claimant referred to having sent a request by recorded delivery on 20/11 and there had been no answer. He had chased it up by telephone. On the five or six occasions he had travelled to Birmingham he made enquiries about his wife's visa and asked for an application form which was refused because she was born in Pakistan and is a Christian. He had been not allowed to see a higher officer when rebuffed. As to whether he had paid a fee with the application in 2011, the claimant explained that he had provided details of his credit card and telephone number and his own address. The fee had not been taken. He is not currently on any medication nor is he seeing any counsellor or psychiatrist.

10. In my questions for clarification, I asked the claimant what type of visa had been applied for in 2011. He responded that it had been for settlement and travel as well. As to when he had applied in 2011 he did not remember exactly but believed it was June or July, after his arrest by Immigration Officers but before the arrest for the criminal offence. As to

why he had applied for a settlement visa, the claimant explained that he had consulted his solicitor who had advised that it would be very difficult for his wife to obtain a visa and live in India. The application for a settlement visa had been because of the difficulties he had encountered living in the United Kingdom and he confirmed that they had decided to go and live in India in 2011. He was last in India in February 2012 but his wife had not accompanied him as she had not been given a visa.

11. Miss Mall's statement confirms the following:

    (i) That she is pregnant

    (ii) The couple have lived together since 2010

    (iii) She has tried to obtain a temporary visa to enter India since 2011. She had first written a letter by recorded delivery "letting them know that the respondent had no leave to remain in the UK and that I wished to travel to India with him but I received no reply".

    (iv) She was refused entry to the Indian Visa Centre which was in Manchester at the time the claimant had received notice of intended deportation. She was informed by the Manchester Visa Centre that they were unable to help her because she was of Pakistan origin. The Manchester India Visa Centre refused to give her an application form. The form that people of Pakistani origin require is not on the internet. She accompanied the claimant on each of the approximately six occasions he had gone to renew his passport. On four, she asked if she could obtain a visa for India and was told she could not because of her origin and was refused an application form on all occasions.

12. I pause here to note that both statements referred to attempts to obtain a visa for the claimant to travel to Pakistan. Mr McVeety confirmed the Secretary of State's position that it is accepted he will be unable to travel there.

13. At the hearing Ms Mall explained that she was naturalised as a British citizen in September 2011. When asked by Mr McVeety how many applications she had made for a visa she confirmed that none had ever been made. She had never been given an application form. She confirmed that she had spoken to the staff and had also written to the Consulate General which had been sent by recorded delivery.

14. Ms Mall also explained that the family in the United Kingdom includes her parents and a brother and sister. She did not see her parents regularly, just on special occasions. Mr McVeety reminded her of the earlier evidence that they had disapproved of the match and she explained that had now changed as she was pregnant. In addition her mother was unwell. Over the last year she had seen them some 30 or 40 times. Miss Mall works as a house carer/ assistant for 33 hours a week.

15. When questioned further about the application in 2011, she explained that an application had not been made then but they had written a letter together and sent this to an address in Birmingham. No forms had been completed.

16. In response to my questions Miss Mall explained that she had arrived in the United Kingdom in September 2005 from Lahore. Prior to that journey she had not been outside Pakistan. She confirmed she worships at a Catholic church in Old Trafford.

17. A file note has been provided of the telephone conversation between the appellant's solicitors and the author of the OASys Report. She confirmed that she did not see the psychiatric report but had been sent the pre-sentence report and that the Probation Officers had sight of the psychiatric report when preparing the pre-sentence report. Miss Flick confirmed in a subsequent email on 29 October 2014 that she was unable to confirm whether she had sight of the psychiatric report as with the claimant no longer in custody, she was unable to access his records.

FINDINGS

18. I make these findings of fact. Miss Mall either alone or together with the claimant has never made application for a settlement or temporary visa for her to travel to India. The claimant was not telling the truth when he explained that he had provided his credit card details in 2011. There would be no requirement to do so if, as Ms Mall has explained, it was a letter of enquiry. I accept the possibility that such an enquiry was made but do not accept that any serious attempt has been made by the parties to obtain an application form and apply.

19. The claimant relies on an extract from The Guardian newspaper dated 14 August 2010 which indicates that applications by British citizens of Pakistan origin take longer. It quotes from the website for visas for India that applications from persons of Pakistani origin take a minimum of 7-8 weeks in contrast to British Citizens who take 2 to 3 days. Such evidence does not support the assertion that simply by virtue of Ms Mall’s Pakistan origins she would be unable to obtain a settlement or visit visa. There may be a delay but no more than that.

20. I do not accept that the evidence demonstrates Ms Mall would face difficulties in India by virtue of her origins or religion or a combination of both that would make it unreasonable for her to live there. Furthermore, I do not accept that the claimant himself would face any difficulties as a consequence or his marriage. The country information relied on demonstrates that a number of individuals of Pakistan origin have been granted citizenship in India. The evidence does not demonstrate that Christians per se have real difficulties. Inevitably Ms Mall’s faith and her origins will attract attention but the evidence does not show anything approaching hostility.

21. The article by Robert Wintemute in the Guardian edition 14 August 2010 identifies a long processing period for visa applications without an explanation why he considers that this makes travel to India impossible. He refers to those who are denied visas resenting India for excluding them and yet he does not particularise why visas are denied. The article does not represent a balanced view. The extract from the International Edition of The News for May 21, 2014 refers to problems encountered by Pakistanis in obtaining visas to India. The concerns expressed by the author who is a teacher of English as a second language based in Sydney appears to relate to difficulties encountered by Pakistan nationals rather than British citizens of Pakistan origin.

22. An extract from a website www.ekklesia.co.uk refers to hostility towards Christians in a remote area of Orissa State in 2008. There is nothing more recent to indicate that that hostility has spread or is widespread.

23. The OASys Report was based on an assessment carried out shortly after the claimant was sentenced in October 2012, as observed by the First-tier Tribunal at [28] of its decision. The claimant is assessed as being of no risk of serious harm to others and of low risk of reoffending. It is also recorded that he had not accepted responsibility for the offences. The OASys report refers at [10.8] to Dr Bashir's report by date. I note that it refers to a report dated 18 October but as there is no dispute that he prepared this report before sentencing on 17 October this is a typographical error. There is no reference to the "most likely diagnosis of malingering" that Dr Bashir considered might be the case. It is not at all clear that the author of the OASYs report was aware of this aspect which clearly had relevance to the assessment being undertaken. I am not persuaded that the assessed low risk of reoffending is particularly reliable.

DISCUSSION

24. There is no question that the couple are committed to one another and that they have a genuine relationship. For the reasons I have given there is no practical or legal bar to the couple living together in India. Their relationship was formed when the claimant had no leave to remain. Although he was refused leave to remain based on his marriage, he was granted discretionary leave until 25 November 2014.

25. Mr Timson's post-hearing skeleton accepts that in the light of *YM (Uganda) v SSHD* [2014] EWCA 1292, I am to apply the Rules introduced in July 2014. These are capable of permitting the claimant to remain notwithstanding the public interest. His offending places him in the upper tercile of the range in paragraph 398(b). It is accepted that paragraph 399(a) does not apply because there is no child. It is argued that 399(b) applies because it would be unduly harsh for Ms Mall to live in the country

to which the claimant is to be deported and for her to remain here without him. It is also argued that section 117C (5) is applicable as this too raises the threshold of undue harshness. It is also argued that "unduly harsh" should be read with child guidance at section 3 and the partner guidance at section 4 of the IDI version 5.0 dated 28 July 2014.

26. The recent decision of the Court of Appeal in *SSHD v AJ (Angola)* [2014] EWCA Civ 1636 emphasises the significant effect of the new rules as a complete code. Sales LJ observed at [39] :

"…because it means that an official or a tribunal should seek to take account of any Convention rights of an appellant through the lens of the rules themselves, rather than looking to apply Convention rights for themselves in a free- standing way outside the new rules."

And at [40]:

"The requirement that claims by appellants who are foreign criminals for leave to remain, based on the Convention rights of themselves *or their partners, relations or children,* (emphasis added) should be assessed under the new rules and through their lens is important, as the Court of Appeal in *MF (Nigeria)* has emphasised."

Although the Court of Appeal was considering the July 2012 rules, its judgment applies equally to the rules made two years later.

27. It is not argued that the claimant can benefit from paragraph 399A as he has not been lawfully resident in the United Kingdom for most of his life. He has undoubtedly integrated to an extent in the United Kingdom but I do not consider there would be any significant obstacles to him living in India.

28. Ms Mall's circumstances cannot be considered without taking account of her pregnancy. Absent this factor, I do not consider it would be unduly harsh for her to accompany the claimant to India and for them to continue their family life there. Having come to Britain in 2005, Miss Mall has experience of moving to a new country and culture. I do not consider her origins and faith would not rule out such an option. She has family in the United Kingdom from whom she would be separated. However as a British citizen it will be open to her to come back here regularly and otherwise keep in touch by social media as many do.

29. The test in paragraph 399 (b) (ii) requires Ms Mall to show compelling circumstances over and above those described in EX.2; see [5] above. The resulting test is a demanding one. I am however persuaded that the fact of Ms Mall's pregnancy when considered with the potential absence of family support in India and an inability to access NHS and other healthcare interventions that she would be entitled to as a British Citizen living in this country, triggers compelling circumstances over and above those described in EX.2. That is not the end of the matter however. Paragraph 399(b) (iii) also needs to be met which involves an enquiry whether it

would be unduly harsh for Ms Mall to remain in the UK without her husband. The focus must again be on her pregnancy. Although s.55 has no application, the reality is that the baby will be born all being well in April 2015. Does this aspect elevate the circumstances to unduly harsh? On the evidence before me Ms Mall's relations with her parents have recently improved. Although her mother has been unwell, I consider there will be emotional and likely practical family support when the baby is delivered. The absence of her husband will be hard on her but in the context of the above factors, I do not consider that it would be unduly harsh for Ms Mall to give birth in the absence of her husband or that this would result in very serious hardship.

30. How does the Act impact on this case? In order to come within Exception 2 of s.117C(5) not only does the claimant need to demonstrate a genuine and subsisting relationship with a qualifying partner (which he has in this case by virtue of that relationship and her citizenship), he also needs to demonstrate that the effect on Miss Mall of his deportation would be unduly harsh. I see no basis for finding that the test of unduly harsh under primary legislation can be anything less than that defined in the Rules. Having found that it would not be unduly harsh on Ms Mall to remain without her husband under the Rules, I also conclude that same result flows under s. 117C (5).

31. Returning to the Rules, I must also ask whether notwithstanding the inability of the parties to come within the exceptions in the rules there are very compelling circumstances over and above the rules sufficient to trump the public interest. I am satisfied there are not. The public interest requires the claimant's deportation which is made greater by the seriousness of his offence reflected in the three years term of imprisonment. The force of the public interest reflects the will of parliament and, as a consequence, this is a powerful factor in the Article 8 consideration.

32. The claimant continues to question his culpability which, coupled with the suggestion of malingering by Dr Bashir, brings into question the sincerity of his remorse and the reliability of the assessment of low reoffending.

33. Whilst the claimant obtained leave after he married, the relationship was formed whilst he did not have leave. He does not have indefinite leave and his criminal offending has imperilled such leave as he has. I have found that his wife could not accompany him to India because of her pregnancy but I have concluded that it would not be unduly harsh for her to remain even though that will entail having her child without the presence of her husband. Such private life that the claimant has developed in the UK does not have any compelling features sufficient to tip the scales. None of these factors even when considered cumulatively comes near to the very compelling circumstances demanded by paragraph 398.

34. Accordingly the appeal by the claimant against the decision by the Secretary of State that s.32 (5) of the 2007 Act applies is dismissed.

Signed

Date 6 January 2015

Upper Tribunal Judge Dawson