Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/02281/2013**

THE IMMIGRATION ACTS

Heard at: Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On: 19th February 2019	**On: 13th March 2019**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

MOHAMMED IMRAN KHAN
(NO ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: -
For the Respondent: Mrs Aboni, Senior Home Office Presenting Officer

DECISION and REASONS

1. The Appellant is a national of Pakistan born in 1982. He is subject to a deportation order but he seeks to remain in this country on human rights grounds.

2. For reasons that are not entirely clear this appeal has been in Tribunal for over five years. The case history is as follows:

   6th November 2013 Respondent signs deportation order

   27th January 2014 Appeal lodged with First-tier Tribunal

20th May 2015	First-tier Tribunal Judge Murray allows appeal, purportedly to the limited extent that the Appellant be granted discretionary leave until care proceedings in respect of his son are resolved
2nd June 2015	The Secretary of State applies for permission to appeal
14th July 2015	Permission granted
23rd September 2015	Upper Tribunal Judge Coker sets the decision of the First-tier Tribunal aside in its entirety, finding fundamental errors in the determination including (a) a failure to apply the relevant statutory framework to a deportation (b) a failure to make relevant findings (c) 'allowing' the appeal on a basis not open to the Tribunal
14th August 2017	Judge Coker makes a 'request for information' pursuant to the Protocol made between the President of the Family Division and the Senior President of Tribunals ('the Protocol')
30th November 2017	The matter is relisted before Judge Coker. The Appellant does not attend because he is back in prison, serving 30 months upon conviction for possession with intent to supply Class A drugs. His partner Ms KH appears, along with two supporting witnesses, who each give evidence. Judge Coker adjourned the proceedings at the request of the Secretary of State, who was unaware that the Appellant had fathered a second child, or that he was now in a relationship with Ms KH. The Secretary of State asked for time to consider that new evidence.

3. As can be seen from this chronology there have been lengthy delays in the progress of this appeal; first in its initial listing, then from September 2015 to the file being returned to Judge Coker in August 2017, and then between November 2017 and now. In the absence of any other explanation it may be that these delays have arisen from administrative errors on the part of the Tribunal; if that is so, I apologise to the parties for that delay.

4. The Appellant appeared before me in person, accompanied by his partner KH. He explained that he has tried to get representation in the past but he is unable to afford it. He did not see any reasonable prospect of being able to afford it in the future. In those circumstances there was little option but to proceed with the hearing with the Appellant being unrepresented. At the outset of the hearing I explained to him the legal framework that I had to apply as follows:

i) The Appellant has, he readily admits, committed a number of serious criminal offences. Between 2003 and 2013 he committed 42 known offences in the United Kingdom resulting in 21 convictions; these included theft, fraud, offences against the person, and in 2011 a conviction for possession of a class A drug with intent to supply. On the 12th September 2017 he received a further conviction for the same offence. The drug involved, on both occasions, was heroin. In addition to this long history of offending the Appellant has, again on his own admission, been living in the United Kingdom illegally for some 20 years. These are the reasons that the Secretary of State seeks to deport him.

ii) The law states that the deportation of the Appellant is in the 'public interest', ie it would be good for this country if he is deported. He can only win this appeal if he can show that one of the 'exceptions' to that rule applies[1].

iii) The Appellant has a partner, Ms KH. He has two children in the United Kingdom. His son by a former partner is now 7. I shall refer to this child as 'S'. His daughter 'D', with KH, is 2½. His family is the reason that the Appellant relies on in his appeal to show that there is an 'exception' in his case and that he should not be deported. In order to show that the exception applies the Appellant must show that it would be "unduly harsh" on his family if he were to be removed. As I explained at the hearing, this is a high test. It is not enough for the Appellant to show, for instance, that his children would be sad if he were deported, or that they would miss him. He must show that the consequences for them would be very severe, excessively harsh or bleak.

iv) If the Appellant cannot show that this exception to the rule applies, he must demonstrate that there are exceptional circumstances that mean that his appeal should be allowed anyway. The exceptional circumstances in his case might be that he has lived here a long time, has lost his ties to Pakistan, and the fact that all of the Appellant's criminal offending has arisen out of his long-term addiction to heroin.

---

[1] Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended):
(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.
….

5. Once I had explained that legal framework I heard oral evidence from the Appellant, whilst KH waited outside. Afterwards KH came back into court and gave evidence. Both witnesses were cross examined by Mrs Aboni. At the end of the hearing I reserved my decision, which I now give.

The Public Interest in Deportation

6. The Appellant arrived in the United Kingdom, on his own evidence, in approximately 1997. There is no evidence of him having had leave to enter, or to him having regularised his position at any time, until 2013 when he claimed asylum in order to try and avoid deportation.

7. The Appellant has, insofar as this Tribunal is aware, 23 convictions relating to at least 43 offences. The most serious of these are two convictions relating to the possession of drugs with intent to supply. I have before me the sentencing remarks of Mrs Recorder Kushner dated the 2nd March 2011. These show that on that date the Appellant was sentenced to three periods of imprisonment for the supply of cannabis and diamorphine, to run concurrently. The longest sentence was 12 months. This is what is called the 'index' offence. It is the reason that the Home Office are taking deportation action against the Appellant: where a sentence of at least 12 months is given, such action is automatic[2].

8. The Appellant was notified of his liability to deportation on the 30th July 2013. The Deportation Order was signed on the 6th November 2013.

9. Since then he has continued to offend. At the hearing in November 2017 KH attended and informed Judge Coker that the Appellant had been convicted on the 12th September 2017 of two counts of possession with intent to supply Class A drugs. Although Mrs Aboni had no evidence relating to the further conviction the Appellant himself confirmed that to be the case. He said that he had been sentenced to 30 months' imprisonment.

10. Having had regard to the evidence I am satisfied that the Appellant is liable to deportation. He is not British. He has committed a long list of criminal offences

[2] Section 32 of the Borders Act 2007:
(1) In this section "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who is convicted in the United Kingdom of an offence, and
(c) to whom Condition 1 or 2 applies.
(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.
…
(4)For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.
(5) The Secretary of State must make a deportation order in respect of a foreign criminal (subject to section 33).
…

at least two of which have resulted in a sentence of 12 months or more being handed down. He is a foreign criminal and the provisions at s32 of the Borders Act 2007 must therefore be applied.

The Human Rights Exceptions

11. As I note above, the Appellant has lived in this country a long time. He was a teenager when he arrived. The papers before me variously indicate that he may have been 14, 15 or 16 years old on arrival: I note that the probation service refer to him having dropped out of school at 14 because he was bored and as a result took no GCSEs. He has therefore lived here for more than half of his life, since today he is 36. It seems that he may have entered as a visitor and then overstayed. He states that he was sent here to live with his uncle. Having heard the Appellant's oral evidence I accept that he has, in his own mind, integrated into this country. He speaks barely accented English and I have no doubt that he regards this country as his home. He has however not had leave for most, if any, of the time that he has spent here. In those circumstances he cannot succeed in showing that he should be allowed to remain on 'private life' grounds[3].

12. I consider first the Appellant's relationship with his partner, KH. I have no doubt at all that this is a qualifying relationship. The Appellant spoke of KH with genuine love, affection and admiration. He told me that KH is a "brilliant mum" and that she has been a rock for him. Even before they had their daughter together she ended up looking after his son from his earlier relationship, because the boy's own mother was a heroin addict who wasn't able to cope. The boy S is now in care and KH has made sure that he has maintained contact with her daughter, D. She has regularly travelled to ensure that D and S can spend time together. She is committed to the Appellant and to his family. KH herself has never used drugs and in his evidence the Appellant made clear that he understands how much she has had to put up with, being with him.

13. The evidence about exactly how long KH and the Appellant have been together was not entirely clear. I accept that such discrepancies in the evidence can easily arise from the passage of time and clouded memories. What is clear is that they have been together for at least 4 years. Their daughter D was born in August 2016. The Appellant and KH lived together when KH was pregnant with D and until he was sent back to prison in September 2017. He was released in December 2018 and he has lived with them since.

[3] See 117C(4) of the Nationality, Immigration and Asylum Act 2002, cited above.

14. I have considered carefully the impact upon KH of the Appellant's deportation. I have no doubt that she loves him and that she wants nothing more than for the two of them to bring their daughter up together in a stable family unit. I accept that he in turn loves her and is committed to her. The immediate consequence of the Appellant's deportation for KH is that she will be left to bring up D on her own. Being a single parent is challenging, no matter how capable a parent you are. I note however the evidence of KH that her own mother supports her (she in fact attended the hearing in order to look after D whilst KH and the Appellant were in the hearing room) so she will not be entirely without assistance. KH has already demonstrated her strength of character in that she has coped whilst the Appellant was on prison and despite the difficult circumstances she finds herself in, has satisfied social services that she is a good parent. I am accordingly satisfied that although the Appellant's deportation will in the short term be difficult and upsetting for KH, it cannot be said to be "unduly harsh". Her future without the Appellant will not be "bleak".

15. I now turn to assess the position of the Appellant's children: his son S who is 7, and his daughter D who is 2½.

16. The Appellant told me that when his son S was born he and the child's mother were together. They were both using heroin at the time. Social services were therefore involved from the outset: he was taken away from them almost as soon as he was born. He was taken into care, but the Appellant and his then partner got to see him every day at a contact centre. After approximately one year S was allowed to come and live at home. S's mother got some help and managed for a time to stop using heroin. The Appellant also entered rehabilitation at that time, but as he puts it: "to be honest, it didn't work".

17. The Appellant's account of S's life thereafter was somewhat confused. The Appellant was in and out of prison for much of the child's life and was continuing to use drugs. A lot of the time he did not know what S's mother was doing. At one point, when S was a toddler, she showed up at KH's door and asked her if she would look after him. KH agreed and S's mother disappeared for about 6 months. KH looked after him that whole time even though he wasn't hers. It was during a period of detention that the Appellant discovered that S had been taken into care, and that the boy's mother is no longer "on the scene". As far as the Appellant is aware, S has not seen his mother since 2015 when he was taken permanently into care.

18. The Appellant told me that in the periods that he has been free he has made an effort to regularly see his son. Even when he was living in Plymouth and the child was with foster carers in Leicester, he would travel every week to see him in a contact centre. He has not however seen the boy since the end of 2017 when he was sent back to jail. He did not want his son to see him in prison. He has not been allowed to see him since his release, but he is currently being assessed and is hopeful that contact could resume. During the whole period,

the Appellant has however spoken to S every week by telephone. S has been with the same foster family since the end of 2015. They live a couple of miles away from where the Appellant and KH are currently living. The Appellant described S's foster mother as "a very nice woman". He said that S is very fond of her and that she treats him well.

19. In his live evidence the Appellant was realistic about the prospects of his son ever coming back to live with him. He acknowledged that the boy's current foster carers, whom the Appellant knows and trusts, are his parents now, and that it would be in his best interests to remain with them. That is not to say that the Appellant has abandoned his relationship with his son. He loves him very much and would like to go back to seeing him once a week. The Appellant was also realistic about the extent to which S might be affected by his own deportation. Asked to comment on that he said: "I can't say - he knows I am his dad and he calls me, but I couldn't say how he would be affected".

20. I have no doubt that in the time that the Appellant has spent with his son he has shown him love and kindness and that it would be sad for S if he did not get to see his father any more. I am unable to take the evidence any further than that. Social services have determined that the child's best interests lie in his permanent foster placement. Although the Appellant has enjoyed direct, and latterly telephone, contact with his son it is clear that the boy will never live with him again. For the past 15 months, contact has been limited to a weekly telephone call. Mrs Aboni points out that this could continue post-deportation. There is no evidence before me to indicate that it would be unduly harsh on S if his father were to be deported.

21. The Appellant's little girl D was born in September 2015. She had lived with her mother KH since she was born. At the time of her birth the Appellant was also living in the family home up until the point he was sent back to prison in September 2017. She therefore spent the first 13 months of her life living with her father and mother together. KH described the Appellant as a great dad. She said that D is extremely close to him. Both witnesses confirmed that they are currently being assessed by social services. Both stressed that this is because of the Appellant's history of drug use and criminal behaviour. I accept that to be the case. There is no indication that KH herself has ever done anything which would warrant social services involvement in her family. As the Appellant admits, their current interest in D is purely because of his return to the family home.

22. Having heard the evidence of KH, I accept that when the Appellant is with his daughter, he is a good father. He enjoys playing with her and helps KH to look after her. I accept the Appellant's point that it would be good for her to have a stable father figure as she grows up. I accept that as long as he is not using drugs, it is in the child's best interests to have him in her life. The reality is, however, that this little girl has spent much of her young life apart from her father. He was sent to prison when she was only 13 months old and remained

there for over a year. Although KH did take the child to see the Appellant in prison, this was only at the very beginning of his sentence. After this he was moved to jail in Doncaster and it was too far for them to travel. Also, he did not want her to see him in jail. At the date of the hearing before me the Appellant has only been back in the family home a bare three months. In those circumstances, I am unable to find that it would be unduly harsh to expect D to remain in this country with her mother KH as her primary carer. KH has been the child's constant. She clearly provides well for her, and I accept the Appellant's assessment that she is a "brilliant mum".

23. That KH has her daughter's best interests at heart is illustrated by the efforts that she has gone to to ensure that D maintains a relationship with her brother S. Once a fortnight KH takes D to visit S and they play together in a soft play or Sure Start centre. KH told me that both children look forward to these trips and that they love seeing each other. She also told me that she would continue to facilitate these visits even if the Appellant were to be removed.

24. I am well aware that the Appellant's deportation is very likely to result in a permanent interference with his relationships with both of his children. It is in my view very unlikely that either child will ever come to visit him in Pakistan. S is subject to a care order and I cannot see the circumstances in which social services would permit a contact visit abroad. As for D, it is hard to see how KH could manage to make that journey. She is dependent on benefits, and as she put it herself, she would never be able to afford it. If the Appellant is to maintain a relationship with either his son or daughter that would have to be by telephone. I accept that this is not ideal, but to put it bluntly, this is the consequence of the Appellant's criminal offending. D will in the short term miss her father, but there is nothing before me to suggest that she would suffer any significant detriment if he were not to live with her in the long term.

25. Having considered all of this evidence I find that the Appellant has not discharged the burden of proof to show that it would be "unduly harsh" for KH, or either of his children, if he were to be deported.

Exceptional Factors

26. Extraordinary as it may be to some readers, given the matters set out above at [§6 to §10], I found the Appellant to be a deeply impressive witness. He spoke with sincerity and great sadness about the path his life has taken. Sent to the United Kingdom as a teenager he fell in with the 'wrong crowd'. He started using drugs and drank heavily. One thing led to another and before he knew it he was leading what professionals in the field call a "chaotic lifestyle". He was by his own estimation addicted to Class A drugs for well over 10 years. Having had an opportunity to hear the Appellant's candid and moving evidence I have no reason to doubt that he greatly regrets taking that path. It has cost him his

health, liberty and relationships with family members. I accept that the Appellant is truly remorseful for the criminal offences he has committed.

27. The Appellant's own evidence is supported by the report by Leicester and Rutland Probation Service dated 31st July 2013, which sets out some of the history and context of the Appellant's offending. I need not set out all of the detail of that evidence here save to note that most, if not all, relates to his drug use. He has a number of convictions for theft, driven by his need to buy drugs. He has a number of convictions for assaults and motoring convictions, all of which arose when he was under the influence of drugs. He has a number of convictions for failure to comply with other sentences, failings arising from the fact that he continued to use drugs. He also has convictions for the supply of both Class A and Class B narcotics, offences motivated by the Appellant's need to fund his habit. The Appellant has, according to the probation service, been a long-term habitual user of cannabis, cocaine and heroin. The report states that he started using Class A drugs as a teenager, and that he became addicted to heroin after being offered it in prison in approximately 2006. The Appellant told me that it is the heroin that has been his downfall.

28. In his oral evidence the Appellant told me that he has not used drugs since he was sent to prison at in September 2017. Staying clean is part of his licence conditions. Since his release in December 2018 he has been tested for drugs twice and both tests were negative. Although I have no independent evidence of that I am prepared to accept that this is the case. I accept that the Appellant deeply regrets his involvement with drugs and that he would like very much to stay out of prison.

29. I accept, and have given weight to, the fact that the Appellant has not lived in Pakistan since he was a young teenager. The Appellant told me that his mother and father still live in the family home in Rawalpindi. Over the years he has had intermittent contact with them. I note that the Appellant told the Home Office, in response to the proposed deportation action, that his family in Pakistan were unhappy about some of the choices he had made. Obviously they were upset about his convictions and they did not like the fact that he had had relationships with British women. There is however no evidence to suggest that they would not assist him and support him were he to return to their home.

30. I give full weight to the fact that addiction is an illness, and that heroin in particular is a cruel master. I take into account the fact that the Appellant started using Class A drugs as a teenager and that he may have been particularly vulnerable, finding himself in this country and dislocated from his family. I have a great deal of sympathy for the Appellant, and I note from her sentencing remarks that this was sympathy shared by Recorder Kushner who considered imposing only a community penalty for the supply of Class A drugs because she believed that the Appellant needed help. That sympathy, and the fact that the Appellant does certainly need help staying clean, unfortunately

only get him so far. The fact remains that the Appellant has been an adult for his entire criminal career. He has repeatedly offended and has shown a blatant disregard not just for the law, but for the victims of his crimes. Being burgled, for instance, is a distressing and nasty experience. I must also take into account that the Appellant himself became involved in the supply of Class A drugs to others, thus fuelling criminality in the community and contributing to the misery of those other addicts.

31. Although there are certainly compelling features of this case I regret to say that they fall well short of the exceptional matters that parliament had in mind in enacting Part 5A of the Nationality, Immigration and Asylum Act 2002. I cannot be satisfied that there are very compelling circumstances over and above the impact upon the Appellant's family and for that reason I must dismiss the appeal.

Decision

32. The appeal is dismissed.

33. There is no direction for anonymity.

Upper Tribunal Judge Bruce
11th March 2019