



**Upper Tribunal  
(Immigration and Asylum Chamber)**

Appeal Number: HU/04117/2018

**THE IMMIGRATION ACTS**

**Heard at Manchester Civil Justice Centre  
On 4<sup>th</sup> November 2019**

**Determination Promulgated  
On 08<sup>th</sup> November 2019**

**Before**

**UPPER TRIBUNAL JUDGE COKER**

**Between**

**KHALID CHUDRY  
(aka Mohammed Al Deen)  
(anonymity direction not made)**

Appellant

**And**

**SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**

For the Appellant: Ms L Mensah, counsel

For the Respondent: Mr A McVeety, Senior Home Office Presenting Officer

**DETERMINATION AND REASONS**

1. The appellant was served with a deportation order dated 22<sup>nd</sup> January 2018 and a decision refusing his human rights claim of the same date. His appeal against that decision was allowed by First-tier Tribunal judge Raikes in a decision promulgated on 8<sup>th</sup> May 2018. That decision was set aside by UTJ Finch in a decision promulgated on 9<sup>th</sup> August 2019 and remitted to the First-tier Tribunal for re-hearing *de novo*.

2. First-tier Tribunal judge Alis heard the appeal and, for reasons set out in a decision promulgated on 25<sup>th</sup> March 2019, dismissed his appeal. Permission to appeal was granted and for the following reasons I set aside the decision following a hearing on 30<sup>th</sup> August 2019.

### Hearing on 30<sup>th</sup> August 2019

1. The appellant relies upon five grounds:
2. Ground 1: the judge applied the wrong standard of proof to the Article 8 claim. The correct standard is reasonable likelihood, but the judge applies the 'balance of probabilities' test.
3. Ground 2: the judge unreasonably and without adequate reasons disregarded the psychiatric report.
4. Ground 3: by disregarding the psychiatric report the judge erred in concluding there was no credible evidence that the appellant needed to be present to prevent the children's health or development being significantly impaired; and it was unclear why the judge added the word 'significantly'.
5. Ground 4: there was no evidential basis for the judge to conclude that older children are better able to deal with separation than younger.
6. Ground 5: the reference to s117C(1) Nationality Immigration and Asylum Act 2002 appears to have incorrectly been applied to his consideration of whether the appellant fell within either of the Exceptions.
7. Although in general the decision of the First-tier Tribunal Judge is comprehensive there are references in the decision to concepts and case law that have been held to be not applicable in the decision to be reached as to whether separation of the appellant from his children is unduly harsh. In particular the judge refers to:

56. In considering whether his deportation is unduly harsh I have to have regard to section 117C(1) of the 2002 Act namely that the deportation of a foreign criminal is in the public interest.

....

59. The Tribunal stated in KMO (section 117 – unduly harsh) Nigeria [2015] UKUT 00543: ...

.....

60. The Tribunal in KMO made clear the expression "unduly harsh" required regard to be had to all the circumstances including the appellant's immigration and criminal history.

61. In KO (Nigeria) and others [2018] UKSC 53 ...The Supreme Court held that consideration of unduly harsh needs to be made in the context that it has been established that deportation of the parent is in the public interest but the seriousness and nature of the offending should not be taken into account in assessing whether deportation would be 'unduly harsh'. ...

....

71. I have considered the evidence submitted and find as follows:

.....

(vi) the appellant is not a serial offender, but his offending behaviour took place over a fifteen-month period.

...

73. Having considered all the above, I am not persuaded by Ms Mensah that it would be unduly harsh for the children to remain here (their mother

made it clear they would not join him in Pakistan) if the appellant were removed.

...

8. Mr McVeety very properly acknowledged that there were concerns that the First-tier Tribunal judge had set out in his decision caselaw that was not relevant and that if he had taken account of the appellant's criminality the decision was infected by a material error of law. He submitted that [61] of the judge's decision was sufficient to show that the judge had the correct test in mind when assessing the evidence and reaching his findings on whether the deportation of the appellant would be unduly harsh on children.
9. If it were not for the references in paragraphs 71 and 73 I would tend to agree with Mr McVeety. But this is not a case where the issue of whether it would be unduly harsh falls squarely adverse to the appellant. If that were so then even if the judge had made an error of law it would not be such as to require the decision to be set aside. I cannot conclude in this case that, irrespective of whether the judge had the appellant's criminality in mind, separation would not reach the high threshold required of 'unduly harsh'. It follows that I am satisfied that the judge has, given the content of the First-tier Tribunal decision, erred in law and I set aside the decision to be remade.

#### Remaking the decision

10. The appellant seeks leave to provide further updated evidence. The respondent does not object to this and I therefore adjourned the remake to be listed before me on 4<sup>th</sup> November with directions as set out below.
11. The issue to be determined at the resumed hearing will be whether the effect on the children of the appellant's deportation will be unduly harsh.
12. For the avoidance of doubt although the decision of the First-tier Tribunal is set aside a number of the facts found are retained as follows:
  - (i) The appellant has a genuine and subsisting relationship with his wife and children, both birth children and stepchildren;
  - (ii) The appellant's imprisonment adversely impacted upon the children;
  - (iii) The appellant's daughter, now aged over 18, was adversely affected but at the time of his imprisonment she had not decided whether she wished to attend University or pursue some other career path. She had subsequently obtained the grades required for admission to University to undertake a course she wished to take, and such conclusion was reached in consultation with the appellant;
  - (iv) The children have responded positively to their father's return to the family home after his release from prison;
  - (v) The appellant's wife was able to care for the children whilst the appellant was in prison albeit with some difficulty;
  - (vi) The appellant and his wife have retained contact with their family in Pakistan and there was no credible evidence that all contact would be lost if the appellant returned to Pakistan and the children remained in the UK;
  - (vii) The family have been reliant on benefits since the appellant was prevented from working.

#### Hearing on 4<sup>th</sup> November 2019

3. The appellant relied upon a psychological report by Ms Adeela Irfan dated 26<sup>th</sup> October 2019 in addition to evidence filed before the First-tier Tribunal,

in particular the psychiatric report of Dr Mohammed. I heard no oral evidence but heard detailed and helpful submissions from both advocates.

4. The sole issue to be determined is whether the appellant's deportation will be unduly harsh upon the children or one of them. I have been assisted in reaching my decision by the psychological report, the psychiatric report and the submissions made by both parties. His stepdaughter was born in April 2000 (now aged 19); his stepson in January 2005 (now aged 15). His birth son was born in November 2008 (now almost 11). Ms Irfan interviewed the appellant's wife and the two older children separately. The younger child was not interviewed in the absence of his mother and Ms Irfan relied upon her observations during her clinical examination and information provided by his mother. Her examinations, which included psychological testing lasted approximately five hours.
5. Ms Irfan describes the emotional and psychological effect of separation of the children from the appellant. She refers not only to the separation caused when he was imprisoned for his criminality (not *alleged* criminality as stated by Ms Irfan) but also describes the emotional and psychological impact of the uncertainty around the appellant's immigration status and the efforts made by the appellant to rebuild the bond between him and the children which was fractured during his imprisonment. The appellant's wife/children's mother does not speak English; it is the appellant who deals with issues that arise during schooling etc. For example he dealt with and resolved his stepdaughter's suspension from college whilst he was in prison. Ms Irfan's report is framed in terms of possibilities of effect. She does not describe the impact of the appellant's deportation as being harsh on the emotional and psychological development of the children but rather refers to the known effect of disrupted and inconsistent parenting and that separation can interfere with the development of health attachments.
6. Her report considers each child individually. The report on the stepdaughter confirms the anxiety and depression referred to by Dr Mohammed and, although not specifically referred to in Ms Irfan's report as having arisen because of family difficulties, when considered as a whole it seems clear that the counselling she had during her college year was required as a consequence of her father's imprisonment. Ms Irfan refers to the stepdaughter as being "quite vulnerable at present" and that she "needs constant care to meet her safeguarding needs".
7. Ms Irfan identifies the anxiety and nervousness of the stepson and quotes his words direct in the report which powerfully describe the trauma that he suffered when his father went to prison, the lack of communication he has with his mother and the isolation and shame he feels. She concludes that the child is "at risk of developing serious mental health condition due to his

frustration, anger and insecure attachments if he is not supported by both father and mother”.

8. The report on the youngest child describes the child’s view of his father and the worry he feels that he would not see him again when he was in prison. She records him saying that now his dad is back home he feels happy. She concludes that the child has developed “emotional instability and poor physical health” and that if the issues remain unprocessed they “can give rise to a number of unpleasant symptoms which may include depression, fear, terror or panic”.

9. Ms Irfan’s report concludes:

9.8 ....In my professional opinion the removal of father can also encourage distance relationships and nurturance of “Skype families” in the British Society which may adversely affect interpersonal skills in [the] children.

9.9. Furthermore, it is determined from clinical interview that all three children are psychologically disturbed and begin to show symptoms of poor mental health. [They] showed symptoms of separation anxiety, nocturnal enuresis, sleep disturbances, nightmare, night terrors, flashbacks and negative impact on cognitive development.

....

9.12. Inconsistency in parenting might have an adverse influence on development and self-esteem of [the] children. This could also make them more vulnerable for severe depression later in life. Because all the children are uncertain that what will happen in any situation with inconsistency of heir parenting or if either father [sic] will not be present then the children may feel more confused and repercussions may lead to wards mental health issues. Inconsistent caregiving could also result children to contribute irresponsible behaviour because children may develop habits of testing parents. The key impact observed was children’s trust that consistent parent will be available and sense of security is undermined.

9.13. ....[The] children who have suffered traumatic separations from their father previously in 2017 and current uncertainty about his status display symptoms of low self-esteem, a general distrust of others, mood disorders (including depression and anxiety), socio-moral immaturity, and inadequate social skills.

9.14. In case of [the appellant’s] removal his children will face disruption in accessing educational, financial and mental and physical health resources. This is an infringement of [the] family’s rights if they have to compromise their rights which can have an impact on their growth and psychosocial development.

...

#### **Recommendations**

12.I would recommend psychological treatment of 10-12 sessions of trauma focused CBT (Cognitive Behaviour Therapy) for [wife] and [stepdaughter].

For [stepson and birth son] it is recommended to arrange 6 to 8 sessions of child centred therapy with a play therapist or child and adolescent psychotherapist.

...

Children need both parents, and parents need the support from social and legal institutions in regard to be there for their children. Therefore I will recommend that the father of children should be engaged in rehabilitation process through personal development, career training and psychotherapy which will allow him to reflect on his past behaviour and resolve any issues that are affecting him.

10. The report does not address the impact upon the children of having contact with their father through Skype rather than face to face and whether that will

have a harsh impact upon them and if so in what way. That the children have suffered in the past because of their father's criminality is beyond dispute. That they will likewise suffer if he is deported is similarly beyond dispute. These are matters that are, in many cases as in this, the consequence of the departure of a parent from the family home. That this is exacerbated because his departure was caused by his criminality, possibly understood by the older two children at least, does not mitigate the sense of loss the children suffer. But that is not the test; Ms Irfan does not describe the impact to date on any of the children as being harsh never mind unduly harsh. She does not undertake any consideration of the possibility of visits by the children to see their father in Pakistan. Nor does she give any assessment of the value of Skype/WhatsApp/Facetime contact. The stepdaughter has accessed psychological support in the past, but she gives no consideration to the impact of that save that it seems it resolved the issues she was suffering from until uncertainties arose again because of the threat of deportation of her father. The stepdaughter is now an adult. The report does not identify a dependency on her father such as engages Article 8. Rather surprisingly the report does not identify that as the oldest child with a mother who is herself suffering from anxiety and depression and is unable to communicate effectively on matters relating to the children because of her lack of English, she will bear an increased burden in keeping the family together. I accept that this role will fall to her, but the report does not indicate that this will cause her increased emotional and psychological problems. If that were the case I would have expected the report to say so, rather than leaving me to speculate, which I do not do.

11. It is of course difficult to accurately hypothesise the extent of the impact of the departure of their father on each child, both individually and as a family, particularly given the vulnerability of the mother. I acknowledge and accept Ms Mensah's submission that the most that can be done is to look at the past and the current situation and try to extrapolate from that, taking fully into consideration that the previous absence of their father was for a relatively short period and it was known that it would come to an end. Mr McVeety draws attention to the lack of medical intervention for any member of the family despite the report by Dr Mohammed, that the stepdaughter accessed some counselling, but this then ceased. He comments that if the problems were as serious as potentially suggested then assistance would already be being sought. I acknowledge Ms Mensah's response to that: the individuals are not necessarily in the best position to self-refer and the family are at present living through and trying to cope with the current threat of deportation rather than the actual deportation. Nevertheless the description of the problems of certainly the two younger children means that I would have expected at least some processes to be put in train irrespective of whether the appellant is deported.
12. The report is not formulated on and extrapolated from a particular history for each individual that, when considered in the context of the general conclusions reached, can lead me to a conclusion that the separation of this

appellant from each of his children is unduly harsh on each child or only one child. I fully accept that each child will find separation difficult and upsetting and that there is a risk that they will develop mental health problems in the future. Ms Irfan makes recommendations for treatment. I accept that there are difficulties in accessing children's mental health services, but I was not provided with evidence of how long the waiting lists were, whether there was access through school or college or GP or social worker or the cost of such services privately. Ms Irfan's report did not conclude that the effect of deportation of the father on any of the children would be unduly harsh and I cannot, from her report, conclude that such is the case.

13. As I commented at the hearing, I have disregarded totally the appellant's criminality save to establish that he has to fall within s117C(5) to avoid deportation. But I am bound by the legislative and jurisprudential framework, harsh though it sometimes is. I cannot conclude, on the evidence before me that the effect of the appellant's deportation would be unduly harsh on any of the children either individually or as a family, taking fully into account the vulnerability of their mother, the full part in their lives played by the appellant and placing considerable weight upon the content of the psychiatrist and psychologist reports as they relate to each child.

Conclusions:

14. The making of the decision of the First-tier Tribunal did involve the making of an error on a point of law.
15. I set aside the decision
16. I re-make the decision in the appeal by dismissing it.

Date 4<sup>th</sup> November 2019



Upper Tribunal Judge Coker