Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/07866/2016

THE IMMIGRATION ACTS

Heard at Field House	**Decision and Reasons Promulgated**
On 24 January 2019	**On 01st March 2019**

Before

UPPER TRIBUNAL JUDGE DAWSON
UPPER TRIBUNAL JUDGE O'CONNOR

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

HR
(ANONYMITY DIRECTION MADE)

Respondent

Representation:
For the Appellant: Mr F Tufan, Senior Presenting Officer
For the Respondent: Ms C Fletcher, instructed by Marks & Marks Solicitors

Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008
Unless and until a Tribunal or court directs otherwise, the claimant (the respondent in these proceedings) is granted anonymity. No report of these proceedings shall directly or indirectly identify the claimant or any member of his family. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

1. The respondent in these proceedings, whom we shall refer to as the claimant is a citizen of Pakistan, born January 1970. His appeal is against a decision dated 21 May 2016 refusing a human rights claim that he had made on notification of a decision dated 19 May 2015 to make a deportation order under section 5(1) of the Immigration Act 1971 on the basis that his presence in the United Kingdom was not conducive to the public good. The appeal was allowed by the First-tier Tribunal. For reasons given in his decision following a hearing on 3 November 2017 Upper Tribunal Judge O'Connor set aside the decision of the First-tier Tribunal owing to legal error. His immigration history and the matters relevant to the Secretary of State's decision are set out in Judge O'Connor's decision as follows:-

> "3. The claimant arrived in the United Kingdom in November 2000 with his wife and two children (AH – born May 1999 and HH – born March 2000), in possession of a 24-hour transit visa. He did not embark on his flight but instead chose to remain in the United Kingdom unlawfully. The claimant subsequently made an asylum application on 3 September 2001 and, thereafter, an application for leave to remain outside the Rules on 19 December 2004 – both applications being refused by the Secretary of State. A third child of the claimant's relationship with his wife was born in October 2001 ("JH") and fourth child ("DH") on 6 April 2009.
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> 4. On 18 August 2008, the claimant was granted indefinite leave to remain in the United Kingdom, ostensibly because his two eldest children had, by that time, accumulated seven years continuous residence here. The claimant's wife and four children are all now British citizens.
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> 5. On 23 October 2009 the claimant was convicted, at Camberwell Green Magistrates' Court, of sexual assault with intent to cause a female to engage in sexual activity without consent, sentenced to six months' imprisonment and placed on the sex offender's register for seven years. This is the claimant's only conviction.
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> 6. In her decision letter the Secretary of State relied on two other alleged incidents involving the claimant. The first involved the claimant's arrest on 15 September 2011 for sexual assault. It is said that no further action was taken against the claimant in relation to this incident, due to inconsistencies in the victim's account. Nevertheless, Metropolitan Police Service documentation states that the claimant is "*viewed as a danger to vulnerable females with learning difficulties*". The second incident relied upon by the Secretary of State involved the claimant's daughter AH, who raised with a teacher a fear that she was going to be taken to Pakistan and forced to marry. Her teacher raised safeguarding issues and the information was passed on to the Metropolitan Police Service. The claimant and his wife were both arrested however, due to lack of evidence, no further action was taken.
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> 7. On 19 May 2015, the Secretary of State notified the claimant of her decision to make a deportation order against him. The representations in response to such notification were treated as a human rights claim. The Secretary of State refused the claim and maintained her decision to make a deportation order, pursuant to Section 5(1) of the Immigration Act 1971. It is said by the

> Secretary of State that the claimant's presence in the UK is deemed not to be conducive to the public good.
>
> 8. The First-tier Tribunal heard the claimant's appeal on 18 April 2017 and allowed it in a decision promulgated on 15 May 2017, having concluded that the claimant satisfies the requirements of paragraph 399(a) of the Immigration Rules."

2. A copy of Judge O'Connor's decision is annexed. At [28] of his decision it will be seen that he gave this direction as to the re-making of the decision:-

> "The starting point for the Upper Tribunal's consideration on the re-making of the decision on appeal will be those findings of the First-tier Tribunal that have not been the subject to successful challenge i.e. (i) that there exists family life between the claimant, his children and his wife; and, (ii) those findings which have been made in relation to the 2011 and 2014 events. That is not to say, however, that further evidence cannot be produced in relation to such matters."

Introduction

3. At the hearing on 21 June we heard evidence from the claimant who was cross-examined. In addition, his wife and two of his children were called, each adopting their statements. None was cross-examined. The hearing concluded with a direction that the parties were to file with the Upper Tribunal their submissions within 21 days of the Supreme Court handing down its decision in *KO (Nigeria) & Ors v SSHD* [2018] UKSC 53. The claimant's solicitors have complied with a further direction for the lodging of a complete set of witness statements and other documentary evidence relied on which had been necessary in the light of the chaotic preparation for this appeal. Ms Fletcher accepted at the directions hearing on 24 January 2019 that evidence had been closed following the hearing in June and accordingly does not seek to rely on new material in the revised statements that largely relates to the return of one of the claimant's sons from Pakistan where he had been educated for a period. We do not consider that any prejudice stems from this as the claimant himself speculated in the course of his evidence in June that his son would be returning in September. Mr Whitwell represented the Secretary of State at the directions hearing and he and Ms Fletcher were content to rely on the submissions that had been previously lodged in December 2018, however, permission was given to Ms Fletcher to provide submissions in response to the Secretary of State's case.

The Evidence

4. In reaching her decision the Secretary of State relied on a witness statement by DC Alan Yau dated 5 January 2015. DC Yau was then working for Operation NEXUS based at New Scotland Yard and describes a partnership operation with the Home Office tackling foreign nationals who breach immigration and criminal laws. The information provided in his statement was recorded on Metropolitan Police Crime Reporting Information System (CRIS) and the Police National Computer. He refers to the claimant having one conviction from two offences and two "non-convictions" from two offences. He provides a summary of both aspects as follows:-

"PNC Conviction History

Sexual Assault with Intent and Cause female to engage in sexual activity without consent – 10/05/2009 – Lambeth – Crime Ref: 1214401/09

On 10/05/2009 at 03.00 hours, victim had wanted to buy a can of redbull from a local shop. Victim has learning difficulties. When she arrived, the shop was closing but the man there allowed her to enter the shop. The man police now knows to be [HR] had closed the shutters and started chatting to her. He then pulled up her t-shirt and kissed her breast. She pulled away from him and wanted to leave but he refused and locked the shop. He then went to switch the lights out. He then got his penis out and took her hand and placed it on his penis which was hard. She pleaded that she had to go as her mum is worried about her. [HR] then allowed her to leave the shop.

[HR] was arrested and interviewed to which he denied the offence. He stated that he never saw victim and no such incident happened that night. ID Procedure conducted to which victim picked out [HR]. CPS consulted and [HR] was charged with Sexual Assault on a female and inciting female to engage in sexual activity without consent.

On 23/10/2009 at Camberwell Green Magistrates Court, [HR] pleaded guilty to both offences and was sentenced to a total of six months imprisonment and placed on sex offenders register for 7 years.

PNC Non-Conviction History

Forced Marriage Procuring an act of cruelty – 27/02/2014 – Lambeth – Crime Ref: 1207051/14

On 27/02/2014, information came in from the school that victim's father [HR] and mother [BH] are trying to force victim to marry a male in Pakistan. Victim is only 14 years of age. [HR] and [BH] both were arrested and interviewed to which they denied the allegation. Further investigations shows that there is lack of any evidence to suggest that there is a plan to force victim to marry. As such, the case was No Further Actioned.

Sexual Assault – 15/09/2011 – Lambeth – Crime Ref: 1231218/11

Victim has learning difficulties. On 15/09/2011, victim was walking across a bridge when [HR] asked her if she had a mobile phone. Victim replied that she did not to which [HR] than pushed her against the bridge railings and kissed her on her mouth and neck and ears and also touched her chest and back. Victim told him to get off her to which he refused. A passerby saw what was happening and grabbed [HR} by the back and pushed him away from her. The passerby told victim to report this incident.

[HR] was arrested and interviewed to which he denied the allegation. He stated that victim had initiated kissing him first to which he responded by kissing her back. He admitted that he did kiss her neck and ears but this was all with her consent. He denies sexual assault.

Further enquiries shows that there were inconsistencies with victims account and therefore this case was reviewed and [HR] was No Further Actioned.

Intelligence Picture

No intelligence to suggest other criminality or gang involvement.

Domestic Circumstances

Subject [HR] has a wife by the name of [BH], date of birth 1972 of [London]. He has two daughters, [AH], date of birth 1999 and [HH], aged 15. [AH] has made allegations against her parents that they were trying to force her to marry a male in Pakistan.

Summary

[HR] has been arrested for two sexual assault allegations, and also a forced marriage allegation. He pleaded guilty to sexual assault and inciting a female to engage in sexual activity. In the other sexual assault allegation, he had admitted licking the neck and ears of the victim however there were insufficient evidence to charge him. Both these victims had learning difficulties.

[HR] has committed sexual offences of which he is placed on the sex offenders register for 7 years. These sexual offences are serious as he had locked the victim into his shop and sexually assaulted her by pulling down her bra and kissing her breasts. He had also refused to let her leave after the sexual assault and grabbed her hand and placed it on his erect penis. He is viewed as a danger to vulnerable females with learning difficulties. My opinion is that his presence is not conducive to the public good. Consideration should be made to have him removed from the UK as soon as possible."

5. DC Boulderston from the Metropolitan Police gave evidence before the First-tier Tribunal. He too is attached to Operation NEXUS. The First-tier Tribunal records his confirmation that the claimant had only one conviction and that his placing on the sex offenders register for seven years had by the date of hearing expired.

6. At the hearing before us the claimant relied on a witness statement, an updated version of which dated 12 November 2018 was included in the composite bundle referred to above. In summary he refers to the absence of any incident involving the police since 2014 and that he is reformed character. In addition, the claimant refers to the strong relationship he has with his family members and the circumstances surrounding JH's request to go to Pakistan and stay with his maternal aunt where he continue to study. He is the main breadwinner for his family and provides for their household needs as a sole trader for a stall in south London from which he derives an income of some £10,000 per annum. There were no relatives of his own in Pakistan who could support him on return; his other family members remain habitually in Italy.

7. The claimant relied on an earlier statement before the First-tier Tribunal dated 21 November 2016. This refers to the family's connection with north Africa and Italy. His father used to work in Libya as an engineer in 1982 and the family which included several siblings moved to Libya in 1985. As the result of an accident which disabled his father from working, the claimant took up his position in the company he had been working for. After marriage in Pakistan in 1994, the claimant's wife joined him in Libya where they remained for six years until they decided to move back to Pakistan in 2000. It was during that journey whilst in transit in London that they stayed on unlawfully. The claimant's siblings principally live in Italy with one in the United Kingdom. In this statement the claimant addresses his offending in 2009, the incident in 2011 and the circumstances with regard to his eldest daughter's allegation of forced marriage. The claimant's denial in that statement in terms that

he had not assaulted his female victim in 2009 was amended prior to adopting that statement at the hearing before us. The amendment was also the subject of cross-examination. He explains also in his statement the circumstances of the incident in 2011 which also led to a number of questions in cross-examination. He finally addresses the circumstances of his daughter's assertion and the impact on him and the family should he be deported.

8. The claimant's wife adopted her statement that had been before the First-tier Tribunal in which she refers to the negative impact on the family wellbeing should the claimant be removed. She refers also to her health problems which includes difficulties with her back and the valued help that her husband provides with the children, the shopping, the housework and the meeting with teachers and attending events.

9. The claimant's eldest daughter AH adopted two statements. As with her father, this includes a more recent statement dated 12 November 2018 and an earlier statement prepared for the First-tier Tribunal. The more recent statement refers to the degree course she is pursuing at university in BSc Criminology and Psychology and the fact that she had overcome her troubles following her father's conviction which had been resolved at therapy sessions at Maudsley Hospital. She is no longer self-harming and refers to her father's positive support as a rock. She explains in her earlier statement that her father had never tried to arrange a marriage for her but nor had he forced or encouraged her into something she was against. She was unaware of the consequences at the time when she was 14 that her false allegations would bring about. She was not cross-examined. The three other children provided statements before the First-tier Tribunal, the youngest, DH being in the form of a letter. The two older children have also provided updated statements. HH explains the course she is pursuing currently in her education and refers to her fear that her father's removal would have a huge negative impact on the family. JH refers to his return to the United Kingdom from Pakistan and the course of study that he is pursuing at college in London.

10. At the hearing the claimant was evasive when questioned about his responsibility for the offence in 2009 and the incident in 2011. Although after some questioning he accepted his guilt in respect of the 2009 offence and his reported behaviour in respect of the 2011 incident we are in no doubt that the claimant does not accept that he was culpable.

11. We are also in no doubt that the family is close knit and mutually supporting. It is evident that the claimant's conduct resulted in considerable tensions leading to mental health difficulties for his eldest daughter. There is no clear explanation why his elder son chose to study in Pakistan for a period from 2014. There now appears to be reconciliation within the family.

The Law

12. The Secretary of State's power to make a deportation order arises under section 3(5) of the Immigration Act 1971 as follows:-

"3(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—

…"

13. The Secretary of State's policy for deportation and his understanding of the public interest is set out in certain provisions in the Immigration Rules. Relevant to the circumstances of the claimant these are as follows:-

"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."

14. In addition para 5A of the Nationality, Immigration and Asylum Act 2002 sets out public interest considerations when considering claims under Article 8 of the Human Rights Convention 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."

Our Conclusions

15. We are grateful to the parties for their written submissions which we take into account in reaching our conclusions. We begin with our consideration of the case under the Rules. It is acknowledged in the submissions that paragraph 399 and Part 5A under the Act are not materially different and that the decision in *KO* applies to both provisions. Nevertheless, the Rules are our starting point as they contain the Secretary of State's view of the public interest. If the claimant can succeed under the Rules, although they are not a complete code, it is likely that the appeal will succeed under article 8 in the light of the Secretary of State having himself decided where the public interest lies in the proportionality assessment. If the claimant is unable to succeed under the Rules, we still need consider whether his removal would nevertheless breach article 8 which is the trigger for Part 5A as it involves further consideration of the public interest. At the hearing in June 2018, and affirmed in her submissions, Ms Fletcher accepts that the conviction for sexual assault in 2009 would have caused the victim "serious harm" given the nature of the offence and the fact that the victim had learning difficulties. Our attention therefore turns to paragraph 399. It is not argued that 399A is in play in this case.

16. We are satisfied that the claimant has a genuine and subsisting parental relationship with two children JH and DH born on respectively in 2001 and 2009. The two other children of the family AH and HH are now over 18. Both children are British citizens and we must therefore decide whether it would be unduly harsh for either child to live in Pakistan to where the claimant would be deported and whether it would be unduly harsh for the children to remain in the United Kingdom without him. The focus of Ms Fletcher's submissions is on the children. It is not her case that it would be unduly harsh for the claimant's wife to live in Pakistan because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM or for her to remain in the United Kingdom without him.

17. Ms Fletcher refers in her submissions to the negative impact on AH of her father's absence but as an adult, this is not an aspect which engages paragraph 399. Likewise, in relation to her brother.

18. The Supreme Court makes it clear in *KO* that the claimant's offence is not a balancing factor to be taken into account. As observed by Lord Carnwath giving the judgment of the court at [23]:

> "On the other hand the expression "unduly harsh" seems clearly intended to introduce a higher hurdle than that of "reasonableness" under section 117B(6), taking account of the public interest in the deportation of foreign criminals. Further the word "unduly" implies an element of comparison. It assumes that there is a "due" level of "harshness", that is a level which may be acceptable or justifiable in the relevant context. "Unduly" implies something going beyond that level. The relevant context is that set by section 117C(1), that is public interest in the deportation what would necessarily be involved for any child faced with the deportation of a parent. What it does not require in my view (and subject to the discussion of the cases in the next section) is a balancing of relative levels of severity of the parent's offence, other than is inherent in the distinction drawn by the section itself by reference to length of sentence. Nor (contrary to the view of the Court of Appeal in IT (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 932, [2017] 1 WLR 240, paras 55, 64) can it be equated with a requirement to show "very compelling reasons". That would be in effect to replicate the additional test applied by section 117C(6) with respect to sentences of four years or more."

19. Lord Carnwath cites with approval the decision of the Upper Tribunal in *MK (Sierra Leone) v SSHD* [2015] UKUT 233 at [27] of his decision:

> "27. Authoritative guidance as to the meaning of "unduly harsh" in this context was given by the Upper Tribunal (McCloskey J President and UT Judge Perkins) in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC), [2015] INLR 563, para 46, a decision given on 15 April 2015. They referred to the "evaluative assessment" required of the tribunal:
>
> > "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."
>
> On the facts of that particular case, the Upper Tribunal held that the test was satisfied:
>
> > "Approached in this way, we have no hesitation in concluding that it would be unduly harsh for either of the two seven year old British citizen children concerned to be abruptly uprooted from their United Kingdom life setting and lifestyle and exiled to this struggling, impoverished and plague stricken west African state. No reasonable or right thinking person would consider this anything less that cruel."

> This view was based simply on the wording of the subsection, and did not apparently depend on any view of the relative severity of the particular offence. I do not understand the conclusion on the facts of that case to be controversial."

20. Earlier in his judgment, Lord Carnwath emphasises the importance of the general principles relating to the "best interests" of children. At [15] he states:

> "15. I start with the expectation that the purpose is to produce a straightforward set of rules, and in particular to narrow rather than widen the residual area of discretionary judgment for the court to take account of public interest or other factors not directly reflected in the wording of the statute. I also start from the presumption, in the absence of clear language to the contrary, that the provisions are intended to be consistent with the general principles relating to the "best interests" of children, including the principle that "a child must not be blamed for matters for which he or she is not responsible, such as the conduct of a parent" (see Zoumbas v Secretary of State for the Home Department [2013] UKSC 74, [2013] 1 WLR 3690, para 10 per Lord Hodge)."

21. He also cites with approval the decision in *EV (Philippines) v SSHD* [2014] EWCA Civ 874, in particular [58] of that decision:

> "58. In my judgment, therefore, the assessment of the best interests of the children must be made on the basis that the facts are as they are in the real world. If one parent has no right to remain, but the other parent does, that is the background against which the assessment is conducted. If neither parent has the right to remain, then that is the background against which the assessment is conducted. Thus the ultimate question will be: is it reasonable to expect the child to follow the parent with no right to remain to the country of origin?"

22. The claimant's wife and all the children are British citizens and therefore entitled to remain. It is against that background we need to consider the minor children's best interests. In our judgment they are best served by being with both parents in a family unit. The claimant's wife has not indicated that she would accompany him to Pakistan and accordingly the reality against which we are to consider matters is that the family unit will be severed by the claimant's deportation. Neither of the two minor children has shown a wish to accompany their father.

23. We return to the enquiry whether it would be unduly harsh for the minor children to live in Pakistan and whether it would be unduly harsh for them to remain without the claimant. The Secretary of State contends that none of the circumstances relied on by the claimant indicate that the effective deportation would be unduly harsh as "excessive" or "severe" or "inordinate" or "bleak". It is argued that the high threshold set out in *KO (Nigeria)* cannot be met in this case because there is nothing out of the ordinary to demonstrate that deportation would be unduly harsh.

24. Ms Fletcher argues that the fact of one child being temporarily outside the United Kingdom did not mean that undue harshness would not exist in respect of the other

children. The children have only been apart from the claimant for a very short period of time, for three months, whilst he was in prison. Since the conviction nine year ago the family have re-established their lives in which the claimant is a constant figure for the life in particular of a child who was now 9 years old. In her submission it is the impact on AH which tips the balance. As we have observed already, AH is not within the exceptions contained in the Rules.

25. We ignore the claimant's offending in reaching our decision on this aspect. As we have found above, the best interests of the two minor children are served by the integrity of the family being maintained. We accept that the family will struggle financially without the claimant. Although we do not have any direct evidence on the point, we consider it likely that such a split will result in a charge on public funds. The development of the two children will be likely to be adversely affected by the absence of a male role in the family although we take into account the fact that JH will be 18 this year. He has resumed his studies here and there is no evidence that the absence of the claimant's presence adversely affected him whilst he was in Pakistan. We take account also the children's elder sisters who appear to be flourishing. They have reached adulthood and they will be in a position to provide some emotional support to their younger siblings along with their mother. Having regard to the fact that the two minor children were born here and are British, we find it would be unduly harsh for DH to live in Pakistan without the rest of his family. Given that JH has spent some time in Pakistan we are not persuaded that it would be unduly harsh for him to accompany his father. As for both children remaining here without their father, the evidence does not demonstrate it would be unduly harsh. There is no indication that JH will be unable to continue his studies and, in the light of the findings we have reached, his younger brother will have the continuing supportive presence of the rest of his close knit family. Accordingly, the claimant has not demonstrated that paragraph 399 applies. As we have noted, no case has been advanced that paragraph 399A applies.

26. That completes our consideration under the Immigration Rules and we now turn to whether despite that conclusion, deportation of the claimant would nevertheless result in a disproportionate breach of the Article 8 rights in play for this family. This requires application of the provisions in Part 5A of the 2002 Act. As we have observed the focus of Ms Fletcher's case is on the impact on the children including those who are now of majority. The additional considerations we are required to apply pursuant to section 117C, in particular based on the case put by Ms Fletcher are in Exception 2:

> "(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."

We reach the same conclusion in respect of the minor children as we have under the Immigration Rules. The wider scope however of Article 8 brings all factors into play. The Court of Appeal in *NA (Pakistan) v SSHD* [2016] EWCA Civ 662 considered the

meaning of "very compelling circumstances" which is the language employed in paragraph 398(c) in relation to the public interest where paragraphs 399 and 399A do not apply.

27. Jackson LJ explains at [29] to [33]:-

> "29. In our view, the reasoning of the Court of Appeal in *JZ (Zambia)* applies to those provisions. The phrase used in section 117C(6), in para. 398 of the 2014 rules and which we have held is to be read into section 117C(3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that "there are very compelling circumstances, over and above those described in Exceptions 1 and 2". As we have indicated above, a foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of the 2014 rules), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.
>
> 30. In the case of a serious offender who could point to circumstances in his own case which could be said to correspond to the circumstances described in Exceptions 1 and 2, but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand, if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim, going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute "very compelling circumstances, over and above those described in Exceptions 1 and 2", whether taken by themselves or in conjunction with other factors relevant to application of Article 8.
>
> 31. An interpretation of the relevant phrase to exclude this possibility would lead to violation of Article 8 in some cases, which plainly was not Parliament's intention. In terms of relevance and weight for a proportionality analysis under Article 8, the factors singled out for description in Exceptions 1 and 2 will apply with greater or lesser force depending on the specific facts of a particular case. To take a simple example in relation to the requirement in section 117C(4)(a) for Exception 1, the offender in question may be someone aged 37 who came to the UK aged 18 and hence satisfies that requirement; but his claim under Article 8 is likely to be very much weaker than the claim of an offender now aged 80 who came to the UK aged 6 months, who by dint of those facts satisfies that requirement. The circumstances in the latter case might well be highly relevant to whether it would be disproportionate and a breach of Article 8 to deport the offender, having regard to the guidance given by the ECtHR in *Maslov v Austria* [2009] INLR 47, and hence highly relevant to whether there are "very compelling circumstances, over and above those described in Exceptions 1 and 2."

> 32. Similarly, in the case of a medium offender, if all he could advance in support of his Article 8 claim was a "near miss" case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were "very compelling circumstances, over and above those described in Exceptions 1 and 2". He would need to have a far stronger case than that by reference to the interests protected by Article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for Article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to Article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation.
>
> 33. Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient."

28. The evidence clearly demonstrates the negative impact on the claimant's eldest child AH of his offending and the mental health difficulties that she suffered as a result. This is referred to by Ms Fletcher in [24] in the following terms:

> "24. AH described periods of suffering from mental illness – "I was a self harmer in the past, I would cut my wrists … my father never judged me but instead he helped me step by step to overcome my mental illness" (**witness statement para 10 page R HR witness statement bundle**) "my father in particular has been my rock…my father's removal will have a huge negative impact on our family and the progress we have made…I worry that without him we will be unable to cope." (**Further witness statement of AH supplementary bundle page 13 paras 5-6**). It is clear that AH in particular is vulnerable, and without her father present there would be a potential relapse in her mental health."

29. No medical evidence has been provided in support of the submission that without the claimant's presence there would be a potential relapse in AH's mental health other than her own expression of concern.

30. Also relevant to the proportionality consideration are the circumstances surrounding the three matters relied on by the Secretary of State in making her deportation decision. Ms Fletcher's understandable acceptance that the conviction for sexual assault would have caused the victim serious harm given the nature of the offence and the fact that the victim had learning difficulties engages section 117C(2). There is in this case a greater public interest in the claimant's deportation. Whilst we readily note that the claimant was not convicted in relation to the incident in 2011,

nevertheless the manner in which the claimant dealt with his culpability in relation to the first offence and the 2011 incident in cross-examination leaves us with serious disquiet over the extent of his remorse. We find that he has no real remorse for those two incidents. This finding does impact on what otherwise might be a more powerful factor in the proportionality exercise of the conviction in 2009 being so long ago. Whilst the learning in *KO (Nigeria)* excludes the offending from our consideration of the undue harshness on the children of separation, nevertheless that offending is relevant to our overall consideration of proportionality given that we have concluded it would not be unduly harsh. Taking all matters in the round our conclusion is that the deportation of the claimant in all the circumstances of this case would be proportionate to the public interest. Accordingly, this appeal is dismissed.

Signed Date 22 February 2019

UTJ Dawson
Upper Tribunal Judge Dawson

Annex

"**DECISION AND REASONS**

Introduction

1. The appeal before the Upper Tribunal is brought by the Secretary of State for the Home Department. I shall refer herein to HR as 'the claimant'.

2. The claimant is a citizen of Pakistan, born in January 1970. He appealed to the First-tier Tribunal against the SSHD's decision of 21 May 2016 to refuse a human rights claim, such claim having been made on 15 June 2015.

3. The claimant arrived in the United Kingdom in November 2000 with his wife and two children (AH – born May 1999 and HH – born March 2000), in possession of a 24-hour transit visa. He did not embark on his flight but instead chose to remain in the United Kingdom unlawfully. The claimant subsequently made an asylum application on 3 September 2001 and, thereafter, an application for leave to remain outside the Rules on 19 December 2004 – both applications being refused by the Secretary of State. A third child of the claimant's relationship with his wife was born in October 2001 ("JH") and fourth child ("DH") on 6 April 2009.

4. On 18 August 2008, the claimant was granted indefinite leave to remain in the United Kingdom, ostensibly because his two eldest children had, by that time, accumulated seven years continuous residence here. The claimant's wife and four children are all now British citizens.

5. On 23 October 2009 the claimant was convicted, at Camberwell Green Magistrates' Court, of sexual assault with intent to cause a female to engage in sexual activity without consent, sentenced to six months' imprisonment and placed on the sex offender's register for seven years. This is the claimant's only conviction.

6. In her decision letter the Secretary of State relied on two other alleged incidents involving the claimant. The first involved the claimant's arrest on 15 September 2011 for sexual assault. It is said that no further action was taken against the claimant in relation to this incident, due to inconsistencies in the victim's account. Nevertheless, Metropolitan Police Service documentation states that the claimant is "*viewed as a danger to vulnerable females with learning difficulties*". The second incident relied upon by the Secretary of State involved the claimant's daughter AH, who raised with a teacher a fear that she was going to be taken to Pakistan and forced to marry. Her teacher raised safeguarding issues and the information was passed on to the Metropolitan Police Service. The claimant and his wife were both arrested however, due to lack of evidence, no further action was taken.

7. On 19 May 2015, the Secretary of State notified the claimant of her decision to make a deportation order against him. The representations in response to such notification were treated as a human rights claim. The Secretary of State refused

the claim and maintained her decision to make a deportation order, pursuant to Section 5(1) of the Immigration Act 1971. It is said by the Secretary of State that the claimant's presence in the UK is deemed not to be conducive to the public good.

8. The First-tier Tribunal heard the claimant's appeal on 18 April 2017 and allowed it in a decision promulgated on 15 May 2017, having concluded that the claimant satisfies the requirements of paragraph 399(a) of the Immigration Rules.

Immigration Rules

9. It is important at this stage to set the First-tier Tribunal's decision within the proper context of the relevant Rules:

> "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) ...
>
> (b) ...
>
> (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 ...
>
> 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) …; 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; ..."

Grounds of Challenge to the First-tier Tribunal's Decision

10. The Secretary of State's pleaded grounds of challenge can be summarised thus:

(i) The First-tier Tribunal erred in failing to make findings as to whether the claimant assaulted an individual in September 2011. Alternatively, the First-tier Tribunal erred in attaching no weight to this incident;

(ii) The First-tier Tribunal's conclusion that it would be unduly harsh for the children to relocate to Pakistan is irrational;

(iii) The First-tier Tribunal erred in failing to give lawfully adequate reasons for its conclusion that it would be unduly harsh for the children to remain in the United Kingdom, if the claimant were to be deported.

11. Permission to appeal to the Upper Tribunal was granted by Upper Tribunal Judge Plimmer in a decision of 11 September 2017, on the following basis:

"2. It is arguable that the assessment at [79] to [82] does not factor in the appellant's offending and focuses solely upon the impact on the children."

Submissions

12. At the hearing, Ms Isherwood relied upon the grounds of challenge and the terms of the grant of permission, asserting that when read as a whole it could not be said that the First-tier Tribunal took account of all material matters in its consideration of whether it would be unduly harsh for the children to leave the UK and live in Pakistan or, alternatively, remain here without the claimant.

13. Mr Sobowale, who said all that could reasonably be said on behalf of the claimant, submitted that:

(i) The First-tier Tribunal had, at [70], made clear findings of fact in relation to the September 2011 incident, concluding that although an incident had occurred - as admitted by the claimant - it had not been demonstrated that any serious harm had been caused by the claimant. Consequently, the First-tier Tribunal attached no weight to the incident in its assessment of whether removal would breach Article 8, as it was entitled so to do;

(ii) As to the alleged offence in 2014, the First-tier Tribunal concluded that there had been no intention on behalf of the claimant, or his wife, to force their child to marry. Consequently, no weight was attached to such incident;

(iii) The submitted failure by the First-tier Tribunal to take account of all relevant matters, in particular the conviction, in its assessment of whether it would be unduly harsh to require the children to move to Pakistan with the claimant or, alternatively, to remain in the United Kingdom without him, had not been made out by the Secretary of State On a proper reading of its decision, in particular paragraph 69 onwards, it is clear that the First-tier Tribunal had well in mind all relevant circumstances when coming to its conclusion on such issues.

Discussion and Decision

14. For the reasons which follow, I conclude that the First-tier Tribunal's decision does contain an error of law capable of affecting the outcome if the appeal and I set it aside.

15. An analysis of the structure of the First-tier Tribunal's decision is beneficial. The core conclusions and reasons are to be found between paragraphs 66 and

83 of the decision. Paragraph 66 contains a summary of events relating to the 2009 conviction, which is immediately followed by a direction as to the relevant Immigration Rules and identification that the Tribunal considered paragraphs 398, 399 and 399A of those Rules, as well as Section 55 of the 2009 Borders Act.

16. Paragraph 68 of the First-tier Tribunal's decision begins in the following terms:

> "The respondent's decision was made on the basis that the appellant's offending behaviour as demonstrated by his conviction, had caused serious harm. The appellant's representatives submitted that the grounds of serious harm had not been made out ..."

17. Immediately following this statement, the First-tier Tribunal engages in an analysis of whether the circumstances of the 2009 offence caused 'serious harm'. That analysis is carried through into paragraph 69, it ultimately being found that the factors put forward by the Secretary of State in relation to the 2009 conviction "*are on the face of it sufficient to justify the discretionary decision that the public interest requires the appellant's deportation unless and accepting paragraphs 399 or 399A applies.*" Set in its proper context it is clear that the reference therein to "*discretionary decision*" is reference to the assessment to be carried out under paragraph 398(c) of the Rules.

18. It is, also, instructive to observe that paragraphs 70 and 71 begin, respectively, as follows:

> "70. I do not attach weight to the 2011 alleged offence when considering offending behaviour that has caused serious harm because ...
>
> 71. I do not attach weight to the 2014 alleged offence when considering offending behaviour that has caused serious harm because ..."

19. The First-tier Tribunal thereafter, in both paragraphs, consider the alleged events of 2011/2014 in the context of the gateway provision in paragraph 398(c) i.e. whether claimant's behaviour had "caused serious harm".

20. In paragraphs 72 of its decision the First-tier Tribunal turn to analyse the best interests of the respective children – observing, *inter alia*, that the Secretary of State accepted that it would be in the best interests of the children to remain in the United Kingdom in the care of their mother. At paragraph 74 the First-tier Tribunal correctly directs itself as to the Secretary of State's position that the claimant had not demonstrated a genuine and subsisting parental relationship with his children, nor had it been demonstrated that the unduly harsh "test" had been met.

21. Moving on, in paragraphs 75 to 78, the First-tier Tribunal analyse the extent of the family life between the claimant and his children and then turn to the issue of undue harshness in paragraphs 79 to 82, concluding as follows:

> "79. The respondent accepts in the refusal that it is in the best interests of the appellant's children to remain in the UK. I find that it has been clearly demonstrated that it would be unduly harsh to separate them from the appellant.

80. The appellant accepts that all his children speak Urdu and is anxious that they should speak the language and understand something of the culture and society in Pakistan. The respondent does not strongly challenge the evidence that the appellant's relatives are in Italy and not in Pakistan. It is accepted that the witness B has family in Pakistan. It is accepted that J (not a witness) was able to relocate to Pakistan for some time to live with relatives there. However, this is not sufficient to justify a finding that the return of the four children, with the appellant and B, in terms of a deportation order, which the respondent accepts is not in their best interests, is anything other than unduly harsh because they are British citizens who have been in the UK for virtually their whole lives in the cases of A, H (from 2000) and J (from 2001) and for his whole life in the case of D, from 2009.

81. Various aspects of the appellant's evidence were relied upon in submissions by the respondent so as to indicate that the appellant is of an undesirable character as shown by his convictions and non-convictions but the issue before me is if the exception in paragraph 399 is met, given that the appellant's children are British citizens that is, if it would be unduly harsh for them to live in Pakistan (which the respondent accepts is not in their best interests) or unduly harsh for them to remain in the UK without the appellant. I find that the answer to both questions is positive. Given their ages, time spent in the UK, settled status as British citizens, integration and education and the fact that the family who are settled in the UK would have to start again in Pakistan, with no accommodation or work identified for the family as a unit, it is unduly harsh for the children to live in Pakistan in order to live in a family unit with the appellant and unduly harsh for them to remain in the UK without the appellant.

82. Any decision to remove the appellant would undoubtedly be unduly harsh for A. It is likely to have a particularly devastating effect on her and upon the family unit because of the background to the deportation order. A acted correctly in reporting her concerns at school but it is now accepted by the police who investigated that in reality she was not at risk of forced marriage. Given the terms of the CRIS report it is not clear why the investigation and allegation was included for judicial consideration. No action was taken after the 2009 offence or the 2011 allegation. In all the circumstances to proceed and make a finding that it is not unduly harsh for this settled family, with three teenage British children to be required to live in Pakistan, which it is accepted is not in their best interests, if they wish to remain together is, on the evidence before me not justified or sustainable."

22. In MM (Uganda) [2016] EWCA Civ 617 the Court of Appeal considered the ambit of the unduly harsh threshold in the context of both section 117C of the Nationality, Immigration and Asylum Act 2002 and paragraph 399 of the Immigration Rules, stating as follows:

> "23. The context in these cases invites emphasis on two factors, (i) the public interest in the removal of foreign criminals and (ii) the need for a proportionate assessment of any interference with Article 8 rights ...
>
> 24. This steers the Tribunals and the courts towards a proportionate assessment of the criminal's deportation in any given case. Accordingly the more pressing the public interest in his removal, the harder it will be to show that the effect on his child or partner will be unduly harsh. Any other approach in my judgment dislocates the "unduly harsh" provisions from their context. It would mean that the question of undue hardship would be decided wholly without regard to the force of the public interest in deportation in a particular case. But in that case the term "unduly" is mistaken for "excessive" which imports a different idea what is due or undue depends on all the circumstances, not merely the impact on the child or the partner in the given case ..."

23. Nowhere in its decision does the First-tier Tribunal direct itself to the interpretation of the words *"unduly harsh"* and, furthermore, there is no reference therein to the decision in MM (Uganda). This, of course, does not of itself constitute an error. The critical issue for this Tribunal is whether the relevant principles are lawfully applied by the First-tier Tribunal.

24. A fair reading of paragraphs 68 to 83 of the First-tier Tribunal's decision discloses that consideration of the 2009 offence, and the events in 2011 and 2014, is restricted to the assessment of whether the claimant's actions caused serious harm i.e. whether the gateway provision in paragraph 398(c) had been satisfied.

25. The critical reasoning on the issue of whether it would be unduly harsh for the children to live in Pakistan, or remain in the United Kingdom without the claimant, does not explicitly incorporate within it an analysis of the weight to be attributed to the public interest in deporting the claimant, which is to be primarily drawn from the claimant's offending and other relevant behaviour; nor in my view can such a consideration be implied into the First-tier Tribunal's decision. The First-tier Tribunal's analysis of the 'unduly harsh' issue focuses entirely on the consequences for the children. There is no cognisance in the analysis of the combination of factors identified in paragraph 3 of the Court of Appeal's decision in MM (Uganda).

26. Consequently, I conclude that the First-tier Tribunal's consideration of the issue of whether the exceptions in paragraph 399 of the Immigration Rules can be made out is flawed by legal error. It was not asserted that such error was incapable of affecting the outcome of the appeal, nor could it be in my conclusion. Accordingly, I set aside the First-tier Tribunal's decision.

27. It was agreed by the parties that the appeal should be remade by the Upper Tribunal. Unfortunately, the hearing of the appeal could not proceed immediately after my announcement of the decision to set aside the First-tier Tribunal's decision because the claimant's Counsel did not have a copy of either the respondent's "nexus folder" or the claimant's bundles of evidence. Plainly,

such documentation will be of importance in the re-making of the decision. For the sake of completion, the absence of such documentation did not hamper the claimant's Counsel's ability to properly present the case at the error of law stage of the proceedings. I provided the claimant's counsel with an opportunity to consider the evidence at the outset of the hearing and, having done so, he indicated that he was content to proceed and did not require any additional time or an adjournment.

28. The starting point for the Upper Tribunal's consideration on the re-making of the decision on appeal will be those findings of the First-tier Tribunal that have not been the subject to successful challenge i.e. (i) that there exists family life between the claimant, his children and his wife; and, (ii) those findings which have been made in relation to the 2011 and 2014 events. That is not to say, however, that further evidence cannot be produced in relation to such matters.

Notice of Decision

The decision of the First-tier Tribunal is set aside.

The decision on appeal is to be re-made in the Upper Tribunal

DIRECTIONS

(i) Each party must file and serve a composite bundle of ALL the evidence that such party intends to rely upon (even if filed already), by no later than 14 days prior to the date of hearing. The bundles must be tabulated so that evidence that was not before the First-tier Tribunal can be clearly be identified;

(ii) The hearing will have a 3-hour time listing. If either party disagrees with this time estimate then that party MUST notify the Tribunal within 7 days of the date of the sending of this decision (copied to the opposing party), giving reasons for such disagreement and the time estimate proposed.

Signed:

Upper Tribunal Judge O'Connor"