Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/08489/2017**

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 4 April 2019	**On 24 April 2019**

Before

DR H H STOREY
JUDGE OF THE UPPER TRIBUNAL

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMED KHALIL
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr M Uddin, Counsel

DECISION AND REASONS

1. The claimant is a citizen of Pakistan. On 18 December 2014 the appellant (hereafter the Secretary of State or SSHD) decided to make a deportation order against him and on 16 August 2017 to make a decision refusing a protection and human rights claim.

2. The claimant was granted entry clearance in December 1990 and first entered the UK in February 1991 for the purposes of settlement. The decision to make a deportation order was prompted by the claimant's criminal offending. He was convicted in August 2005 of "handling stolen goods (receiving)" and was sentenced to two years' imprisonment wholly suspended for two years. He received another conviction later in August of the same month for "conspiring/theft of vehicle". For this he was sentenced for two years' imprisonment wholly suspended for two years concurrent to his other conviction on the same day. In December 2013 he was convicted of two counts of "possessing controlled drug with intent to supply – Class A – other" and one count of "possess control drug – Class B – Cannabis/Cannabis resin". He was sentenced on 4 April 2014 to a total of 30 months' imprisonment. The claimant appealed against the decision of the SSHD. In a decision sent on 17 May 2018 Judge Dhaliwal of the First-tier Tribunal (FtT) allowed his appeal on Article 8 grounds. The judge first of all concluded that the claimant had not made out his claim for international protection. That is no longer the subject of challenge.

3. The judge next turned to consider the claimant's position under the Immigration Rules. At paragraph 33 to 38 the judge concluded:

> "33. In terms of the Immigration Rules, when I consider Paragraph 399(a), the following is of relevance.
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> 34. The Respondent does not dispute that the Appellant has a genuine and subsisting relationship with his British children. The very fact that the children are now 17, 16 and 15 years of age, have been born and raised in the United Kingdom, are at a stage where they have established their own solid friendships, are beginning to take steps towards their ideal careers, are only familiar with the United Kingdom means that they would be expected to take on a completely new culture, leave behind all their friends and aspirations. I also note that they have never been to Pakistan and whilst their parents might be able to help them re-establish a new life, I find that it would be unduly harsh for the British children, being the age that they are now, to live in Pakistan. On the other side of the coin, I take into account that the children were separated from their father for the 15 months whilst he was in prison and therefore I arrive at the conclusion that whilst it might be difficult, it would not be unduly harsh for the children to remain in the United Kingdom without the Appellant, if he were to be deported.
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> 35. In terms of Paragraph 399(b), I am satisfied that the Appellant has a genuine and subsisting relationship with his British wife, it was formed at a time, when he was in the United Kingdom lawfully and his status was not precarious, but due to his wife's health issues, it would be unduly harsh on her for her to remain in the United Kingdom without the Appellant. However, the requirements also demand that it would be unduly harsh for the British wife to live in Pakistan because of the compelling

circumstances over and above those described in EX 2 Appendix FM. The evidence before me does not support the fact that there would be very significant difficulties which would be faced in continuing their family life together in Pakistan.

36. Paragraphs 399(a) and (b) are not satisfied.

37. Considering paragraph 399A, the Appellant has been in the United Kingdom since 1991 and he has thus been lawfully resident for a period of 27 years, this is a factor that is in the Appellant's favour. What is not in the Appellant's favour is that the Appellant has not socially and culturally integrated in the United Kingdom. He began committing criminal offences 2 years after he arrived in the United Kingdom. Thereafter, he has continued to commit offences on a spasmodic basis and those offences have escalated in seriousness. This is indicative of the fact that he has not integrated into society. As for whether there would be significant obstacles to his re-integration into Pakistan, the Appellant was born in Pakistan, spent the first 20 years of his life in Pakistan, indeed, he still speaks Urdu. Whilst he raises additional issues, namely the asylum application, I do not find that to be a credible claim. In any event, there is no reason why he could not relocate and find employment in Pakistan. There are no obstacles to his return let alone significant obstacles.

38. The Appellant therefore does not succeed under the Immigration Rules."

4. The judge then went on in paragraphs 39 onwards to consider the proportionality of the Secretary of State's decision.

5. So far as concerns the claimant's history of offending, the judge stated that she took a serious view of it as had the sentencing judges. She noted the offending that occurred in 2009 involved fifteen wraps of heroin. However she attached importance to the fact that the probation officer deemed that the risk of reoffending was low and that the claimant was very motivated to address his offending and was very capable of having the capacity to change and reduce his offending. At paragraph 53 the judge stated:

"53. As far as the index offences are concerned, the offences that led to the deportation order are serious and are exacerbated by the fact that the Appellant failed to attend court when he was required to do so. The seriousness of the offences, however, are balanced to the extent, that the offences were committed as far back as 2009, some 9 years ago, there has been no further offending and to all intents and purposes, the Appellant seems to have learnt his lesson and presents as a changed man from the one who committed these offences in 2009. Also borne out by his further lack of offending is that it adds credence to the Appellant's claim in that since being arrested for these offences,

> he stopped using drugs. No acquisitive offences which would ordinarily be consistent with a drug misuse problem have been committed."

6. The judge then turned to consider whether the deportation would be unduly harsh on either the claimant's British partner or the British citizen children.

7. As regards the children, whilst accepting that the deportation of their father would have a devastating effect on them, the judge concluded at paragraph 62 that they would still have the support and guidance of one of their primary carers, namely their mother, and concluded that "it would not be unduly harsh for the children to remain in the United Kingdom without the claimant". That conclusion was said to be subject to the proviso as to whether the children would continue to have the support and guidance of their mother. Turning to the position of the claimant's partner the judge noted that the medical evidence confirmed that she suffers from severe scleroderma with progressive systemic sclerosis, pulmonary fibrosis, raynards phenomena, arthritis and ischaemic ulceration. Her doctor was noted to have confirmed that the skin on her face, arms and fingers is very tight and she gets recurrent chest infections. Furthermore her doctor had stated:

> "Due to the severity of these auto immune multiple disorders she is quite incapacitated … she requires the help of an adult inside the house to carry on with her daily household jobs. The raynards on her hands and fingers is quite severe and she is at risk of losing her fingers with the slightest trauma or provocation causing an infection.
>
> She is under the care of a consultant rheumatologist and has been for the last 10 years and on specialist medications which can only be administered within a hospital setting".

8. In light of the medical evidence that the claimant's partner's medical condition was fragile and likely to progressively deteriorate, the judge concluded that she was unable to undertake daily living activities and required assistance to be able to live her life on a day-to-day basis and was not in a position to be able to provide care for her children or her home or her in-laws. At paragraph 67 to 69 the judge stated:

> "67. The reality is that the Appellant's wife may then need to resort to assistance from the state for her own daily and nightly care, which will add to the burden on the state. That is not in the public interest. Further, one cannot completely rule out the fact that as she is unable to provide for the children on her own, that the state may need to also take the burden on for caring for the children, whether, from the home in which they live or to offer residential facilities until those children turn 18. Likewise, that is not in the public interest. This, in my view, undermines the strong public interest in deportation.

68. I reach the inevitable conclusion that if the Appellant were to be deported, that the children will not lose one parent but in all reality will lose both parents, the remaining parent cannot physically or emotionally support the children. In such circumstances, despite my preliminary view that the effect on the children would not be unduly harsh, when one looks at the real consequences of deportation, the effect of the Appellant being deported means that the children lose both of their primary carers, this is inordinately and excessively harsh, in other words 'unduly harsh' on the children and unduly harsh on his wife.

69. I therefore conclude that the public interest in deporting the Appellant is outweighed on this exceptional occasion. The Appellant succeeds on the Human Rights grounds."

9. The SSHD's grounds are not numbered. They raise three main points of challenge. First of all it is contended that the judge's findings in relation to the situation of the children were contradictory. On the one hand, the judge concluded that it would not be unduly harsh on the children if the claimant was deported. On the other hand, the judge concluded otherwise at paragraphs 62 to 68. Secondly it was contended that the judge failed to give clear reasons as to why the claimant's children could not readapt to life in Pakistan. Thirdly it was contended that the judge erred in treating as the decisive factor the medical circumstances of the claimant's wife, given that there was evidence before the judge that his wife had previously had support from her sister-in-law and in addition the judge had failed to fully consider the alternative support arrangements that could or would be available to the claimant's partner. The fact that the claimant's partner was able to visit Pakistan in 2017 although her condition was serious, did not suggest that she was totally dependent on the claimant or that alternative arrangements could not be made.

10. I heard targeted submissions from Mrs Aboni and Mr Uddin.

11. In discussions Mr Uddin abandoned the second ground of challenge. Given that it was clearly the judge's view that the best interests of the children lay in remaining in the United Kingdom with their mother, and that the Secretary of State did not challenge that finding, it was clearly inconsistent to argue that the judge should have taken a different view of the question of whether or not the children could readapt to life in Pakistan. That leaves however the first and third grounds.

12. As regards the first ground, I consider that there is insufficient to establish that the judge did make conflicting findings regarding the circumstances of the children. It is true that at paragraph 34 she stated that "whilst it might be difficult it would not be unduly harsh for the children to remain in the United Kingdom without the claimant if he were to be deported", that was said to be subject to the proviso as to whether the children would continue to have the support and guidance of their mother. At paragraph 68 the judge stated that :

> "despite my preliminary view that the effect on the children would not be unduly harsh when one looks at the real consequences of deportation, the effects of the claimant being deported means that the children lose both of their primary carers, that is inordinately and excessively harsh in other words unduly harsh on the children and unduly harsh on his wife".

13. In light of the above I accept that Mr Uddin was right to argue that effectively the judge had revised her earlier assessment in paragraph 68 as a result of the assessment made of the position of the mother, he properly pointing to the judge's additional observation that this conclusion was subject to the proviso as to whether the children would continue to have the support and guidance of their mother. Whilst if paragraph 68 were the judge's final view, the judge should in consistency have reformulated the earlier findings and altered them to be in line with those made subsequently, I do not consider this was a material error, since it had bene made clear that there was a provisionality to the earlier formulation.

14. More concerning are the principal reason given hy the judge for concluding that the claimant had established that there were compelling reasons outweighing the public interest in the deportation of the claimant. In that proportionality assessment there are two significant failings.

15. First of all, despite citing at paragraph 39 the case of **Hesham Ali [**2016] UKSC 60 and the need identified in that case to consider whether the Article 8 claim was sufficiently strong to outweigh the strength of the public interest in the deportation of the offender, the judge nowhere attached weight, as the majority in **Hesham Ali** considered was necessary, to the fact that the claimant had failed under the Immigration Rules: see paragraphs 38 and 53 of **Hesham Ali**. The judge's findings in relation to the Immigration Rules included not only that it would not be unduly harsh for the children to remain in the United Kingdom without the claimant (paragraph 34 (this is the finding I would accept was perhaps effectively revised later)) but also that despite his lawful residence of 27 years the claimant had not shown that he was socially and culturally integrated in the United Kingdom or that there would be significant obstacles to his reintegration into Pakistan (paragraphs 36 to 37). As a result, the claimant's was a case in which the requirements of paragraph 399(a) and (b) were not satisfied. In the remainder of the decision there is no reference by the judge to the lack of integration or in general terms to the significance for the weight to be attached to the public interests of the failure of the claimant to meet the Immigration Rules. The second difficulty with the judge's proportionality assessment concerns the judge's treatment of the circumstances of the claimant's partner. That brings me to the SSHD's third ground. The judge at paragraph 68 takes the view that if the claimant were to be deported the children would "not lose one parent but in all reality will lose both parents, the remaining parent cannot physically or emotionally support the children".

16. In my judgment that finding went beyond the evidence and amounted to the judge substituting a metaphorical for an actual conclusion. On the evidence the deportation of the claimant would have the result that the children would lose one of their two primary carers, but clearly the other carer, the mother, would continue to live with them and provide some caring functions. Certainly the evidence indicated that she herself required assistance to be able to live her life on a day-to-day basis, but it did not indicate that she would effectively have no role as a primary carer in their lives.

17. Further, whilst the judge did consider the evidence relating to whether the wife would be able to receive family support and/or social services support, her treatment of it cannot be said to have amounted to a reasonable assessment of the proportionality of the decision. In effect the judge concluded that there was a public interest in preventing the children going into care that trumped the strong public interest of the state in deporting the claimant. Had the children involved being very young, that may have been within the range of reasonable responses, but they were 17, 16 and 15 and the evidence indicated that in the past when the claimant had been in prison and when the wife had visited Pakistan, family in the UK were able to assist. The judge's findings that the family members would not, as in the past, be able to provide some degree of help to the wife was not based on any welfare report, but simply on the evidence of the family together with the medical evidence. In order to warrant such an extreme conclusion – that the wife would in effect not be an available primary carer in any shape or form – more was needed.

18. My conclusion is that the judge did materially err in law and that her decision must be set aside.

19. Both parties agreed that if I decided to set aside the judge's decision (as I have) the case should be remitted to the First-tier Tribunal. Although many of the factors are not in dispute, it will be apparent from my above analysis that the issue of what circumstances would face the three British citizen children living in the UK as a result of the claimant's deportation need to be the subject of fresh findings of fact. Two key matters that will need to be resolved are:

    (1) whether it would be reasonable to expect that the claimant's family members (whether the sister-in-law or others) would be able to provide assistance to the wife with the care of the children; and

    (2) whether it would be reasonable to expect that any shortfall in family assistance could be met by assistance from social services. In the context of social services support, there is not only the question of possible care arrangements for the two children still under 18, but assistance to the wife with her own care needs (which might or might not obviate any need to consider social services care for the children)

20. I direct that the claimant's representatives use best endeavours to obtain an independent welfare report on the children's family circumstances, past

and present, and on the likelihood of social services support with care for the wife, so that the judge is in a better position to consider the wife's and the children's likely circumstances in the future. (The issue of the effect of the claimant's deportation on the wife is also an issue under s.117C of the 2002 Act in itself). The claimant's representatives are directed to liaise with the SSHD to ascertain whether they can agree on the identity of an independent social worker.

21. For the above reasons:

The decision of the judge is set aside for material error of law.

The case is remitted to the FtT (not before Judge Dhaliwal).

No anonymity direction is made.

Signed Date: 18 April 2019

Dr H H Storey
Judge of the Upper Tribunal