Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: HU/18108/2019**

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 11 March 2021	**On 24 March 2021**

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

IKRAM UL-HAQ
[NO ANONYMITY ORDER]

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the appellant: No appearance or representation
For the respondent: Ms Alexandra Everett, a Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant appeals with permission from the decision of the First-tier Tribunal dismissing his appeal against the respondent's decision on 31 October 2019 to maintain her decision to deport him and not to revoke her deportation order on human rights grounds.

2. The appellant is a citizen of Pakistan. He came to the United Kingdom lawfully in 2012, to join his wife, bringing with him their baby son. The couple have another

child born in the United Kingdom. Both children, and the appellant's wife, are British citizens now. The elder child has been diagnosed with autistic spectrum disorder.

3. The appellant is a foreign criminal, having been convicted in April 2019 of a sexual grooming offence involving what he thought was a girl younger than 13 years old. He is required to meet the reporting obligations of the Sexual Offences Register indefinitely, and is the subject of a Sexual Harm Prevention Order, again indefinite. He is not permitted to work with children or to reside with his wife and children.

4. **Service.** The appellant did not attend the hearing today, nor has he arranged for representation. I am satisfied that he was properly served with notice of hearing at his last known address and that it is appropriate to proceed with the hearing in his absence.

5. **Mode of hearing.** This hearing took place by Skype for Business, with the consent of both parties given in their response to triage directions by Upper Tribunal Judge Pitt. A Punjabi interpreter was available for the hearing, as for the First-tier Tribunal hearing, but was not used as the appellant did not attend.

6. **Evidence before the Upper Tribunal.** The appellant has filed no new evidence or skeleton argument for the Upper Tribunal hearing. I have considered all the material in the First-tier Tribunal bundle (whether referred to in this decision or not), but in particular, the witness statements of the appellant and his wife, supporting character references prepared for the criminal sentence but included in this bundle, the sentencing remarks of Miss Recorder Mustafa, a January 2020 OASys report, and evidence regarding the circumstances of the appellant's son's autistic spectrum disorder and associated vision problems. I have also had regard to the evidence recorded in the First-tier Tribunal decision, but not to the conclusions drawn therefrom.

Background

7. The appellant and his wife met in Pakistan and married there on 9 August 2009. Their first child, a son, was born to them on 2 September 2011. The wife was granted entry clearance as a Tier 1 General Migrant and came to the United Kingdom on 24 December 2011. The appellant and his four month old son were refused entry clearance and remained in Pakistan. They were not able to join her until 6 May 2012. Their second child, a daughter, was born on 13 August 2014.

8. The wife later became settled, and in due course, a British citizen. The appellant became settled in the United Kingdom on 15 August 2017. The wife has studied for social work qualifications. Her final course of study was for a Master's Degree in Social Work, which was due to be completed in September 2020.

9. On 18 April 2019, the appellant was convicted of attempted sexual grooming of a child under 13 contrary to section 15 of the Sexual Offences Act 2003, the offence being committed between 18 and 26 August 2018. The child in question was a decoy

profile and the person was an adult. The appellant pleaded not guilty, but when convicted he did not appeal either the conviction or the sentence.

10. The sentence imposed was 20 months' imprisonment, with credit for time spent on an electronic tag. The appellant was granted bail in December 2019 but remains under licence and cannot live with his own children. He is permitted supervised contact only.

11. On 15 May 2019, the appellant was served with a decision to deport him to Pakistan, which he challenged on human rights grounds. The human rights claim was refused on 31 October 2019.

12. The appellant appealed to the First-tier Tribunal.

13. In August 2020, the appellant refused an offer of voluntary return to Pakistan. As far as the respondent knows, he remains in the United Kingdom.

First-tier Tribunal decision

14. The First-tier Judge dismissed the appeal. The appellant appealed to the Upper Tribunal.

Permission to appeal

15. On 6 July 2020, Upper Tribunal Judge Finch granted permission to appeal on the basis that the son's autistic spectrum disorder arguably had not been considered properly in the First-tier Judge's decision and that there was no finding whether it would be unduly harsh for the appellant's son, or his wife, to join him in Pakistan, after the wife completed her degree studies in the United Kingdom.

16. On 15 September 2020 the respondent filed a Rule 24 Reply, conceding that the First-tier Judge had failed to consider expressly whether it would be unduly harsh for the appellant's wife and children, particularly his autistic 9 year old son, to join him in Pakistan if he were returned there, or to make a finding as to whether there were 'very compelling circumstances' engaging section 117C(6) of the Nationality, Immigration and Asylum Act 2002 (as amended), which outweighed the public interest in deportation.

Upper Tribunal proceedings

17. By a decision dated 19 November 2020, I set aside the First-tier Tribunal decision in this appeal, to be remade in the Upper Tribunal. I did so without an oral hearing: my decision preceded the judgment of Mr Justice Fordham in *Joint Council for the Welfare of Immigrants v The President of UTIAC* [2020] EWHC 3103 (Admin) which was handed down the following day.

18. Neither party has applied to reopen the error of law decision: it was common ground that the First-tier Judge had erred in law in failing to consider 'very compelling

circumstances' as an issue or to make findings on whether it would be unduly harsh for the appellant's wife and children to join him in Pakistan.

19. I gave directions that either party could, if so advised, file updated witness statements or further evidence. Neither party has done so. There was also a direction for skeleton arguments, but none has been received.

20. A Punjabi interpreter was booked for the resumed hearing and was available. The appellant did not appear.

21. That is the basis on which this appeal came before the Upper Tribunal for remaking today.

Sentencing remarks

22. The appellant was assisted by an interpreter at the sentencing hearing, and was allowed to remain seated during the sentencing remarks, to enable the interpreter to translate, standing only for the sentence itself. In her sentencing remarks, Miss Recorder Mustafa took a serious view of the offence, although it was uncompleted:

> "The difficulty, Mr Malik, with this type of offending is that had this not been a decoy [profile], that the text messaging seems to indicate that you would have been willing to have sexual relationships with someone under 13. And I accept that I am sentencing you for an attempted matter, and I take account of that, rather than the full offence."

23. The judge noted that when arrested, the appellant had four mobile phones in his car, two of which could not be examined. There was no other person in the car. She took into account that the appellant was a 42-year old man who had come to the United Kingdom seven years earlier and had two very young children. He had worked hard, with two jobs, as a taxi driver and a care worker. There were character references. The judge concluded:

> "The sentencing guidelines for meeting a child following sexual grooming, maximum sentence is 10 years' custody, and I have to look at seriousness and in determining seriousness, I consider that this is a category 2 offence because there is raised culpability. Because throughout the communication that you made with the [decoy] person called Chloe, you indicated that, from your side, penetrative sexual activity is intended. And for category 2 the starting point is 2 years' custody. There are no …statutory aggravating features but you did try and lay the blame elsewhere. I do take on board that you have no previous convictions. That people speak highly about you and I reduce the sentence to reflect that and also to reflect the fact that a custodial sentence will have a significant effect on your family circumstances, your ability to work, and your immigration status."

24. In addition to the 20 months' imprisonment imposed, the appellant became subject indefinitely both to the Sex Offenders Register notification requirements and to a Sexual Harm Prevention Order imposed pursuant to section 103A of the Sexual Offences Act 2003. The appellant was disqualified from working with children for life.

Appellant's evidence

Appellant's witness statement

25. In his witness statement dated 30 January 2020, the appellant said that his son was now in year 3 at the local primary school, and his daughter was in Reception. His son remained diagnosed with autistic spectrum disorder, which affected his vision as well as his daily life. The appellant's wife had been fully responsible for the children's welfare while he was in prison, including taking the boy to opticians appointments and speech and language therapy sessions, to assist his development.

26. Although the appellant had been released on bail in December 2019, he was not working and, as his wife was studying, he had previously been the main breadwinner. They were fully reliant on benefits and the appellant's wife found it very difficult to cope with the boy in his absence. He was not living in the same house as his wife and children and was not permitted unsupervised contact with the children, which had a significant impact on their family life together. There were no family members in the United Kingdom to assist them, except the appellant's brother, who was a British citizen with two British children. His brother had his own financial commitments but was able to provide the appellant's wife with emotional support.

27. The appellant expressed regret for the index offence but did not seek to suggest that he had not committed it, in contrast to what is said in the OASys report. He said that his wife had invested a lot of time and money in pursuing her career, to qualify as a social worker. Such employment opportunities were not available for her in Pakistan. It was in the best interests of the children to remain in the United Kingdom with her and for the family to be together.

28. The witness statement is signed, but contains no explanation how the appellant understood it, as his English is said to be poor. In his absence, I give it such weight as I can.

Wife's witness statement

29. The appellant's wife made a witness statement on the same day, 30 January 2020. She was not working: she had her studies and was also the primary carer of the children. She said it was difficult for her to manage their son's needs alone, without the practical and emotional support of her husband.

30. Her husband had become involved in the wrong circles, hence 'these unfortunate circumstances'. He had deep regrets about his involvement in the offence which was an isolated event. Mrs Bibi said that the appellant had been travelling with another friend, who asked for a lift to Newcastle, 4 hours away, and borrowed the appellant's mobile phone, inserting his own SIM card into that phone. When the appellant was

arrested, he was alone and the SIM from the other person was still in his phone. Ms Bibi considered that the appellant had been wrongfully convicted.

31. The family's lives had been turned upside down. They were living on universal credit and the medical condition of their son placed enormous pressure on the appellant's wife, without the help of family members. The family had lost their home and were in temporary accommodation provided by Slough Council from 10 December 2018.

32. Mrs Bibi said that she was happy to accept supervised contact between her husband and the children until he was 'fully recovered' and was considered safe around the children. Since his release on licence, the appellant was having supervised contact with the children, but also helping her by dropping the children off to school with her, attending hospital appointments, grocery shopping and domestic chores. It is not clear whether this fits within the concept of 'supervised contact' or whether the probation service, or social services, are aware of this additional involvement.

33. Mrs Bibi asserted that it would breach the family's human rights if her husband were removed to the United Kingdom as he had a stable job (she did not say whether she meant as a carer or taxi driver) which was the family's main source of income: such employment opportunities were not easily accessible in Pakistan.

34. It would be unduly harsh for the family to relocate to Pakistan given that they had developed a strong United Kingdom private life. Mrs Bibi asked that the appeal be allowed.

Other evidence

35. I am entitled to have regard to the evidence which the parties gave in the First-tier Tribunal, although not to the conclusions drawn therefrom. There is not much evidence recorded, save that the appellant's wife had some help from her brother-in-law while the appellant was in prison.

36. There are also some character references.

    (i) **Appellant's elder brother.** On 23 May 2019, the appellant's elder brother Ihsan Ul-Haq said that he was a British citizen, living in the United Kingdom for over 19 years, and a single father of two children born in 2013 and 2015, following a divorce. The appellant had been 'a massive emotional and financial support' during a traumatic period and played a vital role in his well being, helping with the children. The appellant often did shopping for his brother's family, and bought them gifts.

    The two families went out together and the appellant's wife cooked for the brother's family. The appellant was the only family member his brother had in the United Kingdom, and he shared his problems. If the appellant were removed, his brother would be left alone, and his mental health and emotional well being would suffer. He would be unable to look after his

children. It would be another emotional trauma, affecting the brother's family badly.

(ii) **Former client (caring work).** An undated email from Mr Jeffrey Day stated that the appellant was his late father's principal carer from 2015-2016. His father declined rapidly after the appellant left and died in 2017. The appellant attended the funeral.

(iii) **Local acquaintance.** Ms Sarah Green says on 18 March 2019, that she had known the appellant for about a year as an acquaintance in the local community. She found him 'polite, trustworthy and honest'.

(iv) **Friend from Pakistan.** On 6 March 2019, Mr Muhammad Wasim said that he was a friend from Pakistan, and had known the appellant for nearly 10 years. He considered the appellant to be a person of strong character and did not believe the allegations. The appellant was a caring man, who would help anyone, whether he knew them or not. He was happy to give the appellant any kind of reference.

37. These are the references considered by the sentencing judge, who was unable to give them much weight. The judge also mentioned two other references, one from a Ms Dix, who had got into the appellant's taxi in a distressed state and been unable to pay her fare. The appellant did not charge her: she paid him later, and spoke highly of him. Finally, Mr Tony Johnston, a managing partner at 'one of your employers' valued his services and would be happy to offer him work when he was released.

Evidence concerning the appellant's son

38. The appellant's bundle contains a number of documents concerning appointments with Berkshire Healthcare NHS Foundation Trust for speech and language therapy. An initial appointment was offered in July 2015, and a further appointment was missed in January 2016. An ophthalmology appointment was offered for July 2018.

39. In October 2016, just after the boy had started primary school in the Reception Class, Slough Borough Council commissioned an Educational Psychologist report, prepared by Ms Hannah Brooks, under the supervision of a Supervising Educational Psychologist, Ms Chelsea Barnes. Ms Brooks was awaiting Health and Care Professions Council registration, which was the reason she had supervision. Ms Barnes countersigned the report.

40. Ms Brooks saw the appellant's son, his class teacher, and his Special Educational Needs coordinator on 5 October 2016. The child was just 5 years old: his birthday is in early September and it would have been about a month into his first term at school. He was in Reception Class. Ms Brooks recorded that the appellant's son had a diagnosis of autistic spectrum disorder and the purpose of the report was to ensure that he was being appropriately supported within the Reception Class setting at his school.

41. The boy was reported to have difficulty following routines and engaging appropriately with others, but had settled well into the Reception Class setting and his class teacher had 'no specific concerns regarding [his] progress and development within his reception class'. Ms Brooks' report concluded:

> "[He] is a much loved member of [the] Reception Class. He has settled in well; confidently navigating the Reception learning environment, responding to adult led instructions and appearing happy. He has been observed to play and interact appropriately with his peers and is currently achieving at the expected level for his age. [He] makes best use of the Reception learning environment and responds well to visuals, praise and modelled examples. [His] use of language should be monitored and he would benefit from participating in a small speech and language group with a focus on expressive language skills. He seems to have some sensory needs with regard to oral stimulation and is likely to benefit from access to a chewy key ring. Overall, [he] is making good progress in his Reception class and will benefit from continued support through the use of quality teaching approaches within a whole class setting."

The Educational Psychologist report was to be shared with parents through a copy Record of Involvement.

42. There is no more recent information regarding the boy's educational development, although he will be 10 years old in September and is approaching the age where he would move into secondary education. I take account of the assertion, in both the witness statements, that he continues to have difficulties. However, neither the appellant nor Mrs Bibi gives much detail and there is no updated professional assessment of the child's needs.

OASys Report 29 January 2020

43. An OASys report was finalised the day before the witness statements of the appellant and his wife. The writer presented a different picture of the couple from that depicted in their witness statements signed the next day: the appellant continued to deny his offending behaviour during the assessment, and said that he intended to appeal, which in the event, it seems he did not. The writer also expressed concerns that the appellant's wife maintained that he had not committed the offence and might, therefore, present a safeguarding risk to the children.

44. The appellant had complained of language barriers during the police interview, and false information about incriminating information on his phone. He was engaging positively with Probation and had confirmed that the would comply with his licence requirements when released, and any programmes or intervention work which his sentence plan required. It was not possible to understand his motivation for offending, given that he still denied the offence. His mental health was good and he was not experiencing any emotional issues in prison.

45. The appellant was assessed to present a medium risk to his own children:

> "Whilst there is no current evidence to suggest that [he] would target his own children to fulfil his sexual desires, there is enough of a concern at this stage to suggest that [he]

> has a possible preference for children and in particular, female children. The nature of the risk towards his children is assessed to be that of physical harm, whereby it is possible and plausible for a situation to unfold whereby his sexual desires and urges are needed to be met and takes the advantage of his young children to meet those needs. Emotional harm would also be likely to occur … "

46. The OASys report records that the appellant was prohibited from contacting any child under the age of 16. His former care work employment was no longer considered suitable and he would be assisted to explore different areas of work and to obtain qualifications which would make him more employable.

47. The appellant's wife did not accept that he had committed the offence of which he was convicted, which was considered to be 'likely to distort her judgment of being able to safeguard her children effectively'. Probation, the police and children's social services were involved. A social worker was meeting the appellant's wife every four weeks to ensure the safeguarding of the children.

48. The appellant's wife's address was not suitable for him, as the children lived there, and because of the concerns about the wife's ability to safeguard the children, given that she did not believe the offence had been committed. In this context, the evidence that the wife gives in her witness statement about the appellant dropping the children off at school with her, attending hospital appointments, doing grocery shopping and domestic chores for her is relevant. If the appellant or his wife had appeared at the hearing, I would have asked them more about this.

49. The writer of the OASys report noted that Slough Children's Services would manage and monitor the safeguarding of the appellant's children and the appellant's supervision with his children. A Children in Need review had been set for Wednesday 15 January 2020 at the primary school attended by the children. No copy of that is in the bundle.

Appellant's arguments.

50. For the respondent, Ms Everett relied on the Rule 24 Reply.

51. Absent any appearance by or on behalf of the appellant, I have taken his arguments to be those in his Upper Tribunal grounds of appeal. The appellant notes that the respondent has accepted that he has a genuine and subsisting parental relationship with his children, and also that the relationship with his wife is genuine and subsisting. He is truly remorseful for his offence. This is a first and only offence by the appellant and he seeks a second chance.

52. The appellant says that evidence will be provided 'closer to the First-tier Tribunal hearing' which I take to mean the remaking hearing, to confirm why it would be unduly harsh for the appellant's British children to move to Pakistan with him. He asserts that the United Kingdom is the only place where family life can be enjoyed as a close-knit family.

53. The appellant's case is that his removal would both breach Article 8 ECHR by breaking up his family, and not be in the best interests of his children pursuant to section 55 of the Borders, Citizenship and Immigration Act 2009. He asserts that he plays 'a pinnacle role' in the lives of both children.

Analysis

54. I accept that the appellant has a genuine and subsisting relationship with his wife, and with both his children. He has not been able to live in the same family unit with them since he was imprisoned almost two years ago now and, at least in the United Kingdom, he is unlikely to be able to do so during the rest of their childhood. He was released on licence in December 2019 and the most recent statements are dated 30 January 2020. There is nothing before the Tribunal to say how things have progressed since then.

55. There is no up to date evidence about the autistic spectrum disorder of the appellant's son, who is now 9½ years old. The last external evidence about him dates from just after his 5th birthday. Despite their protestations, the appellant's wife and his divorced elder brother, who have two daughters and two sons between them, were able to support each other while the appellant was in prison. His brother seems to have managed with his own children also.

56. I remind myself that the structured approach to be undertaken by a Tribunal considering an Article 8 ECHR appeal in the context of deportation begins and ends with part 5A of the 2002 Act: see *Binaku* (s.11 TCEA; s.117C NIAA; para. 399D) [2021] UKUT 34 (IAC) at [9] in the judicial headnote.

57. Section 117B is not applicable here. The appellant has been in the United Kingdom legally throughout until the making of the deportation order. Section 117B(6) does not apply to deportation cases.

58. Section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended) applies to this appeal. Section 117C(1) states that the deportation of foreign criminals is in the public interest. Section 117C(2) says that the more serious the offence, the greater the public interest in deportation. Section 117C(3) establishes that the pubic interest requires deportation unless either Exception 1 or Exception 2 applies.

59. At section 117C(6), there is a further consideration: where a foreign criminal has been sentenced to a period of imprisonment of more than 4 years, 'the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. *NA (Pakistan) & Ors v Secretary of State for the Home Department* [2016] EWCA Civ 662 held that the purpose of section 117C(6) was to ensure that in every foreign criminal case, not merely 'four years or more' cases, Part 5A of the 2002 Act did not operate in such a way as to cause a violation of Article 8 ECHR.

60. Exception 1 is not applicable here. The appellant has not been lawfully resident in the United Kingdom for most of his life. When he arrived in the United Kingdom on

5 May 2012, he was already 34 years old and he has been here now for just under 9 years.

61. Exception 2 applies: it is accepted that the appellant has a genuine and subsisting relationship with both a qualifying partner and his two qualifying children. The question for the Tribunal is whether the effect of his deportation on his partner or his children would be unduly harsh. I remind myself that the appellant said he would supply further evidence before the remaking hearing on this point, but he has chosen not to do so. I also take account that the appellant's wife and children, who are all British citizens, cannot be expected or required to go to Pakistan if he is deported: if they do choose to do so, that would be a matter for them all as a family.

62. The evidence before me does not establish that it would be unduly harsh for the appellant's wife and two children to remain in the United Kingdom. They are all British citizens and she has completed her Masters' degree course in Social Work. She is an intelligent, qualified woman who would be able to obtain employment and support the family, with the help of her brother-in-law. The children are in school and support for the autistic spectrum disorder of the older boy has been in place since he began primary school.

63. The quality of family life is reduced because the appellant is not currently permitted while in the United Kingdom to live in the same house as his wife and children, and has only supervised access to the children, a situation which is not likely to change, given his conviction. The support he provided to his brother and his brother's children will also have been affected as the appellant is not permitted to be in unsupervised contact with any child under 16. The appellant's children are therefore in the sole care of their mother, and that would not change if the appellant were to be removed without them. That would not, I find, be 'unduly harsh' on the facts.

64. If the appellant's wife and children were willing and able to accompany him to Pakistan, the proscription on his living with the rest of his family would presumably be inoperative there. It is difficult to assess whether that would be in the children's best interests, but that would be a matter for the appellant and his wife to consider. It would certainly be no worse than the wife and children remaining in the United Kingdom without him. There is no evidence before me, apart from assertions by the appellant and his wife, that the relatively minor difficulties which the appellant's son has could not be treated there. I do not find that this option would be unduly harsh for the appellant, his wife or the children.

65. I consider next whether the appellant has shown that there are 'very compelling circumstances' engaging section 117C(6), which outweigh the public interest in deporting the appellant after such a serious offence. The assertion that there are such circumstances is unparticularised but presumably refers to the autistic spectrum disorder of the appellant's son. Given the paucity of evidence about any difficulties he has, I find that 'very compelling circumstances' are not made out in this appeal.

66. The appeal cannot succeed and I dismiss it.

DECISION

67. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. I remake the decision by dismissing the appeal.

Signed *Judith AJC Gleeson* Date: 13 March 2021
Upper Tribunal Judge Gleeson