



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

Appeal Number: DA/00235/2014

THE IMMIGRATION ACTS

Heard at Manchester

**On 23rd September, 2014
Given extempore
Signed 3rd October, 2014**

Determination

**Promulgated
On 8th October 2014**

Before

Upper Tribunal Judge Chalkley

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

DAVID LESLEY BROWN

Respondent

Representation:

For the Appellant: Mr G Harrison, a Senior Home Office Presenting Officer

For the Respondent: Ms L Mensa of Counsel instructed by Zacharia & Co

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department and to avoid confusion I shall refer to her as the claimant. The respondent is a citizen of Pakistan who was born on 25th November, 1986.
2. His immigration history is brief. The respondent entered the United Kingdom on 4 July 2001, accompanied by his mother and two sisters and

he was travelling on his own Pakistani passport which contained a UK visit visa which had been issued to him in Pakistan on 8th June, 2001.

3. On 28th August, 2002, the respondent claimed asylum on the grounds that as a Christian he was at risk of persecution in Pakistan. His asylum claim was refused by the claimant on 2nd October, 2002 and his appeal was subsequently dismissed on 19th September, 2003. On 6th December, 2004, further representations were made to the claimant on behalf of the respondent asserting that his human rights would be breached by his removal from the United Kingdom but these were rejected by the claimant on 6th May, 2005 and they were dismissed by an Immigration Judge on 19th September, 2005. The respondent has a child born in the United Kingdom on 14th January, 2009. On 10th September, 2009, the respondent's representatives made further representations to the claimant that he should be granted indefinite leave to remain outside the Immigration Rules on humanitarian or compelling compassionate circumstances and on 10th February, 2010, he was granted indefinite leave to remain.
4. The respondent has several convictions. The most recent was on 31st May, 2012, at Manchester Crown Court, when he was convicted of twelve offences of supplying class A drugs, (heroin and crack cocaine) between 13th December, 2010, and 4th April, 2011, and sentenced to 39 months' imprisonment in respect of each of the twelve offences and sentenced to 39 months' imprisonment concurrent for each offence. He was also sentenced to one months' imprisonment for having dishonestly used electricity and on 23rd October, 2011, for offences of dangerous driving, using a vehicle without insurance, driving whilst disqualified and other associated motoring offences he was sentenced to six months' imprisonment, making a total of 46 months' imprisonment.
5. On 23rd January, 2014, the claimant made a deportation order against the respondent under Section 32 of the UK Borders Act 2007, on the ground that the respondent was a foreign criminal whose deportation in the United Kingdom is conducive to the public good under Section 35A of the Immigration Act 1971. The respondent appealed and his appeal was heard by First-tier Tribunal Judge Levin in Manchester on 3rd April, 2013. In his determination he found that there were exceptional circumstances such that they outweighed the public interest in deporting the respondent. He allowed the respondent's appeal.
6. The claimant was dissatisfied with the judge's decision and sought permission to appeal and on 6th May, 2014, First-tier Tribunal Judge Jonathan Holmes granted permission and in doing so said this:

"2. It is arguable that the judge's approach to the 'exceptional circumstances' test was flawed for the reasons set out in the grounds. If the judge's finding was that the 'harassment and discrimination' it was said the appellant would experience as a Christian did not meet the Article 3 threshold, then it is difficult to see how it would play any proper part in the 'exceptional circumstances' test. It is moreover arguable that the judge's approach was not consistent with the guidance of the Court of Appeal in *SS (Nigeria)* [2013] EWCA Civ 550 and the determination makes no reference to the guidance found in either *Zoumbas* [2013] UKSC 74, or *LH (Nigeria)* [2013] EWCA Civ 26, or *Rocky Gurung* upon how to approach the issue of the effect upon a family of deportation when

balancing the public interest in his deportation. The relationship relied upon was one that had been commenced when both the appellant and Ms H knew his immigration status was precarious and whatever their future plans they were not cohabiting at the date of decision, and Ms H's influence had not been sufficient to prevent the appellant from offending. Accordingly it is arguable that inadequate reasons were given for the decision to allow the appeal."

7. Mr Harrison relied on the grounds of appeal to which I will refer in a moment.
8. For the respondent, Ms Mensa reminded me that the respondent entered the United Kingdom at the age of 14 and has a child who was born in 2009. She also reminded me that the judge heard oral evidence from the respondent from Ms H, from the respondent's mother, from Mrs B and from the respondent's two sisters and took that evidence into account. The respondent and Ms H do not at the moment live together but that is because he is on immigration bail and is required to live with his mother.
9. Ms Mensa referred me to paragraph 48 of the determination. There, the judge records the evidence of Ms H who said that when the respondent was released from detention at the beginning of January 2014, they both agreed that their son would be their priority and she described her son as being a "broken child". The judge appears to have accepted this description of the child without actually having any further evidence or any explanation as to what that was supposed to mean. The judge did not specifically acknowledge that, at the time the respondent and Ms H formed their relationship, his status within the United Kingdom was precarious. He was of course granted indefinite leave to remain in 2014 following which his criminal activities appear to have started.
10. Mr Harrison reminded me of the grounds of appeal. They are lengthy and not terribly well-drawn, but the first paragraph points out that all the evidence regarding the negative effect on the respondent's child appears to be self-serving and not supported by any independent evidence. Mr Harrison suggested that the judge's determination appears to have been swayed by emotion and he appears to have ignored the wider interests of society. He told me that there was insufficient consideration of the nature of the offences committed by the respondent and no consideration of the impact of these offences on the wider society. There also appears to have been no consideration of the deterrent effect and no regard at all for the lives which would have been affected and ruined by the respondent's dealing in class A drugs.
11. I believe that this (very experienced) judge has erred in his determination by taking into account in the proportionality exercise that he was bound to undertake in assessing whether the appellant's particular circumstances are sufficiently exceptional to outweigh the public interest, the fact that as a Christian the appellant will face discrimination and harassment because of his religion on his return to Pakistan. He refers to it in paragraph 58 of the determination and again in paragraph 54. In paragraph 54 he sums up the matters he takes into account when considering whether the appellant's circumstances are such as to outweigh the state's interest in

deporting the respondent and says that he is satisfied that the respondent “will encounter serious problems and discrimination and harassment, albeit short of persecution, which will nonetheless have an adverse effect on the respondent’s private life”. That I believe was an error of law. I do not believe that that was a matter which should properly have been taken into account.

12. There is no acknowledgment anywhere in the determination that this respondent commenced his family life at a time when he and Ms H would have known that his status in the United Kingdom was precarious. I believe that this omission was a relevant consideration. I am also troubled by the judge’s apparent acceptance that the appellant’s child was so affected by his imprisonment that he was a “broken child” without an expert evidence that the child was adversely affected by his father’s imprisonment and without explaining precisely what was meant by the word, “broken”.
13. For these reasons I have concluded that the determination cannot stand. Both representatives agreed that in the event that I find an error of law I should remit the appeal to be heard afresh by the First-tier Tribunal in accordance with paragraph 7 of the Senior President’s Practice Statement. This I do. The matter will be heard afresh by the First-tier Tribunal by a judge other than First-tier Tribunal Judge Levins and First-tier Tribunal Judge Brookfield. No interpreter required. A time estimate of four hours should be allowed.

Richard Chalkley
Upper Tribunal Judge Chalkley