



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

Appeal Number: HU/13741/2015

**THE IMMIGRATION ACTS**

**Heard at Field House**

**On 11 April 2017**

**Decision & Reasons  
Promulgated  
On 13 June 2017**

**Before**

**THE HONOURABLE MR JUSTICE COLLINS  
UPPER TRIBUNAL JUDGE TAYLOR**

**Between**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Appellant

**and**

**MR MUHAMMAD USMAN  
(ANONYMITY DIRECTION NOT MADE)**

Respondent

**Representation:**

For the Appellant: Mr T Melvin, Senior Home Office Presenting Officer of the Specialist Appeals Team

For the Respondent: Mr Usman (In person)

**DECISION AND REASONS**

1. This is an appeal by the Secretary of State against the decision of Judge Norton-Taylor given after a hearing on 15 August last year whereby he allowed the appeal of the respondents to this appeal against the decision

of the Secretary of State to refuse a claim made by him for leave to remain in this country on human rights grounds.

2. The respondent came to this country originally in January 2007 with his mother. He was born on 4 May 1991 and is a national of Pakistan. Accordingly when he arrived in this country he was some 16 years old. Unfortunately he committed a serious offence on 16 January 2008 when he sexually assaulted a young woman. He was not apprehended at the time but it was discovered that he had been involved because in the course of the assault he had bitten his victim and a DNA sample was taken. In 2012 he was arrested on suspicion of having committed robbery. We should say immediately that that turned out to be an error and it was accepted that he was not guilty of any offence. Nonetheless a DNA sample was taken following his arrest and this matched the sample that had been taken from the victim of the assault in 2008.
3. The sentence that was imposed upon him as a result of that offence was one of nine months described as imprisonment although of course he being under 18 the sentence was one of detention. As a result of that the Secretary of State decided that he should be deported having regard to the fact that he had committed an offence which had, it was said, caused serious harm. The circumstances of the offence we do not need to go into in any detail, suffice it to say that at half past seven or thereabouts on a January night when of course it was dark the 21-year-old victim was approached and grabbed by the respondent and the assault on her involved his putting a hand on her buttocks through her underwear and having pulled her trousers down and attempted to kiss her on her lips, he bit her on her cheek before running off when he apparently heard a car door shut nearby. He was charged not only with the touching of her in an indecent fashion but also with the much more serious offence of an intention to rape. Of that he was acquitted. So the offence, nasty though it was, and for a first offender meriting an immediate custodial sentence, nonetheless in the hierarchy of sexual offences was at a relatively low end. Nonetheless the First-tier Judge decided that it did cause serious harm to the victim and that was a finding that he was entitled to reach and one which we do not seek in any way to go behind.
4. Other than that the respondent has not offended and it is to be noted of course that he was only 16 still when that offence was committed. He is now married to a British citizen of Bangladeshi ethnicity and has now three small children. As we say there is no suggestion that he has misbehaved in any criminal way or indeed at all since his offending and the chances that he will commit offences are small. Thus he is in the position of one who when he was a young man and before he met with and got married to his present partner committed the offence which we have described which was serious enough but he has on the face of it put that offending behind him.

5. The law applicable is contained in Sections 117B to 117D of the Nationality, Immigration and Asylum Act 2002 and paragraphs 398 to 399A of the Immigration Rules. The relevant provisions of the various amendments to Section 117 are those under 117C because that deals with the approach to Article 8 in cases involving foreign criminals and the first point made is that it is in the public interest that foreign criminals should be deported and the more serious the offence the greater the public interest in deportation.
6. If a foreign criminal has been sentenced to less than four years then the relevant test which is in issue in this case is that deportation should not take place if there would be very significant obstacles to his integration into the country to which it is proposed that he be deported, and that is Section 117C(4)(c). And more important perhaps is Section 117C(5) which provides that a relevant exception, that is an exception to deportation, 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. As we say that is the more significant provision which is material for the purposes of this appeal. There is no doubt that he does have a genuine and subsisting relationship with a qualifying partner who is, as we have said, a British citizen, and equally a genuine and subsisting parental relationship with three qualifying children. And the issue is whether his deportation would be unduly harsh on the partner or the children.
7. The decision made by Judge Norton-Taylor was carefully reasoned and conscientious as Judge Kopieczek granting permission observed. It was thorough and thoughtful but what moved her to grant permission was that, as she put it, the judge had not identified what factors were in play that made his deportation unduly harsh as distinct from matters that were likely to affect a spouse or young children in any deportation case.
8. It must be obvious that in assessing what is unduly harsh a judge has to consider the facts of the individual case and then make a judgment whether on those facts it can properly be decided that it would be unduly harsh and there is obviously no straightforward dividing line which enables it to be said that a particular decision is or is not unduly harsh. The test that has to be applied is set out by the Court of Appeal in **MM (Uganda) [2016] EWCA Civ 450** and in that case Lord Justice Laws so far as material stated as follows. First in paragraph 22 he said:

"I turn to the interpretation of the phrase unduly harsh. Plainly it means the same in Section 117C(5) as in Rule 399. Unduly harsh is an ordinary English expression. As so often, its meaning is coloured by its context."

That perhaps is a statement as he himself said of the obvious. He went on in the next paragraph:

“The context in these cases invites emphasis on two factors, (1) the public interest in the removal of foreign criminals and (2) the need for a proportionate assessment of any interference with Article 8 rights.”

He then referred to the provisions in Section 117C(2) namely that the more serious the offence the greater the public interest in deportation. And he went on in paragraph 24:

“This steers the Tribunals and the court 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.”

9. So that is the approach which the judge refers to and clearly had in mind in deciding whether on the facts of this case there would be an unduly harsh effect on his partner and the children were he to be deported and in reaching that decision he of course had to consider the relative seriousness of the offence which the appellant had committed. And he made the point, and indeed it is a point that is relied on in all these cases by the Secretary of State, that offences involving sexual assaults are particularly to be regarded as serious. He set out the mitigating factors which ranged from his age when the offence was committed and his immaturity, that it was not at the higher end of the scale of sexual offences, he found that the remorse expressed was genuine and was committed over eight years before, there were no further convictions and no other material misconduct and a very low risk of reoffending. Those in themselves were relatively powerful reasons on their face for reaching a consideration on proportionality.
10. Now so far as his wife is concerned, as we have said she is originally from Bangladesh and therefore if he is deported and if the family life is to continue then she has to go to a country which she does not in any way know and obviously if he went on his own that would split up the family who are close and would create its own real problems. Equally there was some evidence that she suffers from eczema and that would not be assisted by having to live in a country such as Pakistan where there are high levels of sunshine. However that was not in itself particularly relied on by the First-tier Judge. So far as the children are concerned they, obviously having been born and so far brought up here, albeit they are relatively young, it would hardly be in their best interests if they were uprooted and had to go to Pakistan and even less in their best interests if they were to be deprived of the father in all the circumstances.
11. What the judge then decided is set out in paragraph 112 of his judgment and we think it would be right that we cite the material parts of that. What he said was this:

“The operative harshness in both scenarios is I conclude undue because of the way in which the test has been framed by the Court of Appeal and an application of the specific facts of this case. When the threshold of what is or is not undue is calibrated according to the appellant’s own criminal and immigration history and all other relevant factors there is on my findings of fact and previous conclusions thereon a disproportionate relationship in this case between what the children are due to bear in the wider sense on the one hand and on the other the public interest of deporting this particular appellant notwithstanding the powerful influence of Section 117C(1) and paragraph 398 of the Rules seen in the light of the relevant case law.

This case is an example of the observation made in the case cited where the relative nature of the test was acknowledged. The less serious the offending and immigration history the easier it may be to show undue harshness. Here the strength of the appellant’s case through his children as it were in demonstrating undue harshness is very significantly increased by the facts relating to the very matters to which I must have regard under **MM (Uganda)**. The wider interpretation of the term actually benefits the appellant. If the child focused approach had been favoured by the Court of Appeal my conclusion might have been different. As it is the factors in the appellant’s favour go to outweigh the ..... factor of the public interest albeit by a narrow margin. It is hard to conceive the wide margins in deportation cases.”

12. In our judgment that was a perfectly correct self direction and analysis of the situation having regard to what should have weighed with the judge. As we say in all these cases provided that the correct approach is adopted it is a question of judgment and giving weight to the various factors which determine the result. With great respect to the Upper Tribunal Judge Kopieczek we do not take the view that there is merit in the grounds sought to be relied on namely that as it was put that there was nothing outside what can be regarded as the norm in relation to effect on partners and children that justified the finding made by the First-tier Judge. As we say in our view that was not a correct approach and the judge was entitled to find as he did. In those circumstances this appeal is dismissed.

No anonymity direction is made.



Signed

Date: 7 June 2017

Mr Justice Collins