



**Upper Tribunal  
(Immigration and Asylum Chamber)  
HU/00054/2018**

**Appeal Number:**

**THE IMMIGRATION ACTS**

**Heard at Manchester  
On 28 September 2018**

**Decision & Reasons Promulgated  
On 07 November 2018**

**Before**

**UPPER TRIBUNAL JUDGE RINTOUL**

**Between**

**MR A K**

(ANONYMITY DIRECTION NOT MADE)

Appellant

**and**

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

Respondent

**Representation:**

For the Appellant: Miss L Mair, instructed by Scarsdale Solicitors  
For the Respondent: Mr C Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. The appellant appeals with permission against the decision of First-tier Tribunal Judge Thorne, promulgated on 10 July 2018, dismissing his appeal against the decision of the respondent made on 15 December 2017 refusing his human rights claim which in turn was made in response to the deportation order signed on 4 September 2017. The deportation order was signed on the basis that the Secretary of State was satisfied that the appellant is a foreign criminal, the appellant having been sentenced to two years' imprisonment on 23 June 2017.

2. The appellant is a citizen of Pakistan who entered the United Kingdom in 2005 with leave to enter as a spouse. He was granted indefinite leave to remain on 6 September 2010.
3. Since then he has been convicted of a number of offences relating mainly to driving fast, disqualified and/or uninsured as well as driving with excess alcohol. As a result of these offences on 25 May 2017 he was served with a notice of intention to deport on upon the basis that he was a persistent offender but on 23 June 2017 he was sentenced to two years' imprisonment on two counts of offences relating to goods and for failing to surrender to authority. The appellant maintains that his deportation would be disproportionate as he has lived in the United Kingdom for over twelve years, he is married to a British citizen, and that owing to close ties that he and his wife have with her mother and other members of the family as well as the fact that after thirteen years of trying for a child they are still undergoing IVF treatment. There are particular difficulties with the appellant's mother-in-law as she is unable to speak owing to ill health. Further, the couple have significant financial problems which make it difficult for the appellant's wife to travel to visit him in Pakistan whilst maintaining relationships with her family here.
4. The respondent, while accepting the appellant has a genuine and subsisting relationship with his wife, did not accept that it would be unduly harsh for her to live in Pakistan given that it is likely she had some experience with the culture and traditions of Pakistan her family being of Pakistani origin and as she may have family members living there. It was not accepted either that it would be unduly harsh for her to remain in the United Kingdom even though the appellant was to be deported and given that she has family, friends and employment here.
5. The respondent considered also that the appellant had not fulfilled regards paragraph 399A of the Immigration Rules the respondent concluding that he had not been lawfully resident in the United Kingdom for most of his life nor that there would be very significant obstacles to his integration into Pakistan. The respondent noted also that there were not very compelling circumstances in this case given that the appellant showed a blatant disregard towards the United Kingdom, had been convicted for a serious criminal offence to which he was sentenced to two years' imprisonment and that IVF would be available in Pakistan and that they would be able to continue fertility treatment there.
6. Judge Thorne heard evidence from the appellant and his wife as well as submissions from both parties. The judge directed himself in light of Hesham Ali (Iraq) v SSHD [2016] UKSC 60 and Agyarko and Ikuga v Secretary of State [2017] UKSC 11 that the appellant could not meet the requirements of paragraphs 399(a) or 399A of the Immigration Rules and that:-
  - (i) it would not be unduly harsh for the appellant's wife to live in Pakistan because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM [35];

- (ii) it would not be unduly harsh for the appellant's wife to remain in the United Kingdom without him [36];
  - (iii) in conducting the proportionately balancing exercise the scales were heavily weighed in favour of deportation [39] and the circumstances in this case did not constitute very compelling circumstances.
7. The appellant sought permission to appeal on the grounds that the judge had erred:
- (i) in using the absence of evidence to justify a finding that something is not the case. And that had the judge made positive findings on the evidence he could have concluded the view to continuing IVF treatment the appellant's mother-in-law being seriously ill that deportation would be unduly harsh; and, that it was unfair to make findings owing to a lack of evidence without giving an opportunity to address the speculative findings on that issue;
  - (ii) in failing to consider material evidence in relation to the appellant's mother-in-law's ill health including in particular that she had not spoken for some time making the maintenance of contact by long distance communication impossible [17] and in failing to consider their limited financial means before concluding that the appellant's wife would be able to travel backward and forward [18 to 19] and in concluding that the appellant did not speak English;
  - (iii) in concluding in the absence of evidence that the appellant's wife could come to the United Kingdom to undergo fertility treatment and they could not travel together.
8. On 6 August 2018 First-tier Tribunal Judge S P J Buchanan granted permission noting that the double negative conclusion drawn at [33] gives rise to the perception that the judge considered maintaining the relationship with the mother by long distance communication that periodic visits would be a necessary means to avoid unduly harsh results to live in Pakistan, yet the judge had noted that the mother was unable to talk.
9. It was for the appellant to show that it would be unduly harsh to expect him and his wife to go to live in Pakistan; or, that it would be unduly harsh for him to be separated from his wife. It flows from that, that it was for him to prove the factual elements upon which he relied in order to make good the assertion that either scenario would be unduly harsh. In essence, the appellant's submissions are that the judge went further than saying that there was insufficient evidence to show the facts which were asserted but instead went on to make findings unsupported by the evidence.
10. In **AA (Uganda)** the First-tier Tribunal Judge was criticised for concluding that there was no evidence that a church did not carry out activities in a poor area and from that concluding that it had not been shown that the appellant in that case could not be supported.

11. The issue of IVF is somewhat complex. As Miss Mair submitted, it is not possible to discern any points of principle from either Agyarko or the High Court's decision in R (Erimako) v SSHD [2008] EWHC 312. I accept that the ability to undertake or undergo fertility treatment is part of an individual's private life rather than at the family life end of the spectrum of family and private life. It does, however, require both parties to be present for some time in one place. That is relevant to both the issue of whether the appellant's wife could be expected to live in Pakistan, or whether if she remained here, the effect on her would be unduly harsh.
12. On a proper construction of the decision it appears [32] that the judge meant that the appellant had not proven that the appellant's wife could not access IVF treatment in Pakistan, it is less clear why he concluded that there might be a possibility of her visiting the United Kingdom regularly. Further, there is no proper explanation for the conclusion that long distance communication and periodic visits would assist in keeping communication with the appellant's mother-in-law who, it was not asserted, is no longer able to speak.
13. The judge does not properly explain why [34] he believed that it had been shown that sufficient money would have been raised from selling a property in the United Kingdom and paying off debts, given the limited equity in the property. There is no proper consideration as to the evidence of the level of indebtedness and there are other matters which at [34] raise some doubts in that it is unclear that it was put to the appellant or his wife.
14. It does not, however, necessarily flow from this that any error in the fact-finding of this issue was material given the conclusion [36] that it would not be unduly harsh for the appellant's wife to remain in the United Kingdom without him. It was for the appellant to prove that also.
15. There is no challenge to the judge's finding that the appellant's wife had managed to live without him for numerous periods whilst he had been in prison or that her family in the United Kingdom can support her.
16. Whilst Miss Mair submitted that the judge erred in concluding that if the wife chose to stay in the United Kingdom she could maintain her relationship, it was for the appellant to prove that this could not be done.
17. Properly construed the conclusion at [36] is nothing more than a finding that on the evidence as presented the case had simply not been made out. Whilst the reasoning could have been more elegantly set out, the appellant has not shown that the judge improperly went beyond noting that there was insufficient evidence to support the appellant's assertions about the circumstances which would be faced and which, he says, amount to undue harshness.
18. In the circumstances, I consider that the decision did not involve the making of an error of law and I uphold it.

**Notice of Decision**

- (i) The decision of the First-tier Tribunal did not involve the making of an error of law and I uphold it.

No anonymity direction is made.

Signed

Date 26 October 2018

A handwritten signature in black ink, appearing to read 'Jonathan Rintoul', written in a cursive style.

Upper Tribunal Judge Rintoul