Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: PA/07621/2016**

THE IMMIGRATION ACTS

Heard at North Shields	**Decision & Reasons Promulgated**
On 28 February 2018	**On 4 April 2018**

Before

UPPER TRIBUNAL JUDGE RINTOUL

Between

MR WASEEM ABBAS SHAH
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Ms M Cleghorn, Counsel, instructed by Iris Law Firm
For the Respondent: Mr Diwnycz, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of First-tier Tribunal Judge Ince, allowing the appellant's appeal against a decision of the respondent made on 12 July 2016 that he is a person who is to be deported as a foreign criminal and to refuse his protection and human rights claims.

2. The appellant is a citizen of Pakistan who came to the United Kingdom in 2010 as a student with the relevant entry clearance. He had prior to that, been forced into marriage with a younger cousin. After he came to the United Kingdom he arranged to be divorced from his wife in Pakistan and then on 29 February 2012 married his current wife, KK, and applied for leave to remain as the spouse of a UK citizen. That application was granted and he was for two years until later he applied for indefinite

leave to remain on the basis of the marriage. Before that application was determined, he was convicted of conspiracy to facilitate the commission of a breach of UK immigration law and sentenced on 19 June 2015 to 45 months' imprisonment. There are a number of other previous convictions. On 16 April 2014 he was convicted of resisting or obstructing a police officer, driving without a licence without insurance, resulting in a final disqualification from driving for twelve months. On 12 June 2014 he was convicted of similar offences but given an absolute discharge and after the conspiracy conviction in November 2014 he was convicted of resisting or obstructing a police officer and possessing a false ID card for which he was fined £630. A further charge of drunk driving followed on 11 June 2015 resulting in a ten week prison sentence suspended for twelve months.

3. With regard to the conviction for conspiracy, he was convicted of arranging and facilitating the marriages of Pakistani nationals with two Czech nationals who were exercising treaty rights. The marriages were due to take place on 24 July 2014 but did not as all were arrested before the ceremonies could take place. As Judge Ince noted in his decision [25] the appellant was at the top of the hierarchy and had benefited financially from the arrangements.

4. Subsequent to his conviction the appellant claimed asylum which the respondent refused.

5. The appellant's case is that he fears his family in particular his uncle (the father of his first wife) for divorcing his daughter and bringing shame on the family. The respondent did not accept his claim and considered that in any event he could obtain a sufficiency of protection from the authorities or could reasonably be expected to relocate. This she considered also that he did not fulfil the requirements of paragraph 399 of the Immigration Rules and that his deportation was proportionate.

6. The Secretary of State did not accept that the appellant had a family, a genuine and subsisting parental relationship with KK's daughter as he did not live with them as part of her family but lived with her aunt.

7. The respondent accepted that the relationship between the appellant and his wife had been formed when he was here lawfully and when his status was not precarious; that they had a genuine and subsisting relationship but that it had not been unduly harsh for KK to live in Pakistan nor would it be unduly harsh for her to remain in the United Kingdom where she could continue to receive medical treatment and have the support of her sister and mother noting that she had lived there during the appellant's imprisonment in June 2015.

8. The judge found:-

   (i) That the appellant and KK were credible about the asylum claim [79]; that the certificate made under Section 72(9) of the Nationality, Immigration and Asylum Act 2002 was not made out;

   (ii) and that if he returned to Pakistan he would be at risk in his home area but that it would not be unduly harsh to expect him to relocate to another part of

Pakistan [88] and this would not be unduly harsh [90], concluding that there would not be a sufficiency of protection for him from the police [92];

(iii) it would not be unduly harsh to be separated from his wife's daughter given that she did not live with the appellant except weekends and had little communication with him since his imprisonment in 2015 and there was no evidence to suggest there would be any health repercussions if he were removed [93];

(iv) that it would be unduly harsh to expect KK to relocate to Pakistan with the appellant given the finding in respect of the asylum claim that if they returned together that they would be traced by his family as they would become known and thus inadvertently and vicariously she would be put at risk [95];

(v) that it would be unduly harsh to expect KK to remain in the United Kingdom without the appellant given the effect of separation on her health to the extent that she has started suffering from panic attacks and depression and on account of suffering intimate and suicidal thoughts in the past, the prospect of the appellant being coming home to be would be the only thing to keep her going;

(vi) That in assessing the public interest it was noted that the appellant was not a danger to the community, had insight into his offending and that he was satisfied he would not reoffend in the future and therefore he was rehabilitated and taking account of the fact that there was sufficiently compelling circumstances such that this is one of the rare instances where the public interest is outweighed.

9. The respondent sought permission to appeal on the grounds that the judge had erred in application the unduly harsh test in failing to have regard, as set out in MM (Uganda) [2016] EWCA Civ 450 in not weighing the appellant's criminal and immigration history and significant public interest in the appellant's deportation against his Article 8 right, materially affecting the outcome of the decision; and, erred in finding that the appellant's rehabilitation weakens the public interest in his deportation, thus failing to take into account OH (Serbia) v SSHD [2008] EWCA Civ 695 where it was found that rehabilitation has not been the most important factor in the public interest and the need to deter a foreign nationals from committing crimes is an important facet of the public interest. It was also noted the public revulsion at serious crimes was also one of the aims of the deportation order. It is also averred that that the judge failed to have any regard to the statutory factors set out in Sections 117B, 117C of the 2002 Act.

10. In what is otherwise a detailed and commendable decision from an experienced Immigration Judge, there is no mention of Sections 117B, 117C of the 2002 Act which in the light of MM (Uganda) fell to be taken into account in assessing whether the effect on the appellant's wife of his removal would be unduly harsh.

11. Despite the respondent's submissions as set out in the grounds of appeal, I consider that the judge was entitled to conclude that it would be unduly harsh to expect the

appellant's wife to go to live in Pakistan because of the sustainable and indeed unchallenged finding that her presence in Pakistan would bring him to adverse attention and thus they would both suffer ill-treatment of sufficient severity to engage Article 3 of the Human Rights Convention. In those circumstances, there is nothing in the public interest which could possibly outweigh that.

12. Despite Ms Cleghorn's best efforts, I am not persuaded the judge had in fact taken into account the proper test in assessing undue harshness given that there is simply no mention of what was taken into the account and as he should have taken account of the factors set out in Section 117B and 117C. Whilst it was not necessary to cite them, there should at the least have been an assessment of those factors.

13. Accordingly, for these reasons, I was satisfied that the judge's decision did involve the making of an error of law.

14. I announced my decision and invited further submissions from the parties. I also heard brief evidence from KK who confirmed that her mother whom she supports, still requires help due to her health and that she goes there at least three times a week, staying overnight on occasion. She said that her daughter has significant medical problems in that she requires monthly injections as the bones in her leg are not growing properly despite the fact that she is 16. She also confirmed that she had lost three stone in weight and had had panic attacks when the appellant was in prison. Her situation was now better and they were now living back together in the matrimonial home.

15. The Secretary of State's powers to deport foreign national offenders are set out in Section 32 UKBA 2007. It is not disputed that the claimant is a foreign criminal as defined in that section. By operation of section 32 (5) UKBA, the Secretary of State must make a deportation order in respect of a foreign criminal unless she thinks that an exception in section 33 of the Act applies. That section provides, so far as is relevant, as follows:-

> 33 Exceptions
>
> (1) Section 32(4) and (5)–
>
> > (a) do not apply where an exception in this section applies (subject to subsection (7) below), and
> >
> > (b) are subject to sections 7 and 8 of the Immigration Act 1971 (Commonwealth citizens, Irish citizens, crew and other exemptions).
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach–
>
> > (a) a person's Convention rights, or
> >
> > (b) the United Kingdom's obligations under the Refugee Convention.
>
> (3) Exception 2 is where the Secretary of State thinks that the foreign criminal was under the age of 18 on the date of conviction.

16. Paragraph 399(b) of the Immigration Rules provides as follows:-

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

17. The appellant is a foreign criminal as defined in Section 117D of the 2002 Act. I am therefore bound to consider the matter as set out in Section 117B in addition to 117C which provides as follows:-

"117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom, and

(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.

(5) Exception 2 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.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign

> criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted."

18. As noted above the finding that it would be unduly harsh to expect KK to live in Pakistan is maintained. It therefore follows that an assessment must be made as to whether it would be unduly harsh to expect her to remain in the United Kingdom and to be separated from the appellant.

19. I accept on the basis of the unchallenged and sustainable findings of the judge that KK has had a difficult past. She is, as Ms Cleghorn submitted, a fragile person. She has as is clear from the medical records, previously been addicted to heroin and was, after treatment with methadone and tranquilisers, able to come off heroin and is no longer dependent on drugs. She achieved that with the support of the appellant but it is equally notable that her addiction was such that this is what prompted Social Services to ask her sister and brother-in-law to take over care of her daughter who is still in their care. I accept also KK's evidence that she has suffered from panic attacks and she has also had suicidal thoughts in the past. I accept also that she suffered from anxiety as a result of the appellant being in prison and then in immigration detention. I conclude that she has shown that if the appellant were to be removed, effectively permanently, from the United Kingdom that would have a significant effect on her well-being which would be greater given her fragility than would otherwise be the case.

20. There is also the fact that this is not a situation in which she could go to visit the appellant in his home country because of the risk that would occur to him and to her were she to do so. It is not clear if they would be able to meet in a third country and it is plausible that the appellant would have difficulty getting a visa for another country given his criminal record in the United Kingdom and the deportation order.

21. Further points in the appellant's favour are that he has never been dependent on benefits, speaks English, and began his relationship with KK whilst he was here with leave. Indeed, it is conceded by the respondent that his position here was not precarious when the marriage took place and the relationship was formed.

22. I bear in mind also that the point of deportation is that it does separate families. It does split up marriages and there must be something of a compelling nature which takes this out of the ordinary such that the public interest is outweighed. In reality, the only factor in this case is the effect on KK.

23. There is little medical evidence as to the effect that there would be on KK although there is some to be gleaned from the medical records put before the First-tier Tribunal which indicate that when the appellant was imprisoned she lost a significant amount of weight. She also suffered from anxiety and panic attacks, and it appears, had intermittent suicidal thoughts. She has also in the past self-harmed and has been a heavy abuser of alcohol as well as illegal drugs. None of this was challenged, nor was KK's evidence that the prospect of the appellant coming home to her was the only thing that kept her going. It is of note also that the medical evidence is that counselling did not work.

24. The evidence from KK's family is that she has stabilised since she began her relationship with the appellant. She also provides care for her mother who also has chronic health problems. Again, this is not challenged in the submissions made to me.

25. Since the decision of the First-tier Tribunal was promulgated, the appellant and KK have resumed their married life again. I consider that, given how his imprisonment affected her, future separation arising from deportation will have a similar effect and is likely to be more severe, given that the relationship will be severed. They will not be able to meet easily.

26. It is likely that KK would be able to live again with her mother, but I am not satisfied given the mother's medical conditions that she would be able to offer much emotional support (and KK is her mother's carer), and the evidence of what happened in the past is that she was unable to assist her mother while she was affected by the appellant's imprisonment. It also affected her relationship with her daughter with whom the appellant also has a genuine and subsisting step-parental relationship (see First-tier Tribunal decision at [42]). Although it was found that separation would not be unduly harsh [93], it is nonetheless a factor to be borne in mind in the overall analysis, not least as she is a minor and has significant health problems which she mentioned in oral evidence and were not challenged.

27. Drawing all these factors together, I conclude that KK's mental health is likely to be severely impaired by the appellant's deportation and the separation from him. This is a case in which medical intervention has been of little assistance, and it is the appellant's presence which has stabilised her. I accept also that there is no realistic prospect of similar assistance from family, or support from counselling, as this did not assist sufficiently in the past. The effect of the appellant's deportation on KK will inevitably be harsh.

28. That does not, however, mean that deportation is unduly harsh when weighed against the public interest in deportation in this case. Against that there are a number of factors which weigh strongly in the public interest. The starting point must be that there is a strong public interest in deporting foreign criminals from the United Kingdom. Second, the more serious the crime as expressed in the length of sentence and other factors, is capable of increasing the public interest in that respect. In this case, the public interest is all the more weighty given the length of sentence, 45 months, and the other offending behaviour which showed a previous pattern of offending.

29. There is a pattern of driving offences whilst uninsured, without a licence and whilst under the influence of alcohol. These are in themselves an indication of a willingness not to obey the rules and norms of society. Further, the nature of the crime for which the applicant was sentenced to 42 months' imprisonment was a concerted attempt to undermine the immigration system in the United Kingdom. The appellant's participation in this was not at a low level. On the contrary, he was at the top of the hierarchy. These are factors which aggravate the seriousness of the crime and increase the public interest in his deportation significantly.

30. That said, it must also be borne in mind that the appellant satisfied the First-tier Tribunal that he had changed and had in effect been rehabilitated to the extent that there was no realistic prospect of him being convicted of an offence in future. That is not, however, a factor which detracts from the public interest in this case.

31. Weighing these matters, and bearing in mind that a child is affected also, I am satisfied that the public interest is so high in this case that it outweighs the harsh effect on KK and her daughter such that deportation is not unduly harsh. That is not a decision which I reach lightly or without trepidation. I therefore remake the decision by dismissing the appeal.

Notice of Decision

1. The decision of the First-tier Tribunal involved the making of an error of law and I set it aside.

2. I remake the decision by dismissing the appeal on all grounds.

Signed Date: 27 March 2018

Upper Tribunal Judge Rintoul