



Upper Tribunal

**(Immigration and Asylum Chamber)
HU/06482/2019 (P)**

Appeal Number:

THE IMMIGRATION ACTS

Decided under rule 34 (P)

**Decision & Reasons
Promulgated**

On 10 November 2020

On 17 November 2020

Before

UPPER TRIBUNAL JUDGE KEKIĆ

Between

N A M

(ANONYMITY DIRECTION MADE)

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation (by way of written submissions)

For the appellant: None received

**For the respondent: Mr A Tan, Senior Home Office Presenting
Officer**

DECISION AND REASONS

Background

1. This appeal comes before me following the grant of permission to appeal by First-tier Tribunal Judge Simpson on 7 January 2020 (served on 15 January 2020) against the determination of First-tier Tribunal Judge O'Brien, promulgated on 30 October 2019 following a hearing at Birmingham on 15 October 2019.

2. The appellant is a Pakistani national born on 25 February 1981. He was a police officer in Pakistan and married the sponsor, whom he had met a week previously, in Pakistan in November 2008. He entered the UK in November 2010 with leave as a spouse until 26 January 2013. The relationship broke down, his applications for leave as a settled person were refused and he overstayed. On 9 October 2014, he was arrested for an assault on his wife. He was served with an IS151A and required to report to an Immigration Officer but did not do so and was recorded as an absconder. On 21 April 2016, he was once again arrested for assault, served with enforcement papers and released with directions to report to Immigration. On 22 July 2016, he made a private/family life application. This was rejected on 19 August 2016. On 6 September 2016, he was remanded into custody. On 8 February 2017, he was convicted of causing grievous bodily harm with intent for which he received a 6 year prison sentence in March 2017 with a concurrent 12 month sentence for the possession of an offensive weapon. On 29 November 2017, the respondent made a decision to deport the appellant under s.32(5) of the UK Borders Act 2007. The appellant's former representatives made representations on his behalf relying on his relationship with his daughter and on the fact that he and his wife had reconciled. A deportation order was, nevertheless, signed and served on 27 March 2019. That is the decision under appeal.

3. A family friend was the victim of the attack at which time the appellant and his wife were not cohabiting. It is now claimed that they have reconciled and that the appellant has family life with her and their daughter born in November 2009; both are British citizens. His wife also has an adult son from a previous relationship who himself has two children who are presently in care. He has the right to see them for an hour and a half once a week. He was previously arrested for an assault upon his former partner who had been seven months pregnant at the time.

4. The appeal came before First-tier Tribunal Judge O'Brien who heard oral evidence from the appellant and his wife. The judge noted the discrepant evidence of the appellant and his wife and found there was no ongoing subsisting relationship between them. He accepted, however, that the appellant had a subsisting parental relationship with his daughter. He noted that although he may have taken a different view, the respondent had conceded that it would not be reasonable for the child to leave the UK for Pakistan but he found that there were no very compelling

circumstances to render deportation disproportionate and dismissed the appeal.

5. The appellant sought permission to appeal. This was granted on the basis that it was considered arguable that the judge had gone behind the concession made by the respondent that it would be unduly harsh for the appellant's ten year old child to go to Pakistan and that this impacted upon his assessment of proportionality and the child's best interests.

Covid-19 crisis

6. Normally, the matter would have been listed for hearing after the grant of permission, but due to the Covid-19 pandemic and need to take precautions against its spread, this did not happen. Instead, directions were sent to the parties on 17 June 2020. They were asked to present any objections to the matter being dealt with on the papers and to make any further submissions on the error of law issue within certain time limits.

7. The respondent's submissions were received on 3 July 2020 but there was no reply from the appellant. On 18 August 2020 further directions were sent to the appellant directing him to comply but to date there has still been no reply. His representatives withdrew themselves from the court records on 2 September 2020 due their inability, despite their best efforts, to obtain instructions. I note that the directions of 18 August were sent by first class post to the appellant at his Smethwick address and to his then representatives. I note that the representatives have been trying to contact the appellant with a view to obtaining his instructions but without success. In the circumstances, I am satisfied that there has been proper service of both sets of directions.

8. I now consider whether it is appropriate to determine this matter on the papers. In doing so I have regard to the Tribunal Procedure (Upper Tribunal) Rules 2008 (the UT Rules), the judgment of Osborn v The Parole Board [2013] UKSC 61, the Presidential Guidance Note No 1 2020: Arrangements during the Covid-19 pandemic (PGN) and the Senior President's Pilot Practice Direction (PPD). I have regard to the overriding objective which is defined in rule 2 of the Tribunal Procedure (Upper Tribunal) Rules 2008 as being "*to enable the Upper Tribunal to deal with cases fairly and justly*". To this end I have considered that dealing with a case fairly and justly includes: dealing with it in ways that are proportionate to the importance of the case, the complexity of the issues, etc; avoiding unnecessary formality and seeking flexibility in the proceedings; ensuring, so far as practicable, that the parties are able to participate fully in the proceedings; using any special expertise of the Upper Tribunal effectively; and avoiding delay, so far as compatible with proper consideration of the issues (Rule 2(2) UT rules and PGN:5).

9. I have had careful regard to the evidence, the determination, the grounds, the grant of permission and the respondent's submissions. I consider that a full account of the facts are set out in the papers before

the Tribunal, that the arguments for and against the appellant have been clearly set out therein and that the issues to be decided are straightforward. There are no matters arising from the papers which would require clarification and so an oral hearing would not be needed for that purpose. I am satisfied that I am able to fairly and justly deal with this matter without a hearing and now proceed to do so.

Respondent's Submissions

10. For the respondent, Mr Tan opposes the appeal. He submits that the judge properly directed himself and that there are no material errors of law. The appellant's sentence required him to show very compelling circumstances over and above the exceptions set out in the Immigration Rules and s.117C. The judge was entitled to place less weight on the evidence of the sponsor's son who provided a statement but did not attend the hearing. However, the judge's findings on that evidence only formed part of his assessment as a whole. It is submitted that the judge was entitled to take account of the history of domestic violence, the fact that the appellant had denied the charge until just before the trial, the lack of credibility in his evidence and the different explanations given by the appellant and the sponsor for why a baseball bat was kept in the house. On the evidence, the judge was entitled to conclude that the appellant posed a moderate risk but he also found that deportation would be proportionate even if the appellant had presented a low risk of harm. It is pointed out that no challenge was made to that finding.

11. Mr Tan submits that the judge did not go behind the respondent's concession as he clearly found that he did not have to make a finding on whether the child could accompany the appellant to Pakistan. He found that there were no very compelling circumstances and that the appellant's wife and child could remain in the UK following the appellant's deportation. Reference is made to Imran (Section 117C(5); children, unduly harsh) [2020] UKUT 00083 (IAC). Although that decision was promulgated after the hearing, it is submitted that the principle of how the unduly harsh test should be applied is relevant. Mr Tan argues that the child could continue to be cared for by her mother who is her primary carer and who looked after her whilst the appellant was in prison. Nothing in the evidence suggested a particular importance of, or dependence on, the appellant that could not be mitigated by the presence of the mother. The respondent maintains that the judge was entitled to conclude that the circumstances and evidence neither demonstrated a situation of undue harshness or very compelling circumstances over and above the exceptions. The issues raised by the appellant did not come close to the threshold required to succeed to establish a case above the commonplace as per PG (Jamaica) [2019] EWCA Civ 1213 and bearing in mind the appellant had to meet an even more stringent test. The Tribunal is asked to uphold the decision of the First-tier Tribunal Judge.

12. The respondent's Rule 24 reply served on 29 January 2020 makes the same points but in a more succinct manner.

13. No submissions have been received from the appellant.

Discussion and conclusions

14. I have taken account of the evidence, the determination, the grounds, the grant of permission and the submissions in reaching a decision.

15. Permission was granted because it was considered that the judge had arguably gone behind the respondent's concession that it would be unduly harsh for the appellant's child to go to Pakistan if the appellant was deported there (ground 4). There was no restriction placed on arguing the other grounds, however, which were (1) that the judge erred in placing weight on the statement of the absent witness; (2) that in the absence of a probation report the judge was wrong to find that the appellant posed a moderate risk of serious harm to the public; (3) that the judge erred in finding that the assistance the sponsor received from another during the appellant's imprisonment would continue if the appellant was deported and (5) that the judge gave no reasons as to why he concluded that there were no very compelling circumstances and failing to take the balance sheet approach of Hesham Ali [2016] UKSC 60. I deal with each ground in turn.

16. The absent witness was the sponsor's adult son. He had provided a statement. The judge was told that he was visiting his children as he did every Tuesday between 12.30 - 2. The judge noted there was no evidence that he had attempted to alter his visitation time or day and there had been no request to facilitate the taking of his evidence avoiding those hours. He noted that the appeal had been previously adjourned to avoid dates when the sponsor attended hospital for dialysis and considered that Tuesdays could also have been included as a day to avoid. The judge was not satisfied that there was a good reason for the sponsor's son's absence and found that, due to the fact that his evidence could not be tested, he was not prepared to place "*much weight*" upon Upper Tribunal. That was an approach entirely open to him. The apportioning of weight is a matter for each judge and Judge O'Brien explained why he did not accept the claim that the sponsor's son would no longer assist her if the appellant was to be deported when he plainly had been doing so when the appellant was in prison. The judge had regard to the fact that the man was unemployed, had been helping his mother for a prolonged period previously and continued to live in the family home. Notwithstanding his claim in his witness statement that he wants to be rid of his responsibilities towards his mother in order to pursue his own life, it was open to the judge to reject the contention that he would not assist her. There is no error of law in that conclusion.

17. It was for the appellant to provide evidence to show that he was not a risk to the public. There is no evidence of any steps taken to address the offending behaviour and the appellant's violence. No evidence of any rehabilitative programmes was adduced. The judge was entitled to have regard to the nature of the attack and the long history of domestic violence. He took account of the sentencing remarks of the trial judge at Wolverhampton Crown Court. He noted that the appellant had pursued the victim out of the family home with a baseball bat and inflicted a violent attack upon him which resulted in 50 days of hospitalisation and serious life changing injuries. He noted that the appellant had denied the charges until just before the commencement of the trial. He was also entitled to take account of the long history of domestic incidents logged by the police between 2011 and 2014 (as set out in the decision letter) and local authority records of abuse. He had regard to the entirely contradictory explanations given by the appellant and his wife for the presence of a baseball bat in the house and noted the severity of the injuries inflicted on the victim by the appellant (at 50). He concluded that despite the absence of a probation report, the appellant continued to pose a moderate risk to the public (at 50 and 67). The judge did, however, also proceed to consider the situation as it would be if the appellant presented a low risk to the public. He considered DS (India) [2009] EWCA Civ 544 and found that the public interest in deportation of criminals went beyond depriving the offender of the chance to re-offend; it also extended to the deterrence and prevention of crime and to the upholding of the public abhorrence of such offending (at 68). He thus found that deportation was justified even if the appellant was at low risk of re-offending. That was a position open to him on the evidence.

18. The grounds also complain that the judge was wrong to find that the family friend who assisted the appellant's wife, along with her son, during the appellant's incarceration would no longer be willing to help out if the appellant was deported. The judge considered the appellant and sponsor's evidence that the friend would no longer help but found that she and the appellant had sought to downplay his ability to help by claiming he was in Pakistan and that he had moved away. The judge noted that in fact his visit to Pakistan was temporary and that he had only moved a short distance away from the appellant and sponsor (at 54). It was open to him to find that the evidence did not support the claims made and to take account of the fact that the appellant and sponsor had both been found to have given unreliable evidence in other aspects of their accounts. The grounds fail to identify any error of law; they simply express a disagreement with the judge's findings.

19. Ground 4 is the complaint that the judge went behind the respondent's concession that it would be unduly harsh for the child to go to Pakistan. There is no substance to this argument. Firstly, as the appellant was sentenced to six years in prison, the test was whether there were very compelling circumstances over and above the exceptions. Secondly, it is quite plain from the judge's determination that he was fully aware of the respondent's position (as set out in the decision letter) and

that although he did not agree with it, he proceeded on the basis that her departure would be unduly harsh. This is confirmed by his consideration (at paragraph 66) of the impact upon the child of a separation from her father. He had already noted that the appellant regularly collected the child from school and accepted that they had a subsisting relationship. Nevertheless, he considered that the child would be cared for by her mother as she had been during the appellant's incarceration, that they could still visit the appellant albeit not easily, that there was no cogent evidence that her welfare had suffered from the recent lengthy separation from the appellant and that the separation would, therefore, not be unduly harsh (at 66). No evidence was presented as to any particularly harsh impact upon the child to set her apart from any other child who would be separated from a parent by deportation. The judge did not go behind the respondent's position and the grounds are wrong to maintain that he did. Even if he set out his own view on the respondent's stance, he clearly assessed the matter on the latter basis.

20. The fifth and final ground argues that the judge did not give any reasons for why he found there were no very compelling circumstances in the appellant's case. The judge has satisfactorily addressed this in his determination. He weighed the family circumstances against the public interest which is extremely strong in a case such as this. He found that there was nothing in the evidence which suggested a particular dependency upon the appellant, that the sponsor would be assisted by others, and indeed would be able to look to social services for help if required, that the evidence given with respect to the appellant's alleged assistance in taking his wife for her medical appointments had been conflicting, that the sponsor had coped during the appellant's imprisonment and that visits could take place after deportation. Balancing up the appellant's family circumstances against the public interest, it was entirely open to the judge to conclude that deportation was appropriate and proportionate in the present circumstances.

21. I, therefore, conclude that the judge did not err in law and the decision to dismiss the appeal is upheld.

Decision

22. The decision of the First-tier Tribunal does not contain errors of law and it is upheld.

Anonymity

23. The First-tier Tribunal judge did not make an anonymity order but to protect the identity of the appellant's child, and pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, I make an anonymity order.

24. Unless the Upper Tribunal or a court directs otherwise, no reports of these proceedings of any form of publication thereof shall directly or indirectly identify the appellant. This direction applies to, amongst others, the appellant and the respondent. Any failure to comply with this direction could give rise to contempt of court proceedings.

Signed

R. Kekić
Upper Tribunal Judge

Date: 10 November 2020