



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: IA/15775/2015

THE IMMIGRATION ACTS

Heard at: Manchester
On: 15th November 2017

Decision & Reasons Promulgated
On: 18th December 2017

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

KU
(anonymity order made)

Appellant

And

Secretary of State for the Home Department

Respondent

Representation:

For the Appellant: Ms Faryl, Counsel instructed by direct access

For the Respondent: Mr G. Harrison, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The Appellant is a national of Pakistan (dob 1st February 1990) who seeks leave to remain in the United Kingdom on human rights grounds.
2. Although the Respondent accepts that the Appellant does enjoy in this country rights protected by Article 8 ECHR – private and family life – she considers it would nevertheless be proportionate to refuse the Appellant leave, because she

believes that he was complicit in what has become known as the 'ETS fraud': it is the Respondent's case that in 2012 when the Appellant applied for further leave to remain as a student he relied on an English Language test certificate that had been fraudulently procured with the use of a proxy in his spoken language test.

Anonymity Order

3. There is no reason why the Appellant should have his identity protected. This case does however turn in large measure on the evidence of his minor stepdaughter. I am concerned that identification of the Appellant could lead to identification of that child and having had regard to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 and the Presidential Guidance Note No 1 of 2013: Anonymity Orders I therefore consider it appropriate to make an order in the following terms:

“Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings”

Case History and Matters in Issue

4. The procedural history of this matter is as follows.
5. On the 2nd March 2015 the Appellant made an application for leave to remain on the basis of his family life with his British partner DA and her two British children, A and O.
6. The application was rejected by way of letter dated the 8th April 2015. The reason for refusal was the ETS allegation, which meant that the Appellant failed under the 'suitability requirements' set out in Appendix FM of the Immigration Rules.
7. The Appellant exercised his right of appeal to the First-tier Tribunal and the matter came before First-tier Tribunal Judge Heynes, sitting at Manchester. The appeal was dismissed in a determination dated 25th April 2016. In short summary the Judge found that the Appellant had used a proxy, that the ETS allegation was made good and that it would therefore be proportionate to refuse him leave to remain on human rights grounds.
8. The Appellant sought permission to appeal to the Upper Tribunal. He submitted that the First-tier Tribunal had erred in its approach to both the ETS fraud and Article 8.

9. On the 20th October 2016 First-tier Tribunal Judge Keene granted permission to appeal to the Upper Tribunal on limited grounds. He found no arguable error in the decision insofar as it related to the ETS fraud, but he was prepared to grant permission on the grounds that Judge Heynes had erred in his assessment of Article 8, *inter alia* for a failure to make findings on the 'best interests' of O, the Appellant's stepdaughter.
10. The matter was listed in the Upper Tribunal before Deputy Upper Tribunal Judge Hall on the 17th January 2017. At the outset of the hearing Ms Faryl, Counsel for the Appellant, made a renewed oral application for permission to appeal on the 'ETS grounds'. Judge Hall refused to consider that application on the grounds that it was out of time, finding that any renewed application should have been made in writing to the Upper Tribunal within 14 days of Judge Keene's decision being sent. Turning to the extant appeal before him Judge Hall found that Judge Heynes had been entitled to dismiss the appeal with reference to the Immigration Rules (ie as Article 8 is expressed within those Rules). He found however that in its consideration of Article 8 'outwith the Rules' the Tribunal had erred in failing to make any findings on whether the Appellant had a genuine and subsisting parental relationship with his stepdaughter. He therefore set the decision aside with a view to remaking it, and gave his reasons for so doing in a written decision dated the 30th January 2017.
11. On the 3rd February 2017 Ms Faryl made an application in writing to the Upper Tribunal for permission to appeal against the decision of Judge Keene (in refusing permission) and Judge Heynes (in dismissing the appeal on ETS grounds).
12. That application was not dealt with by the Upper Tribunal; although it was placed on the file it was not recorded as having been received and due to administrative error it was not placed before a Judge.
13. The matter was relisted before Judge Hall on the 6th July 2017, who upon being advised of the outstanding application, adjourned proceedings.
14. On the 10th August 2017 the application was placed before Upper Tribunal Judge O'Connor, who was duty judge that day. Judge O'Connor noted that the decision of Judge Heynes no longer exists, since it was set aside by Judge Hall on the 30th January 2017. Judge O'Connor concluded, with reference to s 12 of the Tribunals Courts and Enforcement Act 2007, that it was impermissible for the Upper Tribunal to grant permission to appeal against a decision that no longer existed. Permission was therefore refused. Judge O'Connor went on to note however, citing the decision in Kizhakudan v Secretary of State for the Home Department [2012] EWCA Civ 566, that once a decision of the First-tier Tribunal has been set aside, and a decision has been taken to remake the

decision in the Upper Tribunal, the Upper Tribunal may determine the nature and scope of that remaking. The UT has a wide discretion in that regard. It was not at all clear that Judge Hall had appreciated the extent of his discretion. Judge O'Connor directed that the matter be relisted before another Tribunal so that consideration could be given to the scope of the remaking. In doing so Judge O'Connor observed that the issue of the 'ETS fraud' could not sensibly be divorced from the overall reasoning on Article 8, given that it was the centrepiece of the Respondent's case.

15. The matter was then listed before Deputy Upper Tribunal Judge Alis on the 3rd October 2017. What happened that day is not altogether clear but it would appear that the parties agreed by consent that the ETS issue should be re-opened so that the remaking Tribunal could consider the entire case afresh. The Respondent was that day represented by Senior Presenting Officer Mr Bates, who successfully applied for an adjournment so that the Secretary of State could provide further evidence relating to the ETS allegation.
16. So it was that when the matter came before me the matters in issue were
 - a. Whether the Respondent has demonstrated that the Appellant did rely on a fraudulently obtained language test certificate;
 - b. If that burden was not discharged whether the Appellant could succeed with reference to Appendix FM of the Immigration Rules;
 - c. If he could not whether the refusal to grant him leave would nevertheless disproportionately interfere with protected Article 8 rights in this country.
17. At the hearing I heard evidence first from the Appellant, then from his wife Ms DA, and finally, and very helpfully, from his stepdaughter O. I then heard submissions from the parties and I reserved my decision.

Discussion and Findings

ETS

18. I remind myself of the proper approach to the analysis of allegations of fraud of this nature, as set out in numerous decisions including SM and Qadir (ETS-evidence- burden of proof) [2016] UKUT 229 (IAC) and more recently in Ahsan and Ors v Secretary of State for the Home Department [2017] EWCA Civ 2009. It is for the Secretary of State for the Home Department to provide some evidence of wrongdoing, of sufficient cogency to discharge the evidential burden of proof. It is then for the Appellant to respond to that evidence by providing his own explanation as to what took place. In the final analysis I must weigh the Secretary of State's evidence against the "innocent explanation"

provided by the Appellant, and reach my own decision on the evidence presented. The final, legal, burden lies on the Secretary of State and although the standard is the ordinary civil standard, she must meet that test with the production of evidence that can prove her case at the higher end of the spectrum of the “balance of probabilities”.

19. I find that in this case the evidential burden has plainly been discharged. The Respondent has produced the following evidence, which Ms Faryl accepts, in light of caselaw relating to the ETS fraud, must be taken to discharge the initial burden:

- Statements of Rebecca Collins and Peter Millington
- Expert Report of Professor Peter French
- ‘ETS look-up tool’ detailing the date, location (Darwin College) and outcome (invalid) of the Appellant’s ETS language test
- ‘ETS look-up tool’ detailing the summary outcome of all English language tests taken on the 11th July 2012 at Darwin College

20. The Appellant maintained before me that he took his own test. He said that he did not need to use a proxy because he speaks very good English. He went to the test centre on the appointed day. He had with him in his passport, and DVLA provisional licence as identification documents. They stood him against a white wall to get a clear photograph of him. There were 12-15 guys waiting. They asked the men to come to the “quiet zone” where there were banks of computers. The tests took 2 hours altogether, for the four components. People around him were speaking but he could not really hear what they were saying because everyone had headphones on. The Appellant could not recall the order in which the tests were taken but he recalled getting the results from the college some time later. He had no idea of the allegation until he got the “amazing” letter from the Home Office refusing leave on human rights grounds. He asked me to note, which I did, that he speaks exceptionally good English (his live evidence was given in fluent English with an obvious Lancashire/Manchester accent). This was the Appellant’s evidence before me. In his statement drafted for the appeal before the First-tier Tribunal, however, he gave markedly different evidence:

“In August 2012, I applied to Darwin College to study Diploma in Business Studies. As my ESOL result from City and Guilds was pending by that time, I was advised by the college to book English language test with Educational Testing Service (ETS) through their test centre for quick results to avoid being overstayed as my leave was to expire on 11 August 2012. I took their advice and booked the test. On the day of the test the college advised me that I did not need to take the spoken English test because I already had passed it in June 2012. My leave was extended until 20th December 2013.

If I had known that the college will arrange a proxy to accommodate a few of candidates, I would not accept their advice at all because I could pass spoken English test very easily as I have had adequate knowledge and command of English language which is established through my previous English language test results of 2012. However, I regret on this unintentional and innocent mistake and submit my absolute apology”.

21. When asked to explain why in the statement he appeared to admit to having not taken the test personally, the Appellant denied having given that statement. He pointed to the poor English in the statement itself (and the comparable grammatical errors in the ‘statement’ of his British wife) and said that the statements had been drafted by his then solicitor. He had not checked it properly before he had signed it - he had assumed that it would reflect what he had told the solicitor.
22. I have considered the Appellant’s explanation for fact that ETS have determined his speaking test result to be ‘invalid’. I have placed some weight on his ability to describe in some detail the process at the test centre. I have borne in mind that insofar as his relationship with his partner and stepdaughter are concerned, I found him to be credible. I have borne in mind that he does indeed speak good English, and that when his City & Guilds result came through, he had indeed passed. I have held at the forefront of my mind the fact that mistakes can happen, and that expert analysis has shown that in the case of the ETS fraud this has included a small, but significant, number of ‘false positives’.
23. Against those matters I weigh the following. The ‘look-up tool’ specifically identifies the Appellant, and the fact that the test centre was Darwin College. The ETS information shows that of the 13 tests taken at Darwin College on that day 1 was deemed “questionable” and the remaining 12, including this one, were deemed “invalid”. This is therefore a test centre where a very high rate of fraud was detected. I note that the Appellant has claimed to have been photographed on the day of the test, and yet has made no attempt to recover that photograph, nor to obtain the recording of what he says is his voice: MA (ETS- TOIEC testing) [2016] UKUT 00450 (IAC). I must also place considerable weight on the fact that the Appellant has given plainly discrepant evidence on this matter. I accept Ms Faryl’s submission that the witness statements were obviously drafted by the same person, in poor and grammatically incorrect English. That does not change the fact that the Appellant signed that statement. He is an intelligent man, whom as he stresses, has a good command of English. I do not accept that he would have signed such an important document without reading it. I find that the more likely explanation for the discrepancy is that the Appellant decided to admit to having not taken the test, and sought to place the blame on the centre, but later changed his mind. As to his ability to speak English, it is of course the case that people chose to use proxies for many

reasons. Those reasons include lack of confidence (admittedly unlikely in this case), lack of time and commitment, and contempt for the system. Having considered all of that evidence I am satisfied that the legal burden on the Secretary of state has been discharged. I find that on the 11th July 2012 the Appellant's English language speaking test was taken by a proxy, and that he must have known that to be the case when he later relied on that certificate in order to extend his leave to remain.

Article 8: Appendix FM

24. The parties were in agreement that I must begin my Article 8 assessment with reference to the Immigration Rules, since those Rules now reflect parliament's view of where the balance should be struck in terms of what constitutes a family life and when it will be generally be disproportionate to expect someone to leave the UK.
25. The parties were also in agreement that if the Respondent discharged the burden of proof in respect of the ETS allegation, the Appellant's claim 'under the rules' would necessarily fail, because the Respondent has invoked the 'suitability' criteria at S-LTRP.1.6:

S-LTR.1.6. The presence of the applicant in the UK is not conducive to the public good because their conduct (including convictions which do not fall within paragraphs S-LTR.1.3. to 1.5.), character, associations, or other reasons, make it undesirable to allow them to remain in the UK.

26. Although reliance on this provision is a decision susceptible to challenge in this Tribunal (unlike comparable statutory mandates applicable to foreign criminals) Ms Faryl did not contest its application here. The Appellant cannot therefore succeed under the Rules.

Article 8

The Evidence

27. The Respondent accepts that Appendix FM is not a 'complete code' and that the United Kingdom's obligations under the ECHR leave scope for consideration of its articles outwith that framework. She further accepts that it would be possible, albeit extremely unusual, for someone who has failed under 'suitability' criteria such as S-LTRP.1.6 to nevertheless succeed on Article 8 grounds. It would be extremely unusual because the weight to be attached to the public interest (in refusing leave) would in these circumstances be very great indeed. It is considerably greater than the public interest in removing an overstayer *simpliciter*, and would be approaching the weight to be attached to deporting a foreign criminal. Whilst the Appellant has not been convicted of a

crime, and the charge against him was not proven to the criminal standard, the fact remains that fraud is a crime. In this context it is a crime that was deliberately designed to undermine the system of immigration control that exists not just for the benefit of citizens of this country, but of migrants who seek to study, visit, work and live here. I bear that in mind throughout my consideration of Article 8.

28. I had the benefit of hearing extensive evidence from DA, and from her daughter O who is only 12 years old. I also heard from the Appellant himself. I had regard to their written evidence, and to supporting material in the bundle. I found DA and O to be intelligent, informed and wholly credible women. They spoke openly, and at times movingly, about the situation that they have found themselves in, and the consequences for them if the Appellant were to have to return to Pakistan.
29. DA split up from her husband M in approximately 2009. It had long been an unhappy marriage. In early 2014 she was invited to dinner at a friend's house and it was there that she met the Appellant. They chatted a lot that night and saw each other frequently after that. By July 2014 they were in a committed relationship. He moved into the family home in September of that year. They had planned to marry in May 2015 but that was all "turned upside down" by the Home Office letter accusing him of deception and refusing him further leave. DA states that she was "devastated" by this news. Although she had known that the Appellant was on a student visa it had not occurred to her that he might not be able to stay with her in this country. They had been married under Islamic law in March 2015 but she had wanted a big English wedding - "bridesmaids and everything" but this was put on hold because of the Home Office investigation. In the end they were married in a quiet ceremony in July 2015. Obviously they cannot travel while all of this is going on. This has been hard for him because his grandmother passed away in Pakistan and he was unable to go to the funeral or see his family. DA said that she has only "met" his family over Skype - her Pushto is not very good so there is a lot of smiling and hand waving. The Appellant himself avers that he is committed to DA and he feels terrible that he has put her through all of this because he is an "immigrant". He loves her and he wishes he could have given her the wedding she wanted.
30. At the time that DA met the Appellant she was a single mother of two children. Her daughter O had been born in February 2005 so was at that point 9 years old. Her son A had been born in October 1997 and so was 16. She maintained a reasonable relationship with her ex-husband M and the children saw him regularly. After the break up A had remained living with his father (for reasons explained below) but this was only round the corner so she still saw him every day. O has always lived with her. From DA's perspective the Appellant is an asset to her family. In her statement she uses striking language about his relationship with O and A: "they respect him more than their own dad". When

asked whether she stood by that statement she emphatically agreed that she did. She said that her ex-husband is not a bad father but he doesn't really think sometimes. He currently has a new partner who the children do not like at all. He doesn't put them first whereas the Appellant does.

31. I was told that A is on the autistic spectrum. Although he is now 20 he remains in full time education, does not live independently and remains very much dependent on his immediate family for support. He struggles to go out of the house and finds it difficult to deal with new situations. Although he is technically an adult for those reasons I proceed on the basis that he remains an integral part of this family: Mr Harrison accepted, applying the *Kugathas* ratio, that this would be the proper approach.
32. A 'likes what he knows' and that is why it was decided that he should stay in the family home when DA and O moved out. They only moved around the corner and have remained in daily contact. He is very close to DA and O. It took a while for A to build a relationship with the Appellant but now they are very close. They play badminton together, sit for hours on the Playstation and mess around - A is into heavy metal and wears his hair long, and O described to me a recent funny scenario where the Appellant used hair products and straighteners to do A's hair. He teaches him to look after himself. O says that her brother really values his relationship with the Appellant. They get on really well. He feels that the Appellant understands him. This was contrasted, by both DA and O, with the way that M's new girlfriend (now fiancé), and to a certain extent M, behave. DA said that A's relationship with his father has been good but it has been put under strain in the past couple of years by his new relationship. The new girlfriend does not understand A or empathise with his condition. She is quite dismissive of it. There was a recent incident in which M and his fiancé were taking the kids out to a restaurant. As they drove up to the restaurant A could see that it was really busy inside and he became scared. He said to his dad that he was really sorry, he didn't want to spoil the evening but he couldn't actually go into the restaurant because it was so hectic. O said that her father's fiancé responded "oh don't play the autistic card with me". A and O both got out of the back of the car and started to walk home. They called DA and she came and picked them up from the street. M and his fiancé went on to have their meal. Incidents like that have led to the decision that A should now move permanently to live with DA and the Appellant. His father travels a lot and no-one is comfortable with him remaining in the house on his own with this lady who does not seem to understand his particular needs.
33. A has written a letter to the Tribunal, which I have taken fully into account albeit that he was unable to attend the hearing. A's evidence is as follows:

"When I first met [the Appellant] I said to my mum I hope he has a beard because men with beards are very trustworthy. I was glad he did have a beard but I was right with my comment because [the

Appellant] has become more of a dad to me than my own dad. [The Appellant] understands my condition very well. I have an Autistic Spectrum Disorder and I find it very difficult to meet new people and to talk to people that I don't know. There are several other factors in my condition that my mum and [the Appellant] manage very well. When I am at my mums [the Appellant] will ask me to play racing games and we have also played badminton a few times on our own because of my social anxiety. I have accepted [the Appellant] as a father to me and I would be very upset if was to have to leave us. I wouldn't be able to trust anyone else like I trust [the Appellant]. I know that my sister would also be devastated if he was to leave because she adores him"

34. The Appellant himself said that he knows that A has a good relationship with his father whom the Appellant describes as a "good guy". He says that he relates to A as a friend. He calls him 'pal' and A likes this. A stays with DA and the Appellant two nights a week at present but they would like him to move there permanently once they can sort out more room. The Appellant said he and DA love A very much and they want him to feel at home there.
35. No issue was taken with the evidence of A's autism. It was supported by a letter from the Cognitive Behavioural Therapist that A has been referred to, a Mr Paul Smithson, who lists the challenges faced by A as including "difficulties with social interaction, a strong preference for set routines, moderate anxiety, worried about future independence, longstanding difficulties in making and maintaining friendships, sensitivity to changes in routine, actively avoiding social situations".
36. DA told me that the Appellant and O have had a warm relationship since they met. When she was in primary school he would attend her assemblies and "little plays" when DA was unable to, and he takes her on day trips, for instance he took her to the Manchester United museum. Since they moved her journey to school is a long one - she needs to get two different trams and although she will soon start making that journey on her own (she is now in year 8 at secondary school) he has done it with her every day since she started so that she gets used to it.
37. Prior to the hearing O had written a letter to the Tribunal in which she said this:

"When my mum and dad split up I never thought I would be happy again. I moved out with my mum, a little while after my mum said she had met someone nice she said I could meet him that weekend if I wanted to. I did find it a little strange because it wasn't my dad. We went out to a curry place for food and [the Appellant] was showing me how to fold napkins into swans and fans. I thought he was amazing and I couldn't wait to tell me friends how nice he was. Not

long after Mum told me that [they] were getting married and he moved in. We are a very happy family [the Appellant] takes me to school and picks me up from friends or school. He takes me out in the holidays and gets me shakes at the local shop. I love [the Appellant] very much, more than my own dad because of how nice he is to me. My dad has a new girlfriend and spends more time with her than he does with me and my brother. My own dad doesn't seem to have time to spend with us anymore..."

When she gave her evidence I asked O if she had written that letter herself. She confirmed that she had and she said that she meant it and she "doesn't want him to go". She said that her brother really relies on the Appellant and that is important because he's not comfortable with everyone. I specifically asked her whether she thought that she loved the Appellant more than she loved her own dad, and asked her to consider that for a moment: she did, and then said that although she does love her dad she does not love his fiancé and that she and her brother have found it difficult because their dad gives her more of his time now. The Appellant always has time for them.

38. The Appellant describes O as a "little monkey" whom he loves like a daughter. It does not matter to him that she is not his biological child. He has seen her grow up and is very proud of her.
39. In addition to this evidence from the immediate family, I was also given letters in support by five witnesses. The first was from J, DA's mother. J states that the Appellant has a "father type relationship" with the children and that they love him very much. In particular she is very pleased about the Appellant's relationship with A: they have a really strong bond and this is important because A does not find it easy to relate to people. In her view it would "destroy" the Appellant and "crucify" her grandchildren if he is not allowed to stay with them.
40. The second letter is from Z, a friend of the Appellant's. Z states that in his experience the family have a strong bond and that they are very happy together. The children have accepted him, and he has accepted them as his own. It would break their hearts if he had to leave.
41. I was given a letter each from two of DA's close female friends who have both known her for a long time (15 and 20 years respectively). They both comment on the quality of the relationship that the Appellant has with DA's children, particularly the support he gives for his "best friend" A. They describe the marriage as a "loving" one.
42. The final letter came, importantly, from M, the father of A and O. M states that he knows that the Appellant has adapted to the role of stepfather very well. M is confident that the Appellant loves his children and he knows that he has

developed a strong bond with both of them. A in particular has problems forming relationships but has done so with the Appellant. In M's view it would "devastate" the kids if the Appellant was not permitted to stay.

My Findings

43. I have no doubt that the Appellant enjoys a family life with DA and her children. Having heard their evidence Mr Harrison made no submission to the contrary; I note that a more cynical man might have suggested that the Appellant was using DA in order to secure leave to remain in the UK. I have discounted that possibility. DA herself is clearly no fool. She is an intelligent professional woman who clearly understands the implications of having a relationship with someone who is subject to immigration control. Importantly, it is a relationship endorsed by two old friends and her mother, the very people could be relied upon to intervene if they thought she was being taken for a ride. I am satisfied that this marriage is a genuine and subsisting one.
44. I am further satisfied that the Appellant has a genuine and subsisting 'parental relationship' with O, and with A. With O the evidence is clear. DA, O's maternal grandmother, O's biological father, A, O herself as well as three family friends describe her relationship with the Appellant in those terms. They have a strong bond, she trusts him and relies on him, he does things for her that a father would do for a daughter. It does not detract from her relationship with her natural father, but I am satisfied that the Appellant, as her stepfather, is playing a paternal role. In respect of A the evidence was of a slightly different tone. It was the Appellant's candid evidence that he thinks of A as his "best friend". It seemed to me that the Appellant was careful not to 'tread on the toes' of M when it came to A. He was at pains to say that he thought A had a good relationship with his father, and that M was a "good guy". He described A as "his pal". No doubt that is because A is that bit older, and they enjoy doing things together - playing sports and video games - as equals. I note however that everyone else involved in this family spoke of the Appellant's particular bond with A, and again, the evidence was expressed in terms of father-son relationship. I have given especial weight to the evidence of A himself that he loves the Appellant and that the Appellant is like a father to him.
45. I am satisfied that the decision to refuse leave to the Appellant is an interference with his family life. There is no issue taken with the Respondent's legal power to take the decision she has, and it is accepted that it is in the public interest that the Secretary of State denies leave to those who do not qualify under the Rules.
46. I turn to deal with proportionality. Here I am required to balance the Appellant's rights - and those of his family members - against the public interest in removing individuals who do not qualify for leave under the Rules. As I note above the Appellant has been refused leave to remain because he

relied upon an English language test certificate that was fraudulently procured. It is important that I underline that fact, because in the balancing exercise it matters *why* he is being removed. The maintenance of proper immigration control is in the public interest: s117B(i) Nationality, Immigration and Asylum Act 2002. I am therefore obliged to attach significant weight to the public interest in considering the claims of person who cannot meet the terms of the Rules. If those individuals have behaved poorly – in terms of their conduct or associations – since they came to the UK then that weight is obviously increased. It is increased yet further if the individual has been sent to prison for committing a criminal offence: anyone receiving a sentence of between 12 months and 4 years would have to show that the impact of removal would be “unduly harsh” on their children. At the very far end of the scale are those criminals who have received a sentence of four years or more, where only “very compelling circumstances *over and above*” it being unduly harsh for the children would count, a very high test indeed.

47. Where does the Appellant lie on that spectrum? Probably somewhere in the middle, but for the purpose of my decision I need not identify exactly where, since I am satisfied on the evidence before me that the Appellant would still succeed in his appeal even if he were required to discharge the onerous burden placed on those facing deportation.
48. I am satisfied that it would be ‘unduly harsh’ for O to go and live in Pakistan. Much was made by the Appellant of the ‘conservative’ nature of his home town of Mingaora in the Swat Valley, where he suggested that DA and O might be at risk from extremists, including members of his extended family. This to me seemed unlikely in light of DA’s evidence that she has been warmly welcomed by his parents and the fact that the couple have undergone a *nikah* and so are married under Islamic law. I was given no objective evidence whatsoever to demonstrate that the wife and stepchild of a local might be at risk simply for being foreign. I am satisfied however that it would be extremely difficult for O to integrate there. Neither she nor her mother are remotely religious, and beyond simple greetings neither speak a word of Pushto. They would have to adjust to the severe restrictions placed on women, in terms of access to education, employment and even basic freedom of movement. They would have to leave behind their established private lives in the UK, and very likely, A. It would be extremely difficult for A to move. Like his mother and sister he would face the substantial barriers of culture, religion and language, but unlike them would have the additional challenge of facing an entirely alien environment as an autistic person. I accept the evidence that A finds it distressing coping with even very small change. I think it extremely, extremely unlikely that A would move. I think that the impact on O and DA of leaving A behind would be very substantial. If I need to elaborate I would say that the impact would be excessive, and inordinately bleak for this close knit family. Having balanced those matters against the substantial weight to be attached to the public interest in removing the Appellant, I find it to be ‘unduly harsh’.

49. I am further satisfied that it would be 'unduly harsh' to expect A and O to remain here without the Appellant. The evidence before me was of children who at one point (in O's words) did not think that they would ever be happy again. Divorce happens so frequently nowadays that it is easy to forget the devastating impact that it can have on children, even when managed in the apparently mature and civilised fashion that it was by DA and M. O made it clear to me that it was the Appellant who has made her feel that she was part of a whole family once again. She is obviously very devoted to him and he to her. In respect of A the evidence was, from all concerned, that it is very difficult for him to communicate with, and trust, others. And yet he has built a strong relationship of trust with the Appellant. His own father believes that A would be "devastated" if the Appellant were to be removed and there was no evidence before me to contradict that powerful assessment. Ultimately I am asked to decide whether these children should pay the price for the fact that the Appellant was foolish enough to use a proxy test taker back in 2012. Having considered all of the evidence before me I find that they should not. Even when balanced against the very substantial public interest in his removal, their best interests prevail: it would be unduly harsh to expect the children to live without him now.
50. This is not a deportation, but on the evidence I find that the Appellant could meet that higher test. In light of those findings it must be disproportionate to refuse him leave to remain on human rights grounds.

Decision and Directions

51. The decision of the First-tier Tribunal is set aside.
52. The appeal is allowed on human rights grounds.
53. There is an order for anonymity.



Upper Tribunal Judge Bruce
14th December 2017