



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

Appeal Number: HU/06837/2017

THE IMMIGRATION ACTS

**Heard at Birmingham CJC
On 19 October 2018**

**Decision & Reasons
Promulgated
On 09 November 2018**

Before

UPPER TRIBUNAL JUDGE ALLEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**MR M T
(ANONYMITY DIRECTION MADE)**

Respondent

Representation:

For the Appellant: Ms H Aboni, Home Office Presenting Officer

For the Respondent: Mr W Khan, instructed by Fountain Solicitors

DECISION AND REASONS

1. This is the Secretary of State's appeal against the decision of a Judge of the First-tier Tribunal allowing the appeal of P since he was anonymised who I will refer to hereafter as the appellant as he was at that point and to the Secretary of State as the respondent allowing his appeal against a decision of 13 June 2017 refusing his human rights claim following the decision to deport him dated 10 November 2016.

2. Rather than going through what the judge had to say at the outset I will go straight to what was said in the challenge to the decision and then relate that to the judge's findings and the submissions that have been made by the representatives. The first and main ground of challenge was that the judge misapplied the undue harshness test under section 117C of the 2002 Nationality, Immigration and Asylum Act and here it was said that the judge had allowed the appeal based on the undue harshness effects of the appellant's deportation on his children and had failed to identify anything exceptional without weighing the compelling public interest in his removal referred to at paragraph 46 of the judgment.
3. The point was also made that the judge had failed to consider section 117C and had erred by going against established case law and also it was argued that the judge had gone against the case law in stating that the children's best interests always take precedence over the wider public interest and it was argued there was nothing exceptional about the various health and education difficulties relied on by the family. As regards the fact that his daughter attends a special school there was no suggestion that social services would not provide the required support if necessary and the judge appeared to have taken the family's evidence at face value.
4. It was argued that the judge had incorrectly attributed significant weight to the appellant's rehabilitation and remorse when finding out that these were compelling circumstances outweighing deportation and it was said that this did not properly take into account OH (Serbia) on the point of the risk of reoffending being one facet of the public interest, but there were also other relevant and important matters.
5. More importantly even in a case of very serious crime, deterrence and an expression of society's revulsion at serious crimes and in building public confidence in the treatment of foreign citizens who have committed serious crimes were important and then it was said that at paragraph 45 the judge had failed to cite any evidence of the long term effects on the children's development and it was essentially speculation. As a consequence the judge had misapplied the meaning of undue harshness. Permission was granted on all grounds by a Judge of the First-tier Tribunal.
6. It is relevant to mention before going on to submissions and the details of the judge's findings that there is a Rule 24 response on behalf of the appellant where it is argued that the judge's findings on undue harshness are perfectly sound, are consistent with case law as setting out in for example OH (Serbia) and that although section 117C was not considered the exactly parallel provisions in paragraph 399 of the Immigration Rules were properly considered and the balancing exercise had been appropriately carried out.
7. I turn then to the judge's decision and reasons. The index offence in this case is the conviction of 31 October for sexual assault on a female for

which the appellant was sentenced to fifteen months' imprisonment and required to sign the sex offenders' register for seven years and the judge noted the sentencing remarks at paragraph 12 of her decision with reference to the predatory nature of his actions and the breach of trust involved given that he was a taxi driver who should have been providing his passenger with safe passage to her home when she was so vulnerable.

8. The judge had previously set out the legal tests and in particular what I think is common ground is the appropriate test in a case such as this where the sentence is less than four years that it is a question of whether the impact of separation on the family members of the appellant of them remaining in the United Kingdom and him being deported to Pakistan would be unduly harsh. Ms Aboni says and I think that is the general position of the Secretary of State that there would be no question of expecting the family to go to Pakistan and join him if he were deported: they are all British citizens after all.
9. The judge then looked at the legal tests, having looked at the sentencing remarks set out and the OASys Report where the risk of reoffending was assessed was low although the level of harm to the public and children if he did reoffend was assessed as medium and the point was noted that he is on the sex offenders' register, and therefore subject to ongoing supervision and monitoring. He lost his taxi driver's licence and there was reference also to a message he sent to the victim on the following morning showing his complete inability to show any empathy to the victim of the assault. He was still firmly denying the offences at the date of the OASys Assessment, however his behaviour in custody was described as exemplary and there were no courses available while in custody to work on his attitude, skills and behaviour especially towards women.
10. There is then a letter of 12 October 2018 from a probation officer who said he had been keeping his appointments, there was good and open engagement from him, he was fully compliant with all the ongoing risk assessments and he was engaging in long time work in particular in relation to work intended for low risk sexual offenders. The probation officer's view was that he had showed clear strategies for himself to avoid and prevent further offending, and concluded that there were strong protective factors in his personal circumstances, that being the current strong support he had from his family and him towards them.
11. The judge then went on to set out factors favouring the allowing of the appeal and factors in favour of dismissing the appeal and the factors largely in favour of allowing the appeal were the circumstances of the family members in particular his wife who suffers from neuropathic pain, noting also the circumstances of the two adult children, his stepson and son, and the daughter S and the history she has of anxiety, depression and self-harm. She has been diagnosed as being on the autistic spectrum. She attends a special school, having been out of school for a time as a school refuser, at a different school less suited to her needs. Her school

attendance has increased at the current school and the son who has a number of health problems had become a school refuser while his father was in prison but he did seem to have resumed attendance albeit not for a full school day.

12. The judge noted that the appellant had lived in the United Kingdom for eighteen years, his residence had been lawful at all times, he had still some family in Pakistan whom he visited most recently eighteen months ago. He had been convicted of only the one offence, his family knew of the incident and would play a supervisory role to ensure there was no repeat of any such behaviour noting the fact of him being on the sex offenders' register, the risk of offending assessment including the engagement of probation services, the regret he expressed as recorded in a letter from the mosque and in his witness statement and the fact that it was assessed that the best interests of the children lay in remaining in the United Kingdom as the only home that they had ever known and they would not get the kind of support that they would in Pakistan.
13. The judge then went on to list the factors in favour of dismissing the appeal and it was noting the public interest in removing foreign criminals thereby eliminating further risk to the public, the nature of the offence, a nasty predatory offence and abuse of trust, the maintenance of innocence in December 2016, a lack of understanding and the impact on the victim, a medium risk in the community, children and the public should he reoffend albeit the risk of reoffending was low and noting an incident in 2011 where he was arrested but no further action was taken and the discriminatory attitude towards women disclosed in the OASys Report.
14. The judge noted then going on to the witness statements from family members and friends and relatives and again reminded herself of the legal test and then gave detailed consideration to the situation of the daughter. Passing over the repetition of the difficulty she would experience going to Pakistan the judge considered that she very much needed all the support she could get from both of her parents. Wherever she was the evidence showed she was very reliant on her mother to function day-to-day, her routine would be upset yet again by the removal once more of her father from the family unit and this would have an adverse impact on her directly and by reason of the impact on the whole family if he were required to return to Pakistan without the family. On the balance of probabilities this would lead to a deterioration in her mental health, increase the risk of her repeating her self-harming behaviour and would impact adversely on her educational performance and the decision in her regard would therefore be unduly harsh taking full account of the strong public interest in the appellant's removal from the United Kingdom the protection the public from reoffending, deterrence, public revulsion and his behaviour towards an innocent and vulnerable individual and the breach of trust involved.
15. The judge then went on to consider the situation of the son and again taking into account all the evidence set out above and recognising the

strong public interest against the protection of the public deterrence and public revulsion it would be unduly harsh for him to remain in the United Kingdom without his father or to relocate to Pakistan to live with him there. The appellant, she found, has a strong subsisting parental relationship with both children, they rely heavily on the emotional and practical stability he brings to the household and the judge went on to accept that he has a strong and subsisting relationship with his wife who knows of his behaviour and will provide additional supervision to ensure he never again behaves towards other women as he has done in the past. Noting her own health problems and the fact she had only briefly been to Pakistan over the last twenty years the judge was satisfied that it would be unduly harsh for her because of compelling circumstances over and above those described in EX.2 for her to relocate to Pakistan to continue her family life with him there.

16. The challenge is essentially a challenge to the judge's findings on undue hardship and I have set out the grounds and points that were made there which were developed also by Ms Aboni with regard to the argument that there is a lack of reasoning to conclude as the judge did about the public interest, she did not say why the family matters outweighed the public interest and that therefore there was a lack of reasoning.
17. The grounds make a point with regard to the best interests of the children and it is a little difficult to understand ground 4 but if it is said there that the judge made the best interests of the children the determinative factor then I do not think that is a proper interpretation of the decision. The judge certainly identified what the children's best interests were and came to conclusions on those which I think are accepted on behalf of the respondent that their best interests remain in staying in the United Kingdom but of course as the law is clear that is not and cannot be a determinative factor.
18. It is clearly a matter of significant weight but it does not decide things. But the judge did not say that it was a decisive matter and I think wisely she set out the factors in favour of allowing the appeal and the factors against allowing the appeal in her evaluation of whether or not the appellant's removal would be unduly harsh on the family. She also properly considered the impact on the three particular individuals, the daughter, the son and the wife and came to conclusions in relation to them and in each case in each of those three paragraphs 43, 44 and 46 the judge properly reminded herself not only of the factor of the public interest but the detail of it. It is not just a matter of the judge attaching weight to the risk of reoffending. Certainly she took that into account but she also took into account very clearly in each of those paragraphs deterrence and public revulsion at the appellant's behaviour. There is as can be seen from the setting out of the adverse factors no sense in which the judge can be said to have omitted from her consideration any of the relevant issues in this case.

19. It is not I think necessarily a decision to which every judge would have come but an error of law is not to be identified by way of disagreement only and it seems to me in the end that what is expressed in the grounds of appeal in this case is no more than a disagreement. I have not been able to identify any point in which the judge can be said to have erred in law in her evaluation of the balance to be carried out in this case. Undue harshness is a matter which essentially has to be determined on the facts of each case and the judge carried out a proper balance in this case looking carefully at the relevant public interest factors balancing those against the factors in the appellant's favour and came to a finding on undue harshness in line as Mr Khan says with if not the specific wording as such or specific reference to section 117C as such she simply relied on the exactly parallel provisions in the Immigration Rules so there can be no error in that regard.
20. So as a consequence I consider that it has not been shown that the judge erred in law in her reasoning or conclusions in this case and as a consequence her decision allowing the appeal is maintained.

Direction Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

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 their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.



Signed

Date: 31 October 2018

Upper Tribunal Judge Allen