



**Upper Tribunal
(Immigration and Asylum Chamber)
HU/02515/2019**

Appeal Number:

THE IMMIGRATION ACTS

**Heard at Birmingham Employment
Tribunal
on 24 October 2019**

**Decision & Reasons
Promulgated
on 4 November 2019**

Before

UPPER TRIBUNAL JUDGE HANSON

Between

**MUNTAZ AHMED
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr S Woodhouse of Sultan Lloyd Solicitors.

For the Respondent: Mrs H Aboni Senior Home Office Presenting Officer.

ERROR OF LAW FINDING AND REASONS

1. The appellant appeals with permission a decision of First-Tier Tribunal Judge Lawrence promulgated on 1 July 2019 in which the Judge dismissed the appellant's appeal on human rights grounds relied upon by the appellant as an exception to the decision to deport him from the United Kingdom pursuant to UK Borders Act 2007.

Background

2. The appellant is a citizen of Pakistan born on 20 March 1974 who entered the United Kingdom lawfully on 20 March 1998 as the spouse of a B, a British national. On 28 April 1999 the appellant was granted indefinite leave to remain. The couple have four children born in

December 1995, January 1999, July 2000 and November 2008, meaning only the youngest, [M], was a minor at the date of the hearing before the Judge.

3. The appellant is the subject of an order for his deportation from the United Kingdom following a conviction on 27 April 2018 of Possession of Bladed Article for which he was sentenced to 14 months imprisonment. The applicant was also convicted of Failing to Surrender (Bail Offence) in relation to his Crown Court trial for which he received a one-month period of imprisonment, totalling 15 months.
4. The Judge's sentencing remarks noted the first offence related to the possession of a bladed article in a public place, namely at Attwood Close, in Birmingham. The Sentencing Judge records being satisfied that the appellant threatened a Mr Ali with a knife, but that threat was not made in such a way that there was an immediate risk of serious harm to another. The details of the offence recorded by the Sentencing Judge is as follows:

"As to the background, the incident on 26 May, there was some hostility between you towards Mr Ali and his family who were neighbours in Attwood Close in Washwood Heath. At about 5 o'clock that evening, Mr Ali and his wife and some of their children walked past your front door in order to visit a neighbour.

Mr Ali described how he could see you stood on your doorstep as they walked past number 8 where you were then resident, holding the large pink handled knife which was later recovered, at that time cleaning your nails with it but looking at Mr Ali as you did so. Mr Ali told his wife to ignore you and to carry on walking and they walked down the street.

On the evidence, you came out of your house, down the pathway, and started to follow behind them. You still had the knife and when Mr Ali turned round to see why you were following them, you are gripping the handle tightly, saying, "You're fucking with me. I'll fuck with you".

You were plainly in an angry mood and you were threatening him, saying, "I will do it. What are you gonna do?" You were an arm's length away and Mr Ali feared that you may stab him. You did not do so.

Another neighbour came out, confronted you, ask what you were doing with a knife and told you to put it down. You wouldn't listen to him and so that neighbour grabbed you in an arm lock and was able to wrestle you to the ground, making you release your grip from the knife and was able to throw it some distance away under a silver car.

That neighbour told you that if you calmed down he would let you go. You did calm down and so he released you. But you then ran straight to the car and got the knife again. The neighbour managed to grab you again and, together with Mr Ali, they wrestled you to put you down on the ground again.

You were still gripping the knife. They were trying to disarm you and in the course of that Mr Ali received cuts to his hand. It was a small nick but it can be seen on the photographs on the system. They had to keep you down on the ground until the police arrived whilst you were still struggling.

Mr Ali described having been scared, having never been in this sort of situation before, having thought you were going to stab him and plainly being frightened by the episode. His wife and children had been present and watching. She described you having been very angry, threatening them with

the knife and saying that you would do whatever “I’m going to show you. Watch watch”.

She describes her kids having been at the front door. She had previously taken the toddler out of the way when the trouble started but she described them panicking with the kids screaming and crying, watching what was going on and she described that, thereafter, they were terrified to leave their house.

5. The Sentencing Judge noted the appellant had no previous convictions and that since the event he and his wife had separated but found an immediate custodial sentence appropriate and justified in all the circumstances.
6. The Judge in the decision under challenge noted the Sentencing Judge found the offence fell into Category A for ‘culpability’ and Category 1 for ‘harm’. The Judge also notes the Sentencing Judge stating: *“your behaviour was at a time when you were aware that young children were present and watching and your actions cause serious alarm and distress and it therefore puts you in category 1”*.
7. The Judge notes the Crown Court also made a Restraining Order for 5 years to protect Mr Ali and his family prohibiting the appellant from contacting Mr Ali and his family or living there or visiting their home and not to go to his address.
8. The Judge considered the OASys assessment in which it was noted the appellant appeared to be putting the blame for the offences on Mr Ali claiming that he was defending himself as he had been assaulted and went to his property to get the knife to defend himself and denied threatening anybody. The Probation Officer noted the appellant had not accepted responsibility for the offence and blame the victim and had shown no remorse or victim empathy. The Judge noted in a witness statement of 7 June 2019 the appellant claimed that he had made a mistake unintentionally, stating he was a human being and that he got angry.
9. The Judge concludes at [20] that the appellant’s conduct impinges on the public domain in a real sense.
10. The Judge considers the appellant’s family and children from [23]. The youngest was at the date of decision 11 years of age but at the date of the hearing the appellant did not live with either his wife or three younger children. The appellant lived with his old daughter and her husband.
11. The Judge reminds himself it was necessary to consider whether it would be unduly harsh for the minor child to live in Pakistan or unduly harsh for the child to remain in the United Kingdom without the appellant, [26], in which the Judge also notes the respondent accepted it will be unduly harsh for the child to live in Pakistan but not unduly harsh for the child to remain in the United Kingdom.
12. The appellant is described as being a ‘guiding hand’ in the lives of children and that his absence from their lives will be devastating. At [28] the Judge writes *“if the appellant had played any meaningful role, in terms of his upbringing, in [M’s] life there ought to be evidence of adverse impact on [M’s] life. There are myriads of ways of ascertain and demonstrate any adverse impact on [M’s] life. There is no expert report, for example from an independent qualified Social Worker, to demonstrate that the absence of the appellant has had adverse*

impact on [M] and the adverse impact is likely to be exasperated by the appellant's deportation.

13. The Judge concludes at [30] there was no evidence that the appellant's adult children have demonstrated that they have an emotional attachment to the appellant.
14. At [31] the Judge writes "*I find the appellant has not demonstrated that he has a genuine and subsisting parental relationship with [M].*"
15. At [32] the Judge considers the position if he is wrong in his finding the appellant does not have a genuine and subsisting parental relationship with [M] and goes on to consider whether deportation will be unduly harsh for the child.
16. The Judge states it cannot be disputed that the best interests of [M] is to grow with both his parents. Commenting upon the evidence, including written statements from the appellant's adult children, the Judge finds at [34] "*however, none of them have provided the Tribunal with any evidence of a single issue in [M's] life which could only be dealt with the appellant. The appellant has served his prison sentence. He is on licence. He does not live with [M]. There is no evidence that without the presence of the appellant [M's] development has been adversely affected*".
17. The Judge notes [M] has his mother in the UK with whom he resides together with his two older siblings. The Judge finds the child will continue to have the support of his mother if the appellant is removed. The Judge finds at [35]: "*in the instant appeal I have not been provided with evidence which would lead me to a finding that exceptional circumstances exist which are strong enough to override the public interest*". Leading to it being found at [37] "*... Therefore, I find the appellant has not demonstrated, on balance, deporting the appellant would be disproportionate interference because it would have a significant detrimental effect upon [M]. The appellant has not demonstrated, on balance, his deportation is likely to be unduly harsh for [M] to remain in the UK without the appellant*".
18. The Judge finds at [38] that even if accepting there is love and devotion between the appellant and his adult children evidence of dependency was distinctly absent.
19. From [40] the Judge considers family life with his partner. The appellant remains married to B, a British national, for whom it was accepted by the respondent it will be unduly harsh for her to live in Pakistan. The appellant was separated from his wife due to the incident that led to his conviction and the Judge notes in their respective witness statements they give two different addresses. Although both the appellant and his wife claim the reason for this was the Restraining Order imposed by the Sentencing Judge it was found this was not the case as they were already living apart before the Restraining Order was made. At [48] the Judge finds that although still legally married the appellant and B are not in a genuine and subsisting relationship. It is found that neither is involved in the lives of the other. The Judge finds B has not provided cogent evidence that it has been unduly harsh for her living apart from him whilst the appellant has been imprisoned [49].

20. The Judge analyses section 117 C the Immigration and Asylum Act 2002 between [50 – 61] before concluding the respondent's decision is proportionate in dismissing the appeal [63 – 64].
21. The appellant sought permission to appeal claiming misdirection in relation to the cases referred to by the Judge, that the Judge's assessment of the appellant's family life is flawed. Permission to appeal was granted by another judge of the First-Tier Tribunal on 26 July 2019, the operative part of the grant been in the following terms:
 3. Grounds of appeal (GOA)1: At paragraph 27, the citation of JB (India) and the comment that "a greater degree of dependency beyond emotional ties is required before a finding of family life could be established, is arguably not apt where the parental relationship is between adult and minor child.
 4. At paragraph 32 the FTTJ states: "however in ZH (Tanzania) [2011] UKSC 4, held they [best interests of children] can be outweighed by the cumulative effect of other considerations. The Supreme Court went on to hold the very strong weight to be given to the public interest in deporting foreign criminals is not diluted when the rights of children are affected". I am unable to associate those latter comments with the decision in The ZH (Tanzania) is that case concerned removal of a father diagnosed with HIV rather than a father facing deportation as a foreign criminal.
 5. For these reasons, I conclude that it is arguable by reference to the Grounds of Appeal that there may have been error of law in the Decision as identified in the application. I grant permission to appeal.

Error of law

22. The Court of Appeal have recently given guidance to judges to be wary of citing pages of unnecessary decisions from other cases which do not appear to bear any relation to the issues actually being considered in a current case. Whilst it is correct the Judge has set out a number of cases in the decision under challenge it is not made out the Judge materially misdirected himself by making the decision in this appeal based upon a material misunderstanding of relevant legal principles.
23. The issue in the case, in light of the respondent's concession that neither the appellant's wife nor his children could be expected to go to Pakistan with him as to do so would be unduly harsh, was whether it was unduly harsh for these family members to remain in the United Kingdom if the appellant was deported.
24. Mr Woodhouse on behalf of the appellant submitted the Judge disregarded the evidence regarding the family ties and challenged the weight given to the evidence. It is asserted the Judge was wrong to conclude there was no genuine and subsisting parental relationship with [M] and claimed the assessment by the Judge of the appellant's family life was flawed.
25. Relevant case law in relation to the question of whether there is a subsisting parental relationship includes *SSHD v VC (Sri Lanka) [2017] EWCA Civ 1967* in which it was said (in the context of the older immigration rules relating to deportation i.e. where there was an exception where there was no family member other than the foreign

- criminal available to care for the child in the UK) that to have a “genuine and subsisting parental relationship” the parent must have a “subsisting” role in personally providing at least some element of direct parental care to the child. The Court of Appeal also held that each of the words “genuine”, “subsisting” and “parental” referred to a separate and essential quality of the relationship.
26. In *SR (subsisting parental relationship - s 117B (6) Pakistan) [2018] UKUT 00334* the tribunal held that a parent who was unable to demonstrate for the purposes of the immigration rules that they had been taking an active role in a child’s upbringing might still have a genuine and subsisting parental relationship with them as long as the relationship involved an element of direct parental care. On the particular facts 3 yr old child - unsupervised contact 3 hours per fortnight established for 6 months - necessary element of direct parental care found.
 27. In *SSHD v AB (Jamaica) and AO (Nigeria) [2019] EWCA Civ 661* Singh LJ held that the tribunal in *SR* should not have transplanted the passages from *VC (Sri Lanka)* about the old paragraph 399 to a very different context and different wording of the statute. The words “genuine and subsisting parental relationship” were words of the English language and no further gloss should be put on them. King LJ gave some useful pointers in her judgment. Where a parent was seeing a child on a regular basis in an unsupervised setting it was hard to see how he could not have the necessary relationship; but equally an order for direct contact was not conclusive; the parent might only take up the contact unreliably or infrequently. Although it might be more likely that a tribunal conclude that there is no relationship of the right quality where there is only indirect contact, that is not inevitable. It might be that there has been a long gap in contact and this is a reintroduction or a parent is showing commitment to indirect contact necessary before direct contact can be reintroduced. Where a family court has made a final order limiting contact to indirect contact, the tribunal should look closely at the reasons for this. The Family Protocol should be used.
 28. The appellant lived in the family home until he was prevented from doing so following his arrest and, after release from prison, as a result of a Restraining Order. The evidence does not suggest that during the time the appellant was living in the family home he did not have a genuine and subsisting parental relationship with all the children whilst they were minors including [M] who remained a minor at the date of the hearing. The Judge does not appear to have engaged with the above case law and the test set out therein when looking at whether there was a genuine and subsisting parental relationship with [M].
 29. The Judge at [31] refers to evidence that the appellant’s wife has been offered alternative accommodation which was waiting to be finalised. Although that had not been completed, such that the appellant and his wife were unable to live together at the date of hearing before the Judge, Mr Woodhouse provided evidence showing that alternative accommodation had been secured away from the former matrimonial home which is within the area covered by the Restraining Order.

30. The more likely finding the Judge was required to make in relation to [M] is that the appellant has a genuine and subsisting relationship with his child. Similarly there appears merit in the appellant's argument, supported by his wife, that they remain in a genuine and subsisting marital relationship.
31. In either case the test that the Judge was required to consider is that of whether deportation would be unduly harsh.
32. The Judge at [32] considers the position in the alternative as if it had been found the appellant is in a genuine and subsisting parental relationship with [M]. The Judge clearly considered the evidence available with the required degree of anxious scrutiny before concluding at [37] "*... Therefore, I find the appellant has not demonstrated, on balance, deporting the appellant would be disproportionate interference with family life because it would have a significant detrimental effect upon [M]. The appellant has not demonstrated, on balance, his deportation is likely to be unduly harsh for [M] to remain in the UK without the appellant (SS (Nigeria) [2013] EWCA Civ 550.*
33. The Supreme Court in *KO (Nigeria) v SSHD [2018] UKSC 53* held that when looking at unduly harsh the focus was only on the position of the child. "Unduly harsh does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather it poses a considerably more elevated threshold. "Harsh" in this context, denotes something severe or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb "unduly" raises an already elevated standard still higher" was approved, as was the reasoning in *MAB (para 399; "unduly harsh") USA [2015] UKUT 00435 (IAC)*. The Supreme Court noted that the assumption was that there was an "due" level of harshness; a level which may be acceptable or justifiable in context. "Undue" went beyond that. The relevant context was set by section 117C(1) that is the public interest in the deportation of foreign criminals. One was looking for a degree of harshness going beyond what would necessarily be involved for any child faced with the deportation of a parent.
34. Having considered the evidence the Judge concludes that it had not been established it was unduly harsh for either [M] or the appellants wife to remain in the United Kingdom if he is deported. This has not been shown to be finding infected by arguable legal error. The evidence does not establish a degree of harshness going beyond what would necessarily be involved for any child or adult faced with the deportation of a parent or their partner.
35. Whilst the appellant disagrees with the Judge's conclusions and would prefer to remain in the United Kingdom the appellant fails to establish arguable legal error material to the decision to dismiss the appeal. The finding the respondent's decision is proportionate has not been shown to be finding infected by arguable legal error sufficient to warrant the Upper Tribunal interfering any further in relation to this appeal.

Decision

36. There is no material error of law in the Immigration Judge's decision. The determination shall stand.

Anonymity.

37. The First-tier Tribunal made not an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make no such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....
Upper Tribunal Judge Hanson

Dated the 30 October 2019