



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08258/2017

**THE IMMIGRATION ACTS**

Heard at Bradford  
On 1 October 2018

Decision & Reasons Promulgated  
On 5 February 2019

Before

UPPER TRIBUNAL JUDGE LANE

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ND

(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer

For the Respondent: Mr Caswell, instructed by Reiss Solicitors

**DECISION AND REASONS**

1. I shall refer to the appellant as the respondent and the respondent as the appellant (as they appeared respectively before the First-tier Tribunal). The appellant ND, was born in 1975 and is a male citizen of Pakistan. He arrived in the United Kingdom as a spouse in 2003. In February 2004, he was convicted of assault occasioning actual bodily harm. On 10 October 2007, the appellant was convicted of battery and given a community order of eighteen months. On 15 September 2016, the appellant was convicted on three counts of possession/control of articles for use in fraud. He was sentenced to sixteen months' imprisonment. He did not appeal conviction or

sentence. A decision was taken to deport the appellant to Pakistan. That decision, dated 25 July 2017, was the subject of an appeal by the appellant to the First-tier Tribunal (Judge Turnock) which, in a decision promulgated on 11 April 2018, allowed the appeal. The Secretary of State now appeals, with permission, to the Upper Tribunal.

2. In essence, the grounds challenge the decision on the basis that the judge's finding that it would be unduly harsh on the children for the appellant to be removed from the United Kingdom by way of deportation is flawed in law. The Secretary of State argues that the consequences of the deportation for the children would not cross the high threshold of "unduly harsh"; there were discrepancies regarding the children's progress at school (whether they were struggling or "doing very well"); the judge ignored the availability of support groups for the wife and children in the event of the appellant's deportation; the appellant's wife's health did not appear to be connected to the anticipation of his deportation; the judge paid insufficient regard to the public interest concerned with the appellant's deportation.
3. Both representatives before the Upper Tribunal agreed that the crux of this appeal lies in the judge's assessment of "unduly harsh" as provided for in paragraph 399(a) of HC 395 (as amended):

'399. This paragraph applies where paragraph 398 (b) or (c) applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported.'

4. The judge's analysis of the evidence is detailed (the decision runs to fifteen pages). His conclusions as regards the harshness of the impact of the deportation of the appellant on the children appears at [93]:

"However, in this case there are two British citizen children who have lived in the United Kingdom all their lives. They have extended family here, including a supportive grandmother. They are at significant points in their education and, of course, have all the benefits which accrue from British citizenship. They had visited Pakistan but never lived there. I find that it would be unduly harsh for them to leave the UK and to relocate to Pakistan. That is not, of course, an inevitable consequence of the deportation of the appellant. The children could remain in the UK with their mother. That would involve a separation from the appellant. Would the consequence of the separation be unduly harsh? I find on balance that it would be. I accept that the appellant is far from being an ideal role

model for the children as a result of his criminality. However there is some evidence that his recent custodial sentence has had a beneficial impact on him as evidenced by the reports from prison and the certificates he has obtained while serving his sentence. There is evidence including from the children's grandmother, Ms Logie and in the form of medical evidence that the separation from the appellant had a negative impact upon them. I find that the children are genuinely attached to the appellant and in the event that he were removed and they remained that would have a significantly adverse impact upon them, particularly with regard to their education."

5. The question is whether this analysis is adequate and the conclusion was properly available to the judge on the evidence. Mr McVeety, for the Secretary of State, did not challenge Mr Caswell's submission that the appellant is a "medium offender" and thereby entitled to the protection of exception 2 (Section 117C of the 2002 Act):

"Exception 2 applies when 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. Mr Caswell submitted that [93] of Judge's Turnock's decision did not simply represent a brusque disposal of the question of undue harshness but represented the culmination of a lengthy and detailed analysis which fully justified the conclusion. He pointed out that at [76] the judge had dealt in detail with a letter provided by Dr Rafaquat. This dealt with the appellant's wife's depression as a reaction to the appellant's absence from the family home whilst in detention. The doctor noted the appellant's wife was in "very low mood" and that the children had been

"Very upset, struggling at school, not eating or sleeping well. O is bedwetting every night and is brought frequently to the doctors for headaches and other minor ailments. He cries and bangs his head against a wall out of frustration. The Practice has provided support to this family through this very tough time."

The doctor described the family as "clearly struggling to cope." She concluded by noting that "if the appellant is unable to return home, his family would have serious physical and mental health issues." Mr Caswell also submitted that the judge at [82] had correctly examined the facts in the context of the public interest concerned with the appellant's deportation.

7. Mr McVeety, for the Secretary of State, agreed that the judge's analysis at [93] was the focus of this appeal. He submitted that the appellant had chosen to become a criminal knowing the effect that this would have upon his family. A negative impact caused by deportation upon the family did not amount to a consequence which was unduly harsh. The judge in this instance had failed to give adequate reasons for reaching his conclusions.
8. Notwithstanding what the doctor said regarding the appellant's wife's health, the judge concluded at [92] that the effect of deportation of the appellant on the wife

would not be unduly harsh. He recorded that the wife would have the opportunity or choice to return to Pakistan to live with the appellant. That was not a choice which was properly open to the British children of the appellant; indeed, Mr McVeety did not suggest that it would be reasonable to expect the children to return to Pakistan. Leaving aside the question of the appellant's apparent rehabilitation whilst in prison, it is clear that the judge has focused in his analysis upon the medical evidence which I have quoted above. The judge found that this evidence indicated that the impact upon the children caused by the deportation would be so "significantly adverse" as to cross the undue harshness threshold. In my opinion, the judge was entitled to reach that conclusion on the evidence. The medical evidence has unequivocally raised the probability of consequences which go far beyond the distress which any child would suffer as a result of being separated from a parent. "Struggling at school, not eating or sleeping well", bedwetting, crying and banging one's head against a wall out of frustration contributed to a factual matrix which led the doctor to conclude that a further separation would have "serious physical and mental health issues" for the children. I find that the judge was entitled, on the particular facts, to find that the consequences of the father's deportation upon the children would be unduly harsh. The Upper Tribunal should hesitate before interfering with the nuanced analysis of a First-tier Judge who has examined the evidence thoroughly, as I find is the case here. The Secretary of State's appeal is dismissed.

### **Notice of Decision**

9. This appeal is dismissed.

### **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 20 November 2018

Upper Tribunal Judge Lane