Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00674/2013

THE IMMIGRATION ACTS

Heard at Field House	**Decision Promulgated**
On 17 August 2015	**On 22 September 2015**

Before

UPPER TRIBUNAL JUDGE CANAVAN

Between

AK

(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr E. Nicholson, Counsel instructed by Osmans Solicitors
For the Respondent: Mr E. Tufan, Home Office Presenting Officer

Anonymity
Rule 14: The Tribunal Procedure (Upper Tribunal) Rules 2008
Anonymity was granted at an earlier stage of the proceedings and I find that it is appropriate to continue the order. I make clear that anonymity is not granted in order to protect the appellant's reputation following his conviction for a criminal offence but because the case involves consideration of the welfare of four young children. 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 both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

DECISION AND REASONS

Background

1. The appellant appealed against the respondent's decision dated 15 March 2013 to deport him from the UK following his conviction for communicating false information with intent for which he was sentenced to three years imprisonment.

2. The appellant appealed to the First-tier Tribunal. The First-tier Tribunal allowed his appeal in a decision promulgated on 19 June 2013. The respondent was granted permission to appeal against the decision. In a decision dated 05 September 2013 the Upper Tribunal found that the First-tier Tribunal erred in mischaracterising the factors weighing in favour of the appellant and undervaluing the factors relating to the public interest in deportation. The Upper Tribunal set aside the decision and went on to dismiss the appeal. The appellant was granted permission to appeal to the Court of Appeal. In a decision dated 27 November 2014 the Court of Appeal noted that both the First-tier Tribunal and the Upper Tribunal erred in proceeding to determine the appeal without reference to the scheme contained in Part 13 of the immigration rules. The appeal was remitted to the Upper Tribunal. At a hearing on 01 June 2015 it was agreed that the decision finding an error of law in the First-tier Tribunal decision was maintained but the appeal fell to be remade by the Upper Tribunal.

3. At the hearing on 17 August 2015. I heard submissions from both parties, which have been noted in my record of proceedings and where relevant are incorporated into my findings.

Decision and reasons

Factual circumstances

4. The facts of the case are not in dispute. The appellant is a 45 year old man from Pakistan who first came to the UK in August 2001 with entry clearance as a visitor. It is unclear when the appellant met his wife (who is now a British citizen but is of Pakistani origin) but they were married in the UK on 10 July 2003. The appellant was granted further multiple entry visit visas but it is not clear from the evidence exactly how much time he spent in the UK in the period 2001–2008. On 12 November 2008 he applied for leave to remain as the spouse of a British citizen. The application was refused on 02 April 2009 but the appellant was granted Discretionary Leave to Remain until 02 April 2012. The immigration summary contained in the respondent's PF1 form states that leave was granted *"on Article 8 grounds due to his wife's depressive illness, attempted suicide and the requirement to care for the children. It was also deemed that as Mrs [K] was granted status as a refugee family life could not be continued in Pakistan."* The couple have four children aged 13, 11, 9 and 1 year old. All four children were born in the UK and are British citizens.

5. On 25 November 2011 the appellant was sentenced to three years imprisonment for Communicating False Information with Intent. It seems

that his actions arose out of a dispute with some of his work colleagues. The appellant sent a total of 73 letters to various organisations making false accusations and threatened that explosions would take place in different places. The sentencing judge made clear that this had a number of grave consequences. Firstly, he made false accusations against a number of people who were totally innocent. Secondly, he involved the security services in an enormous amount of work investigating false threats when their resources should have been properly directed to real threats. Thirdly, the organisations involved had to increase security and members of the public were put in fear for no good reason. The sentencing judge took into account the depressive illness that the appellant had been suffering from but made clear that it was only relevant to "a minor degree". The judge also took into account the fact that the appellant was of previously good character. He was given credit for his guilty plea but this was reduced to a certain extent due to the lateness of the plea. Given the grave consequences of the offence the appellant was sentenced to 3 years imprisonment.

6. The pre-sentence report dated 23 November 2011 noted that the appellant did not have a pattern of offending but given the nature of the offence for which he had been convicted he was assessed to be a medium risk of causing harm to others but at low risk of reoffending. The psychiatric report of Dr Frank Farnham that was prepared at around the same time concluded that the appellant was suffering from a mild depressive illness but in the period that the offences were committed the symptoms he described suggested that he had been suffering from clinical depression of "moderate severity".

7. In a letter dated 08 March 2013 his then probation office confirmed that the appellant had made excellent progress in prison and was in a position of trust. He had made positive use of his time in prison. He attended courses and reflected on his offending behaviour. He was granted periods of home leave and returned to prison in a timely manner. He was assessed as low risk of reoffending and low risk of serious harm to the public. In a more recent letter dated 12 September 2014 his probation officer confirmed that the appellant had completed his Licence, had fully adhered to the conditions and was no longer required to attend probation appointments.

Legal Framework

8. In *MF (Nigeria) v SSHD* [2013] EWCA Civ 1192 the Court of Appeal concluded that the immigration rules relating to deportation provided a "complete code" to Article 8. This was largely because the provisions contained in paragraph 398 of the immigration rules were deemed to be sufficiently wide to encompass a full proportionality assessment. Part 5A of the Nationality, Immigration and Asylum Act 2002 ("NIAA 2002") introduced a statutory requirement for courts and tribunals to have regard to certain factors when considering "the public interest question". Nothing in the wording of sections 117A-D would appear to undermine the assessment under the immigration rules. The public interest factors

outlined in Part 5A can be taken into account as part of the overall proportionality assessment that takes place within the context of the immigration rules: see *Bossade (ss.117A-D-interrelationship with Rules)* [2015] UKUT 00415.

9. It is clear that the combined effect of the UKBA 2007, section 117C and the amendments made to Part 13 of the immigration rules now emphasise the significant weight that should be given to the public interest in deporting foreign criminals. The wording of paragraph 398 of the immigration rules reflects the basic principle outlined in section 117C(1) NIAA 2002 that the deportation of a foreign criminal is in the public interest. The sliding scale of offending contained in paragraph 398 and section 117C also recognises the principle outline in section 117C(2) that the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation. The sliding scale shows that a person who has been sentenced to a period of imprisonment of more than four years will only be able to resist deportation if there are "very compelling circumstances" that outweigh the public interest. However, in cases involving sentences of less than four years the scheme recognises that Article 8 rights might still outweigh the public interest in deportation in certain circumstances if the foreign criminal meets the requirements of the exceptions contained in paragraphs 399 and 399A (also reflected in sections 117C(4) and 117C(5)).

10. Paragraph 399(a) requires a person to have a genuine and subsisting parental relationship with a qualifying child who is either a British citizen or who has lived continuously in the UK for a period of 7 years immediately preceding the date of the immigration decision. If it would be "unduly harsh" for the child to leave the UK in order to live in the country to which the person is to be deported and is "unduly harsh" for them to remain in the UK without the person who is to be deported then the person will meet the requirement of the exception.

11. Although the exact wording of paragraph 399(b) relating to a person's genuine and subsisting relationship with a partner is more convoluted and is not entirely in harmony with the test reflected in section 117C(5) the essence of the requirements are essentially the same as those relating to children i.e. whether it would be "unduly harsh" for the partner to live in the country of proposed deportation or in the alternative whether it would be "unduly harsh" for the partner to remain in the UK without the person who is to be deported.

12. In the recent decision of *MAB (para 399; "unduly harsh") USA* [2015] UKUT 00435 the Tribunal found that the phrase "unduly harsh" does not import a balancing exercise requiring the public interest to be weighed against the circumstances of the individual. The focus is solely upon an evaluation of the consequences and impact of deportation on the individual concerned. Whether the consequences of deportation will be "unduly harsh" involves a considerably higher threshold than the consequences merely being "uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging". The consequence for an individual will be

"harsh" if they are "severe" or "bleak" and they will be "unduly" so if they are "inordinately" or "excessively" harsh taking into account all the circumstances of the individual.

13. I agree with the reasoning of the Tribunal in *MAB* as to the focus of the enquiry under paragraph 399(a) and (b) of the immigration rules (also reflected in section 117C(5) NIAA 2002). In clear contrast to the wording of paragraph 398 the wording of paragraph 399 is not phrased in a way that gives rise to a full proportionality assessment. It does not state that the impact on the child or partner must be weighed against the public interest. Either a decision to deport is unduly harsh on an individual or it is not. Seeking to weigh the consequence of deportation against public interest considerations does not make it any more or less harsh on an individual. The partial balancing exercise proposed by the respondent in *MAB* could not equate to a full proportionality assessment, which must weigh <u>all</u> the relevant circumstances of a case. The respondent's own guidance recognises that the exceptions relating to family and private life are separate considerations and that the assessment of the cumulative effect of all the relevant factors is likely to take place within the wider ambit of paragraph 398 of the immigration rules: see paragraph 6.6 "Chapter 13: Criminality guidance in Article 8 ECHR cases". A partial proportionality assessment would be a wholly inadequate assessment for the purpose of Article 8. However, given the weight to be placed on the public interest in deportation, it must be recognised that the phrase "unduly harsh" imports a fairly high threshold before a person's Article 8 rights are deemed to outweigh the public interest in deportation for the purpose of the immigration rules.

Findings on the facts

14. It is not in dispute that the appellant has a genuine and subsisting relationship with his wife and four children or that the rest of his family are all British citizens. At the date of the original immigration decision in March 2013 the appellant had three children. The original notice of decision accepted that that it would be unreasonable to expect the children to leave the UK. The respondent stated that it was "widely accepted that a child's best interests are remaining in the UK and having access to their parents" but considered that other factors might outweigh the child's best interests. The respondent considered that it would be reasonable to expect his children to remain in the care of their mother in the UK and stated that it would be possible for them to continue to have contact with their father through "modern forms of communication". The respondent noted that his wife and children could visit him in Pakistan should she wish to do so. It should be noted that the decision was made before the "unduly harsh" test was incorporated into the immigration rules.

15. On 27 January 2015 the respondent issued a supplementary notice of decision taking into account the position of all four children. At this stage the wording of the exceptions contained in paragraphs 399(a) and (b) had been amended to reflect the statutory changes introduced by Part 5A of the NIAA 2002. Despite the fact that the family's position was essentially

the same as it was when the original decision was made in March 2013 (save for the need to consider the welfare of a further child) the respondent now considered that it would not be unduly harsh to expect the four British children to live in Pakistan. Their parents were both of Pakistani origin and had knowledge of the social and cultural customs in Pakistan. It was noted that they had gone to Pakistan for a family holiday in 2010. While acknowledging that the children were British citizens the respondent asserted that they were also Pakistani citizens and were "equally entitled to benefit from the experiences of [their] cultural background". The respondent noted that the children were not subject to removal and it would be for the appellant and his wife to decide whether they chose to relocate the family to Pakistan or whether the children remained in the UK with their mother and kept in contact with the appellant through "modern means of communication".

16. The respondent went on to note that the appellant's wife was initially granted Indefinite Leave to Remain as a refugee but despite this fact she considered that it would not be unduly harsh to expect her to live in Pakistan with the appellant if she chose to do so. She was familiar with Pakistani culture. It was not accepted that it would be unduly harsh for the appellant's wife to remain in the UK without the appellant. As a British citizen she would have access to a range of publicly funded services. She was previously separated from her husband when he was in prison and "although struggled managed to cope being the sole carer for her children with the help and support of extended family members and friends in the UK". The respondent concluded that she no longer feared to return to Pakistan in view of the fact that she returned for a family holiday in 2010.

17. In assessing the best interests of the children and whether the effects of deportation would be "unduly harsh" I have taken into account the statutory guidance "UKBA Every Child Matters: Change for Children" (November 2009), which gives further detail about the duties owed to children under section 55 of the Borders, Citizenship and Immigration Act 2009. In that guidance the UKBA acknowledges the importance of a number of international instruments relating to human rights including the UN Convention on the Rights of the Child (UNCRC). The guidance goes on to confirm: "*The UK Border Agency must fulfil the requirements of these instruments in relation to children whilst exercising its functions as expressed in UK domestic legislation and policies.*" I take into account the fact that the UNCRC sets out rights including a child's right to survival and development, the right to know and be cared for by his or her parents, the right not to be separated from parents and the enjoyment of the highest attainable standards of living, health and education without discrimination. The UNCRC also recognises the common responsibility of both parents for the upbringing and development of a child. I also take into account that the younger the child the more important the involvement of a parent is likely to be: see *Berrehab v Netherlands* (1988) 11 EHRR 322. It is in the best interests of a child to be brought up by both parents unless it is contrary to his best interests to see one or other of his parents: see also *E-A (Article 8 – best interests of child) Nigeria* [2011] UKUT 00315.

18. The appellant did not meet the requirements for leave to remain as a spouse and his application was refused in 2009. However, the respondent's own summary of the appellant's immigration history confirms that, at the time, his family circumstances were sufficiently compelling for him to be granted Discretionary Leave to Remain outside the immigration rules. In particular, the appellant's wife was suffering from severe post-natal depression that led to a suicide attempt. The summary suggests that leave was granted in order for the appellant to assist his wife to care for the children because family life could not be continued in Pakistan because she had been recognised as a refugee.

19. The appellant's bundle contains a letter dated 17 December 2014 from his wife's GP, which confirmed that she had been suffering from chronic depression for a number of years. She suffered from migraines and had been seen by a neurologist. The patient suffered from a peptic ulcer since August 2004 and had constant dyspepsia symptoms. The patient reported to her GP that she was too ill to do the housework and was dependent on her husband to help her look after the children. Whilst there is no recent report there is up to date evidence to show that the appellant's wife continues to be signed off by her GP as unfit for work. In light of this evidence I am satisfied that there is nothing to suggest that her long term problems with depression and other medical issues are likely to have improved to any significant extent.

20. A letter from the appellant's probation officer dated 03 May 2013 stated that she had visited the appellant's home address in order to assess his suitability for Resettlement on Temporary Licence. She noted that his wife was very tearful during the visit and told her that she had found it very hard to cope being the sole carer of their three children while her husband had been in prison in addition to the fact that she suffered from depression. She understood that although he worked the appellant took "huge responsibility" for the care of his wife and children before he went into custody. She concluded that there were "valid reasons" why the appellant should remain at home to provide support for his family's mental and emotional well-being. The fact that the appellant's wife has suffered from severe depression and attempted to take an overdose has been consistent throughout the various pieces of evidence before me and was mentioned in the pre-sentence report and psychological assessment prepared prior to his sentencing in 2011.

21. The statements made by the appellant and his wife in support of the appeal before the First-tier Tribunal both outlined the negative impact that his imprisonment had on their children. Of course, this is entirely as a result of the appellant's own actions. They said that the children's education suffered in his absence. The children were less able to concentrate, there had been a drop in their academic standards and they had shown signs of withdrawal. The youngest child became "extremely clingy". The couple decided not to tell the children the truth about their father's imprisonment because they thought that it would be extremely damaging to them. Instead they led the children to believe that their father was working abroad. They were able to maintain this pretence for a

period of a year while he was in prison and it seems that the appellant then had a phased release where he was able to spend some time at home before being released on Licence.

22. Their evidence is supported to some extent by letters of support written by B J (a home tutor) and A W M (a religious tutor). While those letters tend to support their evidence they do not provide much detail and it is notable that there does not appear to be any evidence from the children's school teachers. Although I find that I cannot place a great deal of weight on those letters they are at least consistent with the overall picture disclosed by the evidence, which shows that it is likely that the appellant has been particularly involved in the upbringing of his children due to the difficulties that his wife faces as a result of ongoing depression and other medical problems. There is nothing implausible about the assertion that the children's school performance, concentration and general well-being might have been adversely affected in their father's absence.

23. In an up to date statement the appellant's wife states that, very reluctantly, she travelled to Pakistan in 2006 for a short visit following the death of her husband's brother. She only did so because she had become a British citizen and relatives convinced her that they would not tell her extended family members that she was in Pakistan. She says that she did not venture outside her husband's family home during the visit and kept a low profile. They visited Pakistan again in July 2010 when her husband's sister died. They stayed in Karachi for two weeks in an area far away from where she used to live. She said that she found the visit very stressful because "it brought back bitter and painful memories".

24. It is difficult to assess what weight to place on the fact that the appellant's wife was recognised as a refugee because no information has been provided to show what her reasons are for fearing to return to Pakistan. I can only make a very general inference from the information contained in her statement that she may fear some form of reprisal from members of her own family rather than fearing persecution from the state. In 2009 the respondent recognised that it would not be reasonable to expect the appellant's wife to continue their family life in Pakistan because she had been recognised as a refugee. While the fact that she was willing to make a short visit to Pakistan in 2010 might undermine her claim to continue to fear persecution, if the basis of her original claim was fear of persecution from family members, it is possible that a short and discreet visit could have been made without any significant risk. But that does not necessarily mean that the appellant's wife would no longer be at risk if she had to settle in Pakistan on a longer term basis. In the end, the appellant has failed to produce sufficient evidence to show what the current risk might be to his wife, if any, for the purpose of assessing whether it would be unduly harsh to expect her to continue her family life with him in Pakistan.

25. The children are British citizens and are entitled to the benefits of that citizenship: see *ZH (Tanzania) v SSHD* [2011] UKSC 4. The respondent's initial position was that it would not be reasonable to expect the children to leave the UK. While education and medical facilities are available in

Pakistan they are not of the same standard as the UK. The children were all born in the UK and have known no other life. Although they would have the benefit of their parents' cultural heritage to assist them to adjust to life in Pakistan they would face considerable disadvantages in terms of denial of the benefits of their rights as British citizens. They would be taken away from all that they know and would have to adjust to life in a new country where they would not have access to the same level of services and where there would generally be a lower level of security. There is a marked contrast between making a short two week visit to Pakistan and the longer term disadvantages that the children would face if they had to relocate there on a permanent basis.

26. If the children remain in the UK they would not have the benefit of their father's ongoing emotional, financial and practical support. The evidence shows that the appellant is likely to be a crucial figure that keeps the family functioning given the physical and mental health problems faced by his wife. Whilst more detailed and up to date evidence could have been produced there is nothing to suggest that her condition has improved over time. In 2009 the respondent considered that the appellant's presence was sufficiently important to grant him leave to remain in order to care for the children. While his wife managed to cope for a limited, and what she knew to be finite, period of time while he was in prison her statement indicates that it was at real emotional cost to her and the children. Now the situation would be made more difficult by the fact that she would have to cope with an additional young child. The evidence shows that she would be unable to work and would in all likelihood become heavily dependent upon the social assistance system at great cost to the public purse. In contrast, the evidence indicates that before his conviction it is likely that the appellant worked to support his family.

27. More detailed and professional evidence could have been provided to explain the impact that prolonged separation of the family would have on the appellant's wife and children. However, the evidence before the Tribunal shows that the appellant's wife has suffered from severe depression for a number of years and on at least one occasion found it so difficult to cope that she attempted suicide. While she managed to cope for a finite period of time while the appellant was in prison I am satisfied that the long term effect of separation from her husband is likely to affect her mental health in a negative way and is likely to cause her very real suffering. This is turn is likely to affect her ability to fully support and care for the children. The evidence suggests that the appellant's absence from his children while he was in prison had a detrimental effect and this would only be exacerbated if they were separated on a long term basis. It is wholly inadequate to suggest that a parental relationship with such young children could be conducted by way of "modern methods of communication". Young children require nurturing, both physically and emotionally, and this could not be done from abroad. The evidence before me shows that the appellant takes a particularly active role in the family because of his wife's various physical and mental health problems. His absence is therefore likely to impact on all other members of the family in a particularly serious way.

28. I bear in mind that the threshold to show whether the effect of deportation is "unduly harsh" on a partner or child is demanding. For the reasons given above I conclude that it could properly be said that it would be unduly harsh to expect the appellant's children to relocate to Pakistan given that they were born in the UK and have significant ties to this country. If they were expected to live in Pakistan solely in order to continue their family life with both parents they would be denied access to a host of rights and advantages that they derive from their British citizenship over a long term period. For the reasons I have already given the separation of four young British children from their father over a long term period is likely to have a particularly damaging effect on their welfare. Their mother is already in a vulnerable position due to her physical and mental health and it is likely that this would be exacerbated if she was left to look after the children on her own. In the past her depression became so serious that she attempted to harm herself. The situation was deemed to be sufficiently compelling to grant the appellant Discretionary Leave to Remain even though he didn't meet the requirements of the immigration rules at the time. In the circumstances of this particular case I conclude that it would also be unduly harsh to expect the children to remain in the UK without the appellant. For these reasons I find that the appellant meets the requirements of the exception contained in paragraph 399(a).

29. The evidence relating to his wife's fear of return to Pakistan is lacking and for this reason it is difficult to assess whether she is currently at risk in Pakistan. The fact that she was recognised as a refugee gives rise to a presumption that she may be at risk on return but it is not clear from the evidence whether two short and discreet visits are sufficient to show that she re-availed herself of the protection of that country or whether the conditions that gave rise to her refugee status have now ceased within the meaning of the Refugee Convention. In contrast to the children the appellant's wife was born and brought up in Pakistan and will be familiar with the culture there. The limited evidence only gives rise to a suggestion that it might be unduly harsh to expect his wife to continue their family life in Pakistan. For this reason I conclude that the appellant has failed to produce sufficient evidence to show that it would affect her in a sufficiently serious way to reach the demanding threshold required to show that it would be "unduly harsh" to expect her to return to continue their family life together in Pakistan. However, I am satisfied that if the appellants' wife remains in the UK the longer term separation of the family is likely to be "unduly harsh" within the meaning of the immigration rules in light of her particular physical and mental health problems and the fact that it would be particularly demanding for her to give four young children the proper care that they need on her own.

30. I have concluded that there is insufficient evidence to show that the appellant also meets the requirements of paragraph 399(b) but for the purpose of this appeal it is sufficient for him to meet the requirements of one of the exceptions. The respondent has drafted the immigration rules in a way that is said to strike a fair balance under Article 8. Section 117C(2)

outlines the general principle that, the more serious the offence committed by a foreign criminal, the greater is the public interest in deportation. The scheme contained in the immigration rules, in conjunction with the statutory provisions contained in section 117A-D of the NIAA 2002, makes clear that there is a sliding scale of offences. Where a person has been sentenced to a period of imprisonment of more than four years the offence is considered sufficiently serious that he will not have the benefit of being able to argue that he meets the exceptions to deportation. But where the person has been convicted of a lesser offence then the scheme recognises that there will be certain circumstances where the public interest in deportation may be outweighed by the person's private or family life considerations.

31. I conclude that the appellant meets the requirements of paragraph 399(a) and therefore comes within one of the stated exceptions to deportation under Article 8 as defined by the immigration rules and section 33(2)(a) of the UK Borders Act 2007.

DECISION

I re-make the decision and ALLOW the appeal

Signed  Date 22 September 2015

Upper Tribunal Judge Canavan