



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: PA/06311/2016

**THE IMMIGRATION ACTS**

Heard at Birmingham Employment Tribunal  
On 7 August 2017

Decision & Reasons Promulgated  
On 20 September 2017

Before

UPPER TRIBUNAL JUDGE HANSON

Between

GSE  
(anonymity direction made)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

**Representation:**

For the Appellant: Mr Jussab instructed by Bond Adams LLP Solicitors

For the Respondent: Mr Kotas Senior Home Office Presenting Officer

**ERROR OF LAW FINDING AND REASONS**

**Background**

1. This is an appeal against a decision of First-tier Tribunal Judge Andrew promulgated on 25 April 2017 in which the Judge dismissed the appellant's appeal on all grounds.

2. The appellant is a national of Afghanistan born on [ ] 1985. The appellant entered the United Kingdom on 30 March 2000. A claim for asylum was refused and an appeal against that refusal dismissed. On 8 September 2003, the appellant married a British citizen. Applications for leave to remain on the basis of marriage were refused including a refusal to grant leave due to the appellant's criminality. Following reconsideration, the appellant was granted indefinite leave to remain on 24 May 2010. On 29 June 2011 the appellant submitted an application for naturalisation as a British citizen which was refused on 1 June 2012 due to his character.
3. On 9 September 2013, the appellant was convicted at St Albans Crown Court possessing a controlled drug, Class B (cannabis/cannabis resin), possession of a false or improperly obtained another's ID card, driving while disqualified and using a vehicle whilst uninsured, for which the appellant was sentenced to one month and one day's imprisonment and disqualified from driving. On 25 September 2013, a decision was made not to pursue deportation and a warning letter sent to the appellant.
4. On 9 March 2015, the appellant was convicted at Warwick Crown Court of committing an act or series of acts with intent to pervert the course of justice and driving whilst disqualified for which he was sentenced on 27 April 2015 to a total of eight months imprisonment, ordered to pay a victim surcharge of £80, and disqualified from driving for two years. On 7 May 2015, a decision was made not to pursue deportation and a second warning letter sent the appellant on 21 August 2015.
5. On 1 February 2016, the appellant was convicted at Leicester Magistrates Court of affray and on 26 February 2016 was sentenced by a judge sitting at Leicester Crown Court to one year and six months imprisonment. On 25 May 2016, a decision was made to make a deportation order which was made on 27 May 2016. The appeal before the Judge was against that decision on the basis the appellant was asserting that one of the exceptions to deportation set out in the Borders Act 2007 was applicable.
6. The Judge clearly considered the evidence with the required degree of anxious scrutiny. It is shown that at the outset of the hearing the appellant's representative sought an adjournment as the appellant and his wife had recently separated, the appellant had some contact with the children but that there was no formal arrangement in place and that enquiries needed to be made as to the current level of contact. The Judge refused the request noting all members of the appellant's family who were to facilitate contact were in court and able to give evidence although a short adjournment was permitted to allow the appellant's representative to take instructions in relation to the contact issue. The Judge further notes that the appeal had been adjourned from 30 January 2017 as the appellant had been released on bail and the nearest hearing centre was Birmingham which necessitated the appeal being relisted.

7. The Judge sets out findings of fact at [23–49] of the decision under challenge which can be summarised in the following terms:
- a. The appellant and his wife separated in early April 2017 as a result of the appellant's affair. The appellant's wife did not accept she should accept the appellant's conduct as evidenced by the lack of a signature on her statement and non-attendance at the hearing. The Judge found at the date of the hearing the appellant could not be said to have a genuine and subsisting relationship with his wife because of the separation [25].
  - b. The Judge noted evidence of three contact occasions since separation. Letters from the children were in the respondent's bundle although the Judge was unable to say when they were written and cannot be indicative of children's feelings now, following separation [26 – 27].
  - c. The respondent accepted it would not be reasonable to expect the children to go to Afghanistan. The other family member prepared to care for the children is their mother [28].
  - d. The Judge was unable to find it would be unduly harsh for the children to remain in the United Kingdom without the appellant, on the evidence [29].
  - e. The Judge had no evidence showing the effect the appellant's deportation upon the children including nothing to show their wishes and feelings; supporting the conclusion the Judge was unable to be satisfied it would be unduly harsh for the children to remain in the United Kingdom without the appellant [30].
  - f. The Judge finds the appellant has not been lawfully resident in the United Kingdom for most of his life [31], cannot be socially and culturally integrated into the United Kingdom, has no respect for the criminal laws of the United Kingdom as demonstrated by his offending behaviour and no respect for the immigration laws as evidenced by the complete disregard of warning letters sent to him [33].
  - g. The assertion by the appellant he no longer speaks Dari was not found credible for the reasons given at [33].
  - h. It was not found there would be very significant obstacles for the appellant if returned to Afghanistan as he is aware of the culture and customs having lived there for the first 15 years of his life, he has some work experience in the United Kingdom, he had an education in the United Kingdom, although there have been "vague referrals" to risk on return no evidence has been adduced to show the appellant would be at real risk on return, the appellant is in good health with no evidence

to show to the contrary [34]. Leading to a finding the appellant does not fall within paragraph 399A [35].

- i. Considering article 8 ECHR, the Judge reminds herself of the need to conduct a balancing exercise and of the sentencing judge's remarks [36 – 38]. The Judge noted she could not ignore the fact the appellant has had previous warning letters which he ignored [39].
- j. The Judge was satisfied the appellant continues to show a medium risk of reoffending as assessed in the OASys report. The Judge noted a protective factor against reoffending was the appellant's wife which has been removed as a result of their separation [40].
- k. Other than the appellant's assertion that was no other evidence the appellant was no longer drinking. Neither the appellant's brothers nor sister-in-law who it is claimed were close to him were aware of his drinking or criminal behaviour, casting doubts upon the claimed closeness of the family unit and the appellant's brothers being a protective factor [41].
- l. In relation to Section 55 and the best interests of the children, there was no evidence in relation to the appellant's nephews and nieces. The best interests of those children are to remain with their respective parents in the United Kingdom [42]. The appellant's own children live with their mother as they have done throughout their entire lives. There has been some contact since separation. The children are British citizens and in good health. The children will continue with their schooling and the Judge had nothing other than vague assertions by the appellant and his family that their schooling will be affected in any way by the departure of the appellant from the United Kingdom. There was no independent evidence to show how, if at all, the children will be affected if the appellant is deported [43].
- m. The Judge accepts that if the appellant is deported he will not see the children as their mother is likely not to allow the children to visit him in Afghanistan. Some contact can be maintained by electronic means [44].
- n. The Judge finds the ideal situation would be for the children to be brought up by both parents but this is not going to happen as a result of the separation. In view of the appellant's complete disregard for the criminal laws of the United Kingdom he is unlikely to be a good influence on the children, that offending must outweigh theirs and the appellant's own interests [45].
- o. At [46] the Judge sets out the factors weighing against the appellant and at [47] the factors in favour of the appellant before concluding at [48] "when I weigh all these matters together I am satisfied that the

balance tips in favour of the respondent and in particular because of deportation of foreign criminals being in the public interest.

8. The appellant sought permission to appeal which was granted by another judge of the First-tier Tribunal on the grounds it was said to be arguable the failure to grant an adjournment arguably amounted to an error of law. The application is opposed by the Secretary of State in the Rule 24 letter dated 29 June 2017.

### **Error of law**

9. The appellant asserts the refusal of the adjournment application deprived him of a fair hearing. The appellant sought to rely on his own evidence and the evidence of his wife on the issue of the best interests of the three children yet the appellant and his wife separated two weeks before the hearing and the appellant's wife failed or refused to attend the hearing. The appellant asserts there was insufficient evidence for the Judge to make a sound finding on the best interest of the children to allow a just and fair disposal of the appeal. The matter should have been adjourned for post separation evidence to be obtained in relation to the children.
10. Mr Jussab also asserts the Judge's assessment of the best interests of the children is flawed as these are central to the assessment of the article 8 and overall proportionality decision. It is also asserted the failure of the Judge to assess the best interests of children first renders the Judge's findings regarding the best interests of the children flawed which in turn renders the assessment of article 8 and the proportionality balance exercise flawed. It is stated in his skeleton argument that the Judge's assessment of the best interests comes at paragraphs 42 to 45 after the Judge's conclusions on whether it will be unduly harsh for the children to remain in the United Kingdom without the appellant, which appears at paragraphs 29 and 30.
11. It is also argued the Judge erred in stating the first matter she had to consider was whether the appellant had a genuine subsisting relationship with the three British daughters yet failing to answer the question before going on to consider whether it will be unduly harsh for the children to leave the United Kingdom. It is stated the failure of the Judge to answer the question renders the findings on the best interests of children and thus the assessment of the proportionality balancing exercise incomplete and unsafe.
12. Before the Upper Tribunal Mr Jussab submitted the adjournment was sought to enable the appellant to obtain further evidence. When asked what evidence the appellant was proposing to get he advised it was witness statements from other sources together with an expert report from a social worker or child psychologist regarding the impact of separation on the children. When asked why the evidence was not obtained before 11<sup>th</sup> of April 2017 and what efforts were made to instruct a social worker the Upper Tribunal was advised that the first effort made was post hearing after 20 April 2017. When asked why a social workers report was required the Upper Tribunal were advised it was because

the children's mother would not be able to assist and that the expert report will be obtained even if the wife did come along. In relation to other evidence it was not shown who the evidence was required from or why it was not available by 20 April 2017. The Upper Tribunal was given the clear impression this was a proposal to permit the appellant to embark on a fishing expedition to see what may be available to support his case rather than identifying a specific issue relating to the needs of the children that may have benefited from expert evidence.

13. It is important to note the chronology of events which shows the decision under challenge was made on 27 May 2016, the appeal was lodged on 13 June 2016, the case was listed for a case management review hearing, on 30 December 2016 the matter was listed for hearing on 30 January 2017 at Newport, on 19 January 2017 a request for change of venue was made by the appellant, on 23 March 2017 directions were issued notifying the change of venue to 20 April 2017 at Birmingham. There has clearly be sufficient time prior to the appellant and his wife separating for the appellant to have obtained all the evidence upon which he was seeking to rely for the purposes of establishing his case.
14. The Judge noted that the adjournment was sought because enquiries needed to be made in relation to current levels of contact [17]. It was also noted by the Judge that the persons who were to facilitate contact were present in court and that they could give oral evidence in relation to this aspect, which they did. Accordingly, it is not made out why, on the point the adjournment was sought, it was necessary for there to be an adjournment. The Judge gives the matter appropriate consideration, including granting additional time to the appellant's representative to take further instructions on the contact issue. No arguable procedural error material to the decision to dismiss the appeal is made out by reference to the principles of fairness in the decision by the Judge to refuse the adjournment application.
15. Mr Jussab took two further points, the first relates to section 55 claiming there is no reference to section 55 at the proper point in the determination as it should have come first and be a primary issue. The second point is that although raising the question of whether there is a genuine and subsisting relationship with the children there is nothing in the determination to show that this question had been specifically answered.
16. In relation to section 55 point it is important to read the decision as a whole. The Judge clearly considered the best interests of the children, for example at [45] and [47A] of the decision under challenge. The Judge noted the lack of evidence of the impact of the appellant's removal upon the children, the appellant's criminality and disregard of warnings given by the respondent about the impact of future criminal conduct upon his liability for deportation. I find the Judge clearly considered the best interests of the children which are not the determinative factor. It is not made out the Judge gave the same insufficient weight. The Judge was clearly required to factor this element into the

proportionality assessment which the Judge arguably did. The weight given to these matters was for the Judge.

17. In relation to the question the Judge is asserted to have posed but not to have answered, I find it can be inferred from the determination that the Judge must have accepted there was a genuine subsisting relationship with the children as otherwise there would have been no need for her to have considered the impact on the children and their best interests in relation to the deportation decision.
18. I find no arguable legal error material to the decision to dismiss the appeal has been made out.

**Decision**

19. **There is no material error of law in the Immigration Judge’s decision. The determination shall stand.**

Anonymity.

20. The First-tier Tribunal made an order pursuant to rule 45(4)(i) of the Asylum and Immigration Tribunal (Procedure) Rules 2005.

I make such order pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008.

Signed.....

Judge of the Upper Tribunal Hanson

Dated the 19 September 2017