Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: DA/02541/2013**

THE IMMIGRATION ACTS

Heard at Bradford	**Decision & Reasons Promulgated**
On 30 August 2018	**On 01 October 2018**

Before

UPPER TRIBUNAL JUDGE LANE

Between

WM
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Miss Frantzis, instructed by Howells, Solicitors
For the Respondent: Mr McVeety, Senior Home Office Presenting Officer

DECISION AND REASONS

1. The appellant, WM, was born in 1980 and is a male citizen of Afghanistan. He arrived in the United Kingdom in 2002. In 2004, he applied for leave to remain as a partner of LM (a British citizen). His application was refused on 18 February 2005. On 13 August 2005, the appellant committed a sexual assault on a 14 year old girl. In 2006, the appellant returned to Afghanistan in order to make an application for entry clearance as the fiancé of LM. At this stage, the Secretary of State was unaware of the criminal offending of the respondent and entry clearance was granted on 9 March 2006. On 29 September 2006, the appellant and LM married in the United Kingdom. Her first child (Z) was born in 2006 and her second child (K) was born in 2008.

2. On 24 December 2006, the appellant was arrested and charged with a sexual assault upon an adult woman. On 8 February 2008 he was sentenced to a total of 22 months'

imprisonment (twenty months for the sexual assault on the 14 year old girl; two months consecutive for the sexual assault on the adult woman).

3. A decision was made by the Secretary of State to deport the appellant to Afghanistan on 5 September 2008. Problems arose in respect of that decision which was ultimately withdrawn by the respondent. In the meantime, the appellant, having been detained for immigration purposes following his release from prison, returned to the family home in May 2011 where he has remained living since that date. A new decision to deport the appellant to Afghanistan was made on 28 November 2013. The appellant appealed against that decision to the First-tier Tribunal which allowed the appeal against the decision to deport him by a determination promulgated on 9 May 2014. Following an appeal by the Secretary of State, that decision was upheld by the Upper Tribunal. However, in June 2016, the Court of Appeal allowed the respondent's appeal and remitted the matter to the Upper Tribunal for a fresh decision to be made, having regard in particular to the amended Immigration Rules and Sections 117A-117D of the Immigration, Nationality and Asylum Act 2002 (as amended). Following a number of adjournments, the matter came before me at Bradford on 30 August 2018.

4. The burden of proof in the appeal on Article 8, ECHR grounds rests on the appellant. The standard of proof is the balance of probabilities.

5. The substantive law has changed since the First-tier Tribunal made its decision allowing this appeal in May 2014. The parties agree that the relevant law now is that set out in Exception 2 (EX2 of the 2002 Act, Section 117C(5)):

> (5) Exception 2 applies where 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.

The appellant gave evidence in English. He adopted his written statements as his evidence-in-chief. He explained that he had been designated the formal carer of the child Z some two years previously. He had given up work in order to look after Z. Both Z and his sister K have been diagnosed as autistic (Z in March 2018 and K in November 2017). The appellant explained that Z is now "heavier and stronger" than he had been in the past and is aggressive towards his mother (LM) and she is physically incapable of controlling him when he becomes enraged. Both children attend different schools which require the parents, the appellant and LM, to travel with each child in different directions every day. The appellant explained that it is simply not possible for LM to provide daily care for both children. This is especially true in light of the difficulties arising from their autism.

6. The appellant said that Z is particularly close to the appellant and has said that he will attempt suicide if the appellant is removed from the country. Indeed, the diagnosis of autism for Z in March 2018 was undertaken very swiftly after medical professionals treating Z considered that he was possibly suicidal.

7. Cross-examined by Mr McVeety, the appellant said that his father in Afghanistan had died but he still had sisters and his mother living in that country. He stays in touch with his Afghan family by telephone.

8. I heard evidence in English from LM, the wife of the appellant. She adopted her written statements as her evidence-in-chief. She confirmed that both children Z and K have special needs arising from their autistic condition. She said that A was better able to control Z because Z is now so strong that she cannot physically deal with him.

9. Cross-examined, LM said that both children are academically able but are demanding in school on account of their autistic conditions. Z in particular can become very anxious and unwilling to attend school and has to be "calmed down" by the appellant. LM herself suffers from difficulties arising from a 2009 spinal injury. I note that she entered the courtroom using crutches.

10. The Tribunal reserved its decision.

11. I acknowledge the force of Mr McVeety's submissions in this case. It is now agreed that the decision to deport is lawful and that there was only a narrow issue for the Tribunal to determine which concerns the application of EX2 (see above). Mr McVeety acknowledged that the appellant has not reoffended following his imprisonment. However, he drew attention to the decision of the Supreme Court in *Ali* [2016] UKSC 60. At [69], the Supreme Court held:

> In para 14 above Lord Reed suggests that sections 32 and 33 of the 2007 Act were enacted in response to public concern about, in particular, the procedures for the deportation of foreign offenders. But it is clear to me that there was equal, if not greater, dissatisfaction with the decisions themselves, in particular when they rejected deportation. Why, in particular, did the people of the UK, by their elected representatives, take the unusual step of pre-empting the minister's decision whether a deportation was conducive to the public good by making a formal resolution in section 32(4) that the deportation of a foreign criminal was conducive to it? No doubt they did so primarily because of the strength of their wish to protect themselves from disorder and crime, which, of course, is an aim specifically recognised in paragraph 2 of article 8 of the ECHR and which the Strasbourg court "has consistently considered [to be] the legitimate aim pursued by deportation": para 53 of the AA case, cited at para 25 above. "This means", says Lord Kerr at para 96 below, "that, customarily, the risk of re-offending will be of predominant importance". Indeed Lord Kerr proceeds to ask: "If an individual is unlikely to commit crime or be involved in disorder, how can his expulsion on that ground be said to be rationally connected to the stated aim?" But, with respect, might Lord Kerr's analysis be too narrow? Might not the deterrent effect upon all foreign citizens (irrespective of whether they have a right to reside in the UK) of understanding that a serious offence will normally precipitate their deportation be a more powerful aid to the prevention of crime than the removal from the UK of one foreign criminal judged as likely to re-offend? See DS (India) v Secretary of State for the Home Department [2009] EWCA Civ 544; [2010] Imm AR 81, para 37, Rix LJ.

12. Mr McVeety said that it was essentially a matter for the Upper Tribunal to determine whether the threshold of "undue harshness" had been crossed in this instance.

13. I consider this to be an unusual case. I am left in no doubt at all of the importance of the public interest in the removal of criminals who have committed serious offences such as the sexual offence committed by this appellant. However, I make the following findings. Having regard to the medical evidence (in particular the reports of Dr Patel) I accept that there would be a "massive impact" upon Z in particular of the deportation of the appellant. I accept that the appellant is the primary carer of Z

and that Z has complex medical, emotional and educational needs. I find that Z is prone to aggressive and physically violent responses to disruptions of routine which is vitally important for his continued welfare. I find that LM deals primarily with the child K but her own physical problems and lack of the physical ability to deal with the outbursts of Z, together with the complex medical needs of K indicate that she cannot care for both children adequately on her own.

14. Miss Frantzis, for the appellant, characterises this as a case which stood out from the norm primarily on account of the autistic condition of the two minor children. I agree. I do, however, attach less weight to her submission that the appellant had only spent thirteen months in the last twelve years in the United Kingdom in prison; whilst that may be the case, his offending remains serious and, notwithstanding his apparent reformation, the deterrent effect of the appellant's deportation remains a powerful factor. Having said that, I also note that the appellant is no longer on the Sex Offenders Register.

15. Having heard the evidence of both LM and the appellant, I was struck by the strength of their relationship as husband and wife. I have no doubt that they are dedicated to the care of two children whose own lives are rendered difficult by autism. Having assessed all the evidence very carefully and stressing again the relevance of the public interest in this instance, I have concluded that this is a rare case where the impact of the appellant's removal upon those family members left behind, including his wife LM and the children K and, in particular Z would have not only unduly harsh consequences but would be potentially catastrophic for this family. In light in particular of the fact that LM is, in my finding, unable to cope with Z physically or emotionally I consider it inevitable that the removal of the appellant from the family unit would have the consequence of leading also to Z requiring the care of third parties, most likely the care services provided by the local Authority. That alone is, in my opinion, an unduly harsh consequence of the appellant's removal. For these reasons, the appeal is allowed.

Notice of Decision

16. The appeal of the Secretary of State against the decision of the First-tier Tribunal dated 9 February 2014 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 25 September 2018

Upper Tribunal Judge Lane

No fee is paid or payable and therefore there can be no fee award.

Signed Date 25 September 2018

Upper Tribunal Judge Lane