



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: HU/04117/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 30 July 2018**

**Decision & Reasons Promulgated
On 9 August 2018**

Before

UPPER TRIBUNAL JUDGE FINCH

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

And

KHALID CHUDRY

Respondent

Representation:

For the Appellant:

Mr. S. Kotas, Home Office Presenting Officer

For the Respondents:

Ms F. Shaw of counsel, instructed by Farani Taylor Solicitors

DECISION AND REASONS

BACKGROUND TO THE APPEAL

1. The Respondent is a national of Pakistan. It is his case that he entered the United Kingdom in May 1993 and applied for asylum on 4 May 1993. His application was refused on 6 December 1993 but he did not appeal against this decision. He applied for indefinite leave to remain 14 November 2008 and on 30 November 2012 he was granted leave to remain on family and private life grounds until 29 May 2015.

2. On 28 February 2017 the Appellant was convicted of one count of carrying on the business of a company with intent to defraud creditors or for other fraudulent purposes. He was also convicted on 14 counts of making false representations to make gain for self or another or cause loss to other/expose other to loss. He was then served with a decision to deport on 13 March 2017.
3. On 22 January 2018 he was served with a deportation order and a decision that his deportation would not breach his Article 8 rights. He appealed and, in a decision promulgated on 8 May 2018, First-tier Tribunal Judge Hussain Raikes allowed his appeal. The Appellant sought permission to appeal on 17 May 2018 and First-tier Tribunal Judge Woodcraft granted him permission to appeal on 30 May 2018.

ERROR OF LAW HEARING

4. Counsel for the Respondent relied on a skeleton argument which outlined generic case law relating to deportation cases as it was written without the benefit of seeing the Respondent's Bundle, the grounds of appeal and the basis upon which permission to appeal was granted. I put her case back in the list so that she could read and consider these documents. Both the Home Office Presenting Office and counsel for the Respondent subsequently made oral submissions and I have referred to the content of these submissions, where relevant, in my decision below.

ERROR OF LAW DECISION

5. The Respondent was sentenced to 32 months imprisonment and, therefore, he was subject to automatic deportation under section 32 of the UK Borders Act 2007.
6. Paragraph 398 of the Immigration Rules states that:
“Where a person claims that their deportation would be contrary to the UK’s obligations under Article 8 of the Human Rights Convention, and
(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 18 months”.

7. Paragraph 399 of the Immigration Rules states that:
- “This paragraph applies where paragraph 398(b)...applies if-
- (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 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 7 years immediately preceding the date of the immigration decision; and in either case
- (a) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or
- (b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported...”
8. Section 117C of the Nationality, Immigration and Asylum Act 2002 states that:
- (1) The deportation of foreign criminals is in the public interest.
- (2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
- (3) In the case of a foreign criminal (“C”) who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C’s deportation unless Exception 1 or Exception 2 applies.
- ...
- (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 the child would be unduly harsh”.
9. First-tier Tribunal Judge Raikes found in paragraph 31 of her decision that it would not be unduly harsh for his partner to remain in the United Kingdom without the Respondent and that it would also not be unduly harsh for her to move to Pakistan. Counsel for the Respondent did not dispute this finding,
10. The First-tier Tribunal Judge went on to find that Exception 2 applied in relation to the Respondent’s own child and his two step-children. In paragraph 32 she considered the circumstances of his oldest step-child. However, as the Home Office submitted when doing so she failed to take into account that paragraph 399 and also section 117D of the Nationality,

Immigration and Asylum Act 2002 limits reliance on a genuine and subsisting parental relationship with a child to persons who are still under the age of 18 and the Respondent's oldest step-child was already 18 at the date of the appeal hearing before the First-tier Tribunal. Therefore, First-tier Tribunal Judge Raikes erred in law in finding that Exception 2 applied to her. The fact that she did not fall within the Exception also undermined the First-tier Tribunal Judge's overall assessment of whether the deportation of the Respondent would be unduly harsh on the children as a group.

11. In paragraphs 33 – 37 First-tier Tribunal Judge Raikes also found that Exception 2 applied to the two younger children. When doing so she relied on the short report provided by Dr. Mohammad, a consultant psychiatrist, who had examined the mother and the children. He noted that when the Respondent was sent to prison and was no longer living with the family, the older son had not been doing very well at school and had stopped playing cricket, despite having been playing at local championship level. He also noted the Respondent's wife had said that the youngest child was being difficult. Counsel for the Respondent referred to this report as an expert report but I have noted that Mr. Mohammad had not listed his qualifications or his experience and he had not provided any medical diagnosis or prognosis in relation to the children
12. Counsel for the Respondent submitted that the decision in paragraph 34 of the decision that it would be unduly harsh for the children to remain in the United Kingdom without the Respondent was supported by the First-tier Tribunal's findings in paragraphs 22 – 24 and 33.
13. However, it is clear from these paragraphs that the First-tier Tribunal Judge had not directed herself to the fact that paragraph 26 of *MM (Uganda) v Secretary of State for the Home Department* [2016] EWCA Civ 450 states that:

“The expression “unduly harsh” in section 117C(5) and Rules 399(a) and (b) requires regard to be had to all the circumstances including the criminal's immigration and criminal history”.
14. At most, at the end of paragraph 37 the First-tier Tribunal Judge found that:

“I am satisfied that issues in respect of their education and accommodation if returned, together with the practical difficulties in terms of, amongst other things, the children's settlement and whether the Appellant would be in a position to fully support them all in this particular context,

would, in my view, make integration there extremely difficult and therefore outweigh the public interest in the deportation of the Appellant with his children”.

15. This indicates that the First-tier Tribunal Judge had concluded her “unduly harsh” test before taking into account the Respondent’s criminality and immigration history. There was a very brief reference to the Respondent’s criminality in paragraph 38 of the decision where the First-tier Tribunal Judge said that she had “considered the nature and seriousness of the Appellant’s criminal behaviour in relation to the exceptions and also the time elapsed since the offence, the Appellant’s conduct during that period and the length of the Appellant’s stay in the country”. However, this appears to be a more general reference to the proportionality test to be applied and does not indicate any focus on the part the criminality plays in the unduly harsh test. There is also no reference to the Respondent’s lack of immigration status between 1993 and 2012.
16. This omission is made explicit in paragraph 42 of the decision, where the First-tier Tribunal Judge failed to direct herself in relation to the decision in *MM (Uganda)* or apply its ratio.
17. When applying the unduly harsh test the First-tier Tribunal Judge also failed to take into account the definition of this test, which was formulated in *MAB (para 399; “unduly harsh”) USA* [2015] UKUT 435 (IAC) and followed in *KMO (section 117 – unduly harsh) Nigeria* [2015] UKUT 543 (IAC). In paragraph 26 of *KMO* the Upper Tribunal found that:

“Although, for these reasons, I respectfully depart from the approach advocated by the Tribunal in *MAB* I do adopt the other guidance offered by that decision:

“Whether the consequences of deportation will be “unduly harsh” for an individual involves more than “uncomfortable, inconvenient, undesirable, unwelcome or merely difficult and challenging” consequences and imposes a considerably more elevated or higher threshold.

The consequences 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 of the circumstances of the individual”.
18. In paragraph 40 of her decision the First-tier Tribunal said that she was satisfied that the Appellant presented as having a low risk of re-offending and relied on his indication that his offence was a one-off for which he was truly sorry. When doing so she failed to take into account the fact that the Appellant had set up a company and a complicated scheme for the purpose of large scale fraud and that the counts on which he was convicted only represented a

small sample of his fraudulent behaviour. His Honour Judge Leeming noted “the carrying on the business in the way found involving what it does connotes something considerably wider than isolated instances of fraud”.

19. The First-tier Tribunal failed to deal explicitly with the finding at paragraph 2.11 of the OASys Assessment where it is said that the Appellant “had attempted to apportion the blame for these offences to all parties bar himself” or the fact that the Appellant had also been successfully prosecuted for fraud back in 1997. It was also noted in paragraph 12.8 that in “the sentencing PSR he would not accept responsibility and did not demonstrate any genuine empathy towards the victims”. This needed to be weighed in the balance with the remorse he expressed during his appeal against deportation.
20. As a consequence, there were errors of law in First-tier Tribunal Judge Raikes’ decision.

DECISION

- (1) The Appellant’s appeal is allowed.
- (2) The decision of First-tier Tribunal Judge Raikes is set aside.
- (2) The appeal is remitted to the First-tier Tribunal in Manchester to be heard *de novo* before a First-tier Tribunal Judge other than First-tier Tribunal Judge Raikes.

Nadine Finch

Signed

Date 30 July 2018

Upper Tribunal Judge Finch