**Upper Tribunal**
**(Immigration and Asylum Chamber)** Appeal Number: HU/06166/2018

**THE IMMIGRATION ACTS**

| **Heard at Manchester Civil Justice Centre** | **Decision & Reasons Promulgated** |
|---|---|
| **On 26 APRIL 2019** | On 27 June 2019 |

**Before**

**UPPER TRIBUNAL JUDGE LANE**

**Between**

**HS**
**(ANONYMITY DIRECTION MADE)**

Appellant

**and**

**THE SECRETARY OF STATE FOR THE HOME DEPARTMENT**

Respondent

**Representation:**
For the Appellant: Mr Malik, instructed by Whitefield solicitors
For the Respondent: Mr Bates, Senior Home Office Presenting Officer

**DECISION AND REASONS**

1. By a decision promulgated on 19 February 2019, I found that the First-tier Tribunal had erred in law such that its decision fell to be set aside. My reasons were as follows:

> "1. The appellant, HS, was born in 1965 and is a male citizen of India. He first came to the attention of the authorities in 2011 when he was arrested. He was due to return to India in September 2011 but shortly before his removal removal directions were cancelled after the appellant made an application for leave to remain. The appellant is married to a British woman. The appellant's application to remain on

the basis of his marriage was refused but he was granted discretionary leave to remain until 25 November 2014. On 30 April 2012, the appellant was convicted at the Crown Court Manchester of two counts of concealing, disguising, converting, transferring or removing criminal property. He was sentenced to 3 years' imprisonment. He was served with a notice of automatic deportation and made representations to the Secretary of State in respect of his human rights (Article 8 ECHR). His appeal to the First-tier Tribunal in 2014 was allowed. That decision was reversed on appeal to the Upper Tribunal and the appellant became appeals rights exhausted on 28 April 2015. The appellant made further representations in respect of a fresh claim in October 2015 which were rejected by the Secretary of State. The appellant succeeded in a judicial review of that decision to the extent that a further refusal decision was issued to which the appellant had a right of appeal. That decision is dated 26 February 2018. The appellant appealed against that decision to the First-tier Tribunal (Judge Chambers) which, in a decision promulgated on 13 July 2018, dismissed the appeal. The appellant now appeals, with permission, to the Upper Tribunal.

2. At the time of the previous litigation in the First-tier and Upper Tribunals the appellant's wife was pregnant with their child. That child (H) born in April 2015 and is a British citizen.

3. I find that the First-tier decision should be set aside. And I have reached that decision for the following reasons. Since the appellant is the father of a "qualifying child" for the purposes of the 2002 Act (as amended) the appeal fell to be considered under the provisions of Section 117C(5) of that Act:

> '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.'

4. The judge refers to Section 117C(5) (Exception 2) at [27]. However, he does no more at [28] than observe that the Upper Tribunal, deciding an earlier appeal before the child H was born, concluded that it would "not be unduly harsh for the appellant to return to India without his wife and child." Considerations at that stage did not focus on the child which had not been born but on the "possible deprivation of the standard of health care which [the appellant's wife] might receive when compared to the UK." I find that the judge should have considered the provisions of Section 117C(5) and in particular whether or not it would be unduly harsh for the child and partner to be separated from the appellant. I acknowledge that Judge Chambers has considered the evidence concerning the child and which he has quite properly not discounted at [31]. He notes that "the risks to the child are variously identified as being considerable, significant and detrimental. They are not fanciful." However, having set out the test under Section 117C(5), the judge did not seek to apply it. Instead, at [32] he first considers that the appellant's partner would have a choice whether or not she joined the appellant in India (taking the child H with her). It seems to have been the existence of this choice which has led the judge to conclude that "the exceptions to deportation do not apply." I agree with Mr Malik, who appeared for the appellant, that the

> judge has not properly considered the statutory provisions. The question before the judge was not whether or not the partner and child would go with the appellant but whether it would be unduly harsh if they were to remain in the United Kingdom and be separated from him.
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> 5. The judge compounded his error at [32] by referring to the absence of "very compelling circumstances rendering the appellant's removal a breach of Article 8 ECHR." As I have noted, the test which the judge had to apply is contained in Section 117C(5); that is not a test of "very compelling circumstances" but of undue harshness. It is unclear from the judge's decision whether or not he considered the removal of the appellant by deportation would have unduly harsh consequences for the partner and child who remained in the United Kingdom.
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> 6. I agree also with Mr Malik that it is not clear whether the judge at [31] – [32] has considered as part of the "all other relevant considerations" the appellant's criminal offending. I consider that it is likely he did so. If he did, then he contravened the principles articulated in KO (Nigeria) [2018] UKSC 53 which provide that the level of a parent's criminal offending has no place in the assessment of children's best interests.
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> 7. I make no comment about the remaining grounds of appeal. I have found that the decision needs to be set aside for the reasons I have given above. The decision will be remade in the Upper Tribunal following a resumed hearing.
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> Notice of Decision
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> The decision of the First-tier Tribunal which was promulgated on 13 July 2018 is set aside. None of the findings of fact shall stand. The decision will be remade in the Upper Tribunal following a resumed hearing at Manchester Civil Justice Centre before Upper Tribunal Judge Lane on a date to be fixed."

2. At the resumed hearing at Manchester on 26 April 2019, I heard evidence from the appellant and from his wife. Remarkably, the resumed hearing took place on the same day scheduled for the appellant's wife to attend maternity hospital in order to give birth to her second child. As I understand it, immediately after the hearing had finished, she left the court in order to attend the hospital. I have received no indication that the birth did not go well and I assume, as at the date of writing this decision, the appellant and his wife are now the parents of two children.

3. Both witnesses adopted their written evidence is their evidence in chief. There was no cross examination.

4. As identified at the initial hearing, the test in this appeal is that set out at section117C (5) (see above at [3]). Mr Bates, who appeared for the Secretary of State, did not submit that the appellant's wife and the children should be expected to leave the United Kingdom to continue their family life in India upon the appellant's deportation. The focus, as Mr Malik who appeared for the appellant, stressed was whether the separation of the appellant from his family by reason of his deportation will have

consequences which would be unduly harsh for the wife and child. He submitted that I had to assess the circumstances as at the date of the resumed hearing in the Upper Tribunal. Those circumstances included the fact that on that day the appellant's wife would be giving birth to her second child.

5. There was before both the First-tier Tribunal and me expert evidence from a consultant psychiatrist, Dr Hussein and also an independent social work report from Mr Musendo. Dr Hussein considered that the appellant's wife would be under stress if she were to have care for a young child in the absence of the appellant (who has hitherto been the primary carer, his wife working 30 hours per week part-time) and in circumstances where relations with her own Pakistani Christian community had in damaged by her marrying the appellant, a Sikh. Mr Bates submitted that the report was written in general terms and was, by the nature of the circumstances facing the family at present time, dependent upon speculation as to what might happen in the future. The same is true of the social work report. Mr Musendo attempts in his report to predict whether the child, currently still very young, would be likely to develop behavioural problems if separated from the appellant. The appellant's wife had become distressed when providing evidence to Mr Musendo claiming that she would be unable to cope with the trauma of separation.

6. I have attached weight to the expert reports but I consider there is some force in Mr Bates's submission that both reports rely on speculation as to the likely effect of the deportation upon the wife and child. The social work report records the subjective opinion of the appellant's wife as to how she would be unable to cope in the absence of the appellant. Understandably, the expert was concerned by the distress of the appellant's wife as manifested before him at interview but I agree with Mr Bates that there is little hard evidence to show that she would suffer as a result of the deportation consequences which may properly be described as unduly harsh. It is, perhaps, not helpful to speak of the 'normal' harshness which will arise in virtually every case where a parent is separated from a child and spouse, but I am reminded that the test is one of undue harshness rather than simply harshness. In every case where family members bonded by ties of deep affection are suddenly separated by the severing or alteration of those ties there will be harsh consequences for the individuals concerned. Ultimately, whilst the reports record the evident distress communicated to the experts by the appellant's wife when interviewed, there is little hard evidence which would show with any particularity how harsh the consequences will be for wife and the child.

7. I acknowledge that I must determine the appeal by reference to the family's circumstances as at the date of the resumed hearing. Having said that, at the time of that hearing the appellant's wife had only one child although I accept that on that day the appellant's wife would naturally have been in a state of some considerable stress given that she was just about to give birth. However, I do not consider that it would be appropriate for me to give very significant weight to the fact that the resumed hearing

took place at a time of heightened stress for both adult family members. The test of undue harshness cannot, in my opinion, be focused upon such a specific point in time; it is necessary to apply the test by reference both to present circumstances and those which are likely to pertain in the immediate future. It is necessary, therefore, to apply the test having in mind that the appellant's wife would be left behind in the United Kingdom with a toddler and a new baby if the appellant is deported.

8. I note from the previous decision of the Upper Tribunal in January 2015 that the judge found that 'the absence of a husband will be hard on [the appellant's wife] but in the context of the above factors, I do not consider that would be unduly harsh for [her] to give birth in the absence of a husband or that this would result in very serious hardship' [29]. Amongst the factors considered by the Tribunal was evidence that the appellant's wife's relations with her parents had recently improved. At the time of that Upper Tribunal hearing, the appellant's wife was about to give birth some three months later. The Tribunal concluded that it would not be unduly harsh on the appellant's wife for the appellant to be deported. I am aware that I must consider the circumstances now and that I am not bound by conclusions reached on different circumstances by an Upper Tribunal Judge in an earlier appeal.

9. However, I have not ignored the fact that the circumstances of the family before me today do not differ greatly from those existing in 2015. I have no doubt at all that the appellant's wife will become very distressed if separated from her husband. However, there is little hard evidence to show that she would be compelled by the separation either to harm herself or that she would become incapable of caring for her children. I am aware that the appellant's wife works but it cannot be said that the need for her to carry on in that employment rather than to become primary care of the child can itself render the separation unduly harsh upon her. I accept that she would have to carry the burden of looking after the child without receiving much support from her family whether or not the relations have remained as they were in 2015. I find, however, that she is physically and psychologically capable of taking on care for the child as a sole parent; there is no evidence to suggest otherwise. As regards the effect of the deportation upon the elder child, as I have noted above, the youth of the child has hampered the attempts of the social worker and a psychiatrist to offer any firm view as to the likely long-term effects of separation. It is necessary to decide this appeal on the basis of the evidence; it is for the Tribunal to apply the objective test of undue harshness and to avoid being excessively influenced by the evident and genuine distress expressed by the appellant's wife. Looking beyond that distress, I find that, if she had to do so, the wife would cope physically and emotionally both with the separation and with the care of her children. Accordingly, I find that Exception 2 is not made out on the evidence before me and the appellant's appeal against the refusal of his human rights claim arising from the decision to deport him should be dismissed.

## **Notice of Decision**

The appellant's appeal against the decision of the Secretary of State dated 26 February 2018 is dismissed.

Signed Date 2 June 2019

Upper Tribunal Judge Lane

**Direction Regarding Anonymity – Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008**

Unless and until a Tribunal or court directs otherwise, the appellants are granted anonymity. No report of these proceedings shall directly or indirectly identify them or any member of their family. This direction applies both to the appellants and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.