Upper Tribunal
(Immigration and Asylum Chamber) Appeal Numbers: HU/09302/2018

THE IMMIGRATION ACTS

Field House
On 16th July 2019

Decision & Reasons Promulgated
On 30th July 2019

Before

UPPER TRIBUNAL JUDGE LINDSLEY

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

A K
(ANONYMITY ORDER MADE)

Respondent

Representation:
For the Appellant: Ms N Willocks-Briscoe, Senior Home Office Presenting Officer
For the Respondent: Ms S Iqbal, of Counsel, instructed by Whitefields Solicitors

DECISION AND REASONS

Introduction

1. The claimant is a citizen of Pakistan born on 11th March 1985. He arrived in the UK in May 1991 with his mother and siblings. He was then a dependent on his father's asylum claim, which was refused and dismissed, and also in further representations. The claimant was however granted leave to remain until January 1999 and then granted indefinite leave to remain in June 2000. He applied for

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British citizenship in 2004, but the application was refused for non-payment of a fee.

2. On 20th September 2002 the claimant was convicted of robbery and taking a vehicle without consent and sentenced to four years youth custody. On 19th October 2005 the claimant was convicted of damaging property and sentenced to a community punishment order and made to pay £600 of compensation. On 23rd August 2006 the claimant was convicted of driving whilst disqualified and was sentenced to four months imprisonment. On 8th September 2006 the claimant was convicted of driving whilst disqualified and sentenced to one month imprisonment. On 21st September 2006 the claimant was convicted of resisting or obstructing a constable and sentenced to one month imprisonment. On 8th July 2007 the appellant was stopped entering the UK with his brother's passport and convicted in February 2008 of possessing another's identity document and sentenced to six months imprisonment. On 20th February 2009 the claimant was convicted of robbery and sentenced to 32 months imprisonment.

3. On 14th June 2017 the Secretary of State issued a stage 1 deportation letter. On 9th August 2017 the claimant responded raising a protection and human rights claim, although in October 2017 he stated that he no longer wished to rely upon an asylum claim but just on Article 8 ECHR. On 5th April 2018 his human rights claim was refused, and a deportation order was signed against him. Further representations were refused in a decision dated 16th April 2018. His appeal against the decision refusing his human rights claim was allowed by First-tier Tribunal Judge Beach in a determination promulgated on the 3rd May 2019.

4. Permission to appeal was granted by Judge of the First-tier Tribunal Grant-Hutchinson on 30th May 2019 on the basis that it was arguable that the First-tier judge had erred in law in finding that the claimant did not have to show very compelling circumstances under the Immigration Rules simply because his 4 year sentence to youth custody was one he was given whilst he was a minor. It was also found to be arguable that the decision that he would have very significant obstacles to integration in Pakistan could not simply be shown by the fact that he would be unfamiliar with the country of deportation and had been in the UK for a long time. It was also found to be arguable that his deportation would not be unduly harsh to his child as he only sees his child at weekends and holidays and there was no objective evidence his child would need professional intervention if he were deported.

5. The matter came before me to determine whether the First-tier Tribunal had erred in law.

Submissions – Error of Law & Remaking

6. The Secretary of State argues in the grounds of appeal and orally in submissions from Ms Willocks-Briscoe that the First-tier Tribunal erred in finding at paragraph 55 of the decision that the fact that the claimant was under 18 years when he received his 4 year sentence means that he does not have to show very compelling

circumstances under the deportation scheme set out s.117C of the Nationality, Immigration and Asylum Act 2002 and in the deportation Immigration Rules. The fact that the claimant was under the age of 18 years at the time of that conviction simply means that he cannot be subject to automatic deportation for this offence. Reliance is also placed on Johnson (deportation - 4 years imprisonment) [2016] UKUT 00282 (IAC) which held that an offence of 4 years or more can become relevant to a deportation appeal even if there has been a previous successful human rights appeal if the appellant commits further offences and there is a new appeal against deportation.

7. Further, it is argued that the conclusion that the claimant would have very significant obstacles to integration was not reached properly as there is a high threshold for this test, and culture shock or unfamiliarity with the country does not amount to very significant obstacles, see SSHD v Olarewaju 2018 EWCA Civ 557. There was too much focus on issues of employment and a lack of evidence that he would not be able to obtain a job and reasoning to support this conclusion. There was a failure to consider the fact that the claimant had friends he visited in Pakistan, as is set out at paragraph 16 of the decision. Ultimately the evidence showed that the claimant could, perhaps with a bit of struggle, acquire the knowledge within a reasonable period of time to remake his private life ties (see SSHD v Kamara [2016] EWCA Civ 813 where the Court of Appeal referenced the need for an individual to understand how life in that society is carried on and participate) as he has ties in the Pakistani community, and thus it was a perverse decision that he would have very significant obstacles to integration if returned to Pakistan.

8. Ms Willocks-Briscoe also argued for the Secretary of State that it was not properly concluded that it would be unduly harsh for NK, the claimant's son by a previous relationship, if he were deported as his mother is his primary carer and he only sees the claimant at weekends and holidays and it cannot properly be said that he is at a crucial time in his development, see RA (s.117C: "unduly harsh"; offence: seriousness) Iraq [2019] UKUT 00123 (IAC), as there was no expert evidence on this point or anything which evidenced that he would need professional intervention if the claimant were deported. The test of unduly harsh is a high one, see KO (Nigeria) & Ors v SSHD [2018] UKSC 53, requiring something severe or bleak. This test had not been met on the facts of this case, and there was no evidence that the needs of NK could not be met by support provided from Social Services and medical services in the UK.

9. Ms Iqbal accepted that the First-tier Tribunal had erred in law in not applying the very compelling circumstances test for the reasons set out below.

10. Ms Iqbal argued however that that the conclusion of the First-tier Tribunal that the claimant would face very significant obstacles to integration in Pakistan was not based simply on culture shock or unfamiliarity or issues of obtaining a job but instead came to that conclusion as a result of a multitude of factors, which are set

out at paragraphs 57 to 60 of the decision and that this conclusion was therefore rational and lawful.

11. Ms Iqbal argued that the conclusion that it would be unduly harsh to the claimant's child, NK, if the claimant were deported was also properly reasoned by the First-tier Tribunal who had the benefit of an independent social worker's report. NK was found to be vulnerable; to have had an emotionally disturbed childhood and need the input of a child psychologist and Social Services; to be at vulnerable stage of his development; and that the claimant leaving the UK would negatively impact on his functioning, education and emotional development. The situation for this child was extremely complex as due to the sensitivities of his mother it was not possible to tell him about the claimant's new relationship and child. It is therefore clear that on these particular facts the conclusion that this was a crucial time when he needed a father figure and the conclusion that the deportation of the claimant would be unduly harsh was rationally open to the First-tier Tribunal. It was clear that the appropriate high standard had been applied as the impact on the claimant's other child, RM-K, had not been found to be unduly harsh. Overall there was a holistic consideration of the evidence which applied the correct test and did not err in law.

12. At the end of the submissions on error of law I informed the parties that I found that there was an error of law in failing to apply the very compelling circumstances case but the First-tier Tribunal had not erred in the "Exceptions" tests applied nor made perverse decisions which were not rationally open to the First-tier Tribunal on the evidence before them. I set out my reasons for that decision below. Both parties were happy to proceed with the remaking of the decision on submissions immediately.

13. With respect to remaking Ms Willocks-Briscoe submitted that very compelling circumstances is a very demanding and high test, see paragraphs 21 and 22 of RA (S.117C: "unduly harsh"; seriousness) Iraq [2019] UKUT 00123 citing NA (Pakistan) & Anor v SSHD [2016] EWCA Civ 662. The claimant needs to show matters over and above the factors in the exceptions and cannot do so on the facts of this case. In applying this test it is necessary to balance the seriousness of the offences. This claimant has 7 convictions for 13 offences which include a four year sentence for robbery in 2002 and a 2 year six month sentence for a robbery in 2009, and so there is a very serious public interest in his deportation. There was no culpable delay on the Secretary of State's part in bringing these proceedings as there was a failure to tell him about the conviction which meant things were not initiated for over 8 years, see the findings of the First-tier Tribunal at paragraph 72 of the decision.

14. Ms Willocks-Briscoe argued that there was no evidence that there was anything over and above unduly harsh to NK if the claimant was deported. NK could be supported by Social Services, his mother and his wider family in the UK if the claimant were deported and for the other reasons set out in the error of law submissions this was not over and above unduly harsh. There was ultimately

nothing more than the splitting of a family which was the normal consequence of deportation, and did not suffice to meet this test, see KO (Nigeria). She argued also that there was no extreme level of very significant obstacles to integration if the claimant had to return to Pakistan for the reasons she identified in her submissions with respect to error of law.

15. With respect to remaking Ms Iqbal submitted that she relied upon her skeleton argument that had been before the First-tier Tribunal and her oral submissions. She argued that the very compelling circumstances test is a Hesham Ali v SSHD [2016] UKSC 60 balancing exercise. As a result, particularly with reference to paragraph 38 of that decision, it is correct to balance in the claimant's favour the fact that his conviction is one as a child and at the lowest level (a four year conviction) to which this high test applies. Further his conduct since he committed his criminal offences amounts to ten years of entirely law-abiding behaviour. She also relied upon the Home Office guidance "Criminality: Article 8 ECHR" dated 31st January 2019 which accepts that family and private life ties can be strengthened due any delay in taking deportation proceedings, as per EB (Kosovo) v SSHD [2008] UKHL 41. She contends that it is clear that the claimant has become further integrated during this period of delay in initiating proceedings forming another relationship and having another child. Also in this claimant's favour is his low risk of reoffending, as is clear from the long period in which he has had no convictions and has been working and his deeply expressed remorse for his previous criminality as set out in his witness statement; and the fact that his criminal behaviour was as a result of a difficult childhood.

16. The best interests of both of his children are to have the claimant remain in the UK. This has been found to be unduly harsh to his older child NK, and it is argued that this would be extremely so, and thus over and above this test, as NK has suffered not just because of the claimant's imprisonment but also due to the difficulties between the claimant and his ex-partner which have led to him being a very vulnerable child. The evidence of his current partner is that she would not travel with him to Pakistan for rational reasons (see her witness statement at page 28 of the appellant's bundle) and thus his deportation would, in reality, deprive his younger child RM-K of his father. Further in the claimant's favour is the following: the fact that the claimant's immediate family are all in the UK; the fact that the claimant's wife has been matched as a kidney donor for her sister and will need the support of the claimant for herself and their child RM-K during this time; the claimant's very significant obstacles to integration in Pakistan; the fact of the claimant's very long residence: he is now 34 years old and he arrived when he was 6 years old and has been lawfully in the UK with indefinite leave to remain for most of his life, and so did not form his private and family life ties whilst present with precarious leave; the fact that the claimant is financially independent due to his wife's work as an antisocial behaviour officer and his demonstrated ability to obtain work, and the fact that he speaks good English.

17. At the end of the remaking submissions I reserved my determination.

Conclusions – Error of Law

18. S.117D(2) defines foreign criminal for Part VA of the Nationality, Immigration and Asylum Act 2002 as someone who (a) is not a British citizen and who (b) has been convicted of an offence and (i) sentenced to a period of imprisonment of at least 12 months, or (ii) been convicted of an offence which has caused serious harm or (iii) is a persistent offender. At s.117D(4)(c) a sentence of imprisonment includes: " a person who is sentenced to detention, or order or directed to be detained, in an institution other than a prison (including, in particular, a hospital or an institution for young offenders) for that length of time. As a result it is clear that the test at s.117C(6) of the 2002 Act, requiring very compelling circumstances over and above the Exceptions at 1 and 2, applies to a person who has been given a sentence of four years detention in a young offenders institution.

19. As the First-tier Tribunal sets out at paragraph 55 of the decision of the Secretary of State was made under s.32(5) of the UK Borders Act on the basis that he is a foreign criminal who has been sentenced to a period of imprisonment of at least 12 months and his deportation is therefore conducive to the public good. It is correct to say that if the claimant's only offence had been the one he was convicted of as a child then he would been exempt from such proceedings under s.33(3) of the UK Borders Act 2007. However it is notable that the offence was listed at paragraph 10 of the decision as part of the criminal history relevant and relied upon in making the decision, and the test applied by the Secretary of State was whether there were very compelling circumstances over and above those described in the exceptions to deportation at s.117C(4) and (5) of the 2002 Act.

20. The grounds of appeal argue that the First-tier Tribunal erred in law in excluding this offence as being is material in assessing the criteria for deportation of the claimant under s.117C of the 2002 Act. The Secretary of State argues that it is clear that offences which do not trigger the proceedings can be material in setting the statutory parameters for the appeal, as was done in the case of Johnson (deportation – 4 years imprisonment) [2016] UKUT 00282 (IAC).

21. Given that it is clear that a past conviction that has not resulted in deportation can be relied upon in a deportation appeal and given that s.117D(4)(c) of the 2002 Act clearly provides that youth custody counts equally as a sentence of imprisonment I find that the First-tier Tribunal erred in law at paragraphs 55 and 56 of the decision in not applying a test as to whether there are very compelling circumstances over and above the Exceptions to deportation. This was accepted as correct by Ms Iqbal.

22. With respect to Exception 1 at s.117C(4) of the 2002 Act the Secretary of State accepts that the claimant has been lawfully resident in the UK for most of his life and does not challenge the finding that he is socially and culturally integrated in the UK, see paragraphs 57 and 58 of the decision. It is clear that the First-tier Tribunal applied the correct definition of integration, as "a broad evaluative judgment" which is set out in full at paragraph 49 of the decision, particularly as

there is also reference to being able to understand the cultural and social mores and build private life relationships within a reasonable period of time again when the facts of the case are considered at paragraph 60. In coming to the conclusion that this test is met weight is properly given to the findings that he had no known family in Pakistan; his period of residence in the UK since the age of 6 years; and his education and work all being in the UK. The context of the claimant being fit and healthy and having made three short trips to Pakistan was considered. I conclude that there are detailed and rational findings at paragraph 60 with respect to the claimant having very significant obstacles to integration on return to Pakistan which were open to First-tier Tribunal on the evidence before it and there was no failure to consider anything material.

23. Likewise, I find that the finding that it would be unduly harsh to the claimant's child, NK, to have to remain in the UK whilst he is deported was rationally and properly open to the First-tier Tribunal on the evidence. The First-tier Tribunal properly directs itself with respect to the high test in "unduly harsh" setting out at paragraph 48 of the decision an extract from NA (Pakistan) that separation of children from their parents was a consequence of criminal conduct, and the simply desirability of children being with their parents not normally being a compelling circumstances to outweigh the high public interest in deporting criminals; and further at paragraph 50 an extract from KO (Nigeria) that unduly harsh is a high degree of harshness which goes beyond what would necessarily be involved for any child being faced with the deportation of a parent. As Ms Iqbal has argued that the correct understanding of the high level of the test led to the conclusion at paragraph 69 of the decision the that the deportation of the claimant whilst his younger child, RM-K, and partner remained in the UK would not be unduly harsh to them.

24. The deportation of the claimant was found by the First-tier Tribunal to be unduly harsh to NK, who is 12 years old and the claimant's older child by a previous relationship, because expert evidence from an independent social worker, found to have the requisite expertise at paragraph 61, was that there was a genuine, subsisting and positive relationship between NK and the claimant, and that it was view of NK that he would be devastated by his deportation and that in the context of his emotionally disturbed childhood, which required the input of a child psychologist and Social Services, that the claimant being deported would impact on NK's functioning, education and emotional development with a real risk of harm. The First-tier Tribunal concluded at paragraphs 64 to 67 of the decision that NK had particular vulnerabilities due to his difficult childhood, and that, reliant on the expert evidence he was at a very vulnerable stage of his development and that the deportation of the claimant could well lead to the need for further professional interventions, as had previously been needed, to address this harm, and as a result it was found to be unduly harsh. I find that there was proper reliance on expert evidence and findings that the consequences of deportation of the claimant for NK went well beyond the normal consequences of deportation for a child of a family, and that a sufficient level of severe harshness and bleakness existed on the facts of this case to meet this test.

Conclusions - Remaking

25. As indicated above the test for remaking in this case is whether s.117C(6) can be met: and thus whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 (at s.117C(4) and (5)), which the preserved findings of the First-tier Tribunal find are met. This is best determined, as per Hesham Ali, by a balancing exercise. In the same case the Supreme Court also held as follows that: " a custodial sentence of four years or more represents such a serious level of offending that the public interest in the offender's deportation almost always outweighs countervailing considerations of private or family life;" Similarly in NA (Pakistan) it was noted that to meet this test there would be need to features of the case which were of the kind in Exceptions 1 or 2 or features falling outside those exceptions which made an especially strong Article 8 ECHR case.

26. As per the Court of Appeal in AJ (Zimbabwe) v SSHD [2016] EWCA Civ 1012 I must firstly fully recognise the very powerful weight to be given to the strong public interest in deporting foreign criminals. This public interest has three facets: the need to deter other foreign criminals from committing crime; the need to maintain public confidence in the immigration system; and protection of the public. For reasons I set out below I do not find that the claimant's deportation is needed to protect the public but the other aspects must be given full weight against the appellant succeeding in this appeal. The claimant has seven convictions for 13 offences, the most serious being two convictions for robbery which is a serious crime involving fear of violence or actual violence towards law-abiding citizens and financial/ property loss for the victim. However, I recognise that there is some force in the submission of Ms Iqbal that the claimant is at the lowest end of sentence needed to engage this highest test and that this should be borne in mind when considering the proportionality of his deportation, whilst of course still adhering to the very compelling circumstances test and bearing in mind that it will be unusual for the claimant's family and private life to outweigh the public interest.

27. I find that the claimant does not represent a risk of reoffending as he has not committed any further offences since the robbery which led to his conviction at Snaresbrook Crown Court on 20th February 2009. This is now over ten years ago. It has been found by the First-tier Tribunal in an unchallenged finding that he is culturally and socially integrated into the UK due to his not having committed any offences and having assumed a lawful existence in the UK with work, family and friends. In his evidence to the Tribunal he has expressed a great deal of remorse for his behaviour, and explained how in prison in 2009 he did a victim awareness course and acquired qualifications which enabled him to turn his life around. He now has a loving family, with a wife and two sons to provide for and a good income from work as a HGV driver for Redbridge Builders Merchant. I stress that I fully appreciate that this means simply that one of the three key aspects of the public interest does not require the claimant's deportation. It is notable that in Johnson at paragraph 27 consideration is given to circumstances

where an offence is committed as a young man and a long period of non-offending then elapses, and it is concluded that this could be a "very compelling circumstances" which could protect an appellant against expulsion. However, I find that the need to deter other foreign criminals from committing crime and the need to maintain public confidence in the immigration system still represent a very considerable public interest in the claimant's deportation.

28. Neutral matters in this balancing exercise are that the claimant speaks English and is financially independent as both he and his partner are in employment.

29. On the claimant's side of the balance there is firstly the fact that he has met both of the Exceptions under s.117C(4) and (5) of the 2002 Act. The test is of course that there must be something over and above those Exceptions so this alone does not suffice but I find that it is an important first step. With respect to the private life Exception I do not find that he has shown anything over and above very significant obstacles to integration in Pakistan on the facts of this case, but this is a matter which may combine with others to make the case very compelling. Within the findings that led to his meeting this Exception are his long and lawful residence starting as a 6 year old child, and his private life ties (which include those with extended family in the UK for both himself and his partner) which led to a conclusion that he was integrated in the UK as well as a finding that he has no known family in Pakistan. It is clear that the delay in commencing deportation proceedings, albeit not a culpable error by the Secretary of State, has led to this claimant having deeper family and private life ties with the UK.

30. With respect to the "unduly harsh" Exception I am persuaded however that the facts of this case can properly described as strongly unduly harsh to the claimant's son NK. The social work evidence (based on interviews with NK himself, NK's mother and the claimant) is that NK is "without doubt a vulnerable child" who has suffered emotional harm in the past necessitating Social Services and mental health services involvement, and particularly at this point of time in early adolescence needs a father figure and stable positive male role model in his life, and thus regular on-going face to face contact with his father. It is the social worker's opinion that there is a real risk that separation from the claimant would undermine his emotional stability, cause him great distress and trauma, and harm his educational development. I accept that were this harm caused to NK on the claimant's deportation that Social Services and CAMHS would be available to him in the UK, but these services can only do their best to try to address the harm caused, and are not in a position to prevent it happening. I find that the deportation of the claimant would be beyond bleak and severely harsh for NK even with the support from state services to assist him in his damaged state.

31. I also accept the submissions of Ms Iqbal that there are other positive elements on the claimant's side of the balance on the facts of this case. The best interests of the claimant's other son, RM-K are to have the claimant present in his life. As set out by the social worker the claimant is one of his secure attachment figures and it will be emotionally harmful to remove him from RM-K (now a baby of ten

months old), particular as this will be emotionally and practically stressful for his mother. Even though the claimant's deportation is not found to be unduly harsh to him and his mother/ the claimant's current partner, this is of relevance as those best interests could not be met by RM-K and his mother accompanying the claimant to Pakistan as it was found by the First-tier Tribunal that it would be unduly harsh to expect them to live with the claimant in Pakistan due to her levels of anxiety and being of Indian heritage, and in the context of the claimant having been found to have very significant obstacles of his own to integration in Pakistan. It is of relevance here that the claimant and his British partner formed their family life relationship when he was lawfully and not precariously present in the UK with indefinite leave to remain.

32. For these reasons I conclude on the totality of the evidence before me that this is an exceptional case and there are very compelling circumstances (primary the over and above unduly harsh impact of deportation on NK but additionally the meeting of the private life Exception to deportation which included a finding of very significant obstacles to integration in Pakistan for the claimant and the fact of his deportation being contrary to the best interests of his younger child RM-K) that mean in a case where the public interest in deportation whilst still very strong lacks any element of public protection that the claimant's deportation is not a proportionate interference with his Article 8 ECHR rights.

Decision:

1. The making of the decision of the First-tier Tribunal involved the making of an error on a point of law.

2. I set aside the decision of the First-tier Tribunal

3. I re-make the decision in the appeal by allowing it on Article 8 ECHR grounds.

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269) I make an anonymity order. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the original appellant. This direction applies to, amongst others, all parties. Any failure to comply with this direction could give rise to contempt of court proceedings. I do so in order to avoid a likelihood of serious harm arising to the claimant's older child who has been found to be particularly vulnerable.

Signed: *Fiona Lindsley* Date: 22nd July 2019

Upper Tribunal Judge Lindsley