Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/17261/2017

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 22nd March 2019	**On 26th April 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE JUSS

Between

OMAR [M]
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Mr I Harding (Counsel, instructed by Universal Solicitors)
For the Respondent: Mr S Whitwell (Senior Home Office Presenting Officer)

DECISION AND REASONS

1. This appeal concerns the Appellant, who is a citizen of Pakistan and was born on 1st January 1993. By a decision dated 29th November 2017 the Respondent decided to refuse the Appellant's human rights claim and refused to revoke a deportation order which had been made on 19th October 2016, in respect of the Appellant, under Section 32(5) of the UK Borders Act 2007. The basis of the deportation order was that on 27th September 2016, before the Crown Court at Snaresbrook, the Appellant was sentenced to a total sentence of two years and three months, with respect to offences

of common assault and unlawful possession of an offensive weapon (which consisted of a pair of scissors).

2. It is a feature of this appeal that there had been a previous hearing before IJ Kainth, at Harmondsworth on 30th January 2018, which was promulgated on 19th February 2018, where the judge concluded that the Appellant could not succeed, given the automatic provisions on the deportation order, and the Appellant's failure to demonstrate that there were exceptions to the normal course of action involving a foreign criminal.

3. Thereafter, an appeal to the Upper Tribunal led to the finding of an error of law. The determination by UTJ Kekić, on 4th January 2019, which was promulgated on 8th January 2019, was to the effect that the judge had, at paragraphs 55 to 57 of the determination, referred to an ex-partner who had discretionary leave to remain, and to a Family Court order in respect of a child. However, this plainly referred to some other case, and the reference to another case meant that "anxious scrutiny" had not been exercised in this case. Given that the judge had to determine whether the facts were such that the Appellant's case could meet the "unduly harsh" test, it was incumbent upon the judge to ensure that proper care was taken and the correct facts were put forward and determined free of any errors of any kind. That being so, the matter would be retained in the Upper Tribunal for a second stage substantive hearing. It is in these circumstances that this appeal falls to be determined by me today.

The Hearing

4. At the hearing before me on 22nd March 2019, Mr Harding of Counsel, and Mr Whitwell, as Counsel for the Appellant and the Senior Home Office Presenting Officer respectively, took a few moments to isolate the issues for consideration. Mr Harding sought an assurance that, given that there was now a second child, whether this was a "new matter" which the Secretary of State would not consider. Mr Whitwell made it clear that it was not in issue and the appeal could still be heard on the basis that there was a second child now. Mr Harding also raised the question of the Appellant's nationality, given that this appears to have been ascribed to him by the Immigration Officer, in circumstances where the Appellant claimed that he did not know where he came from, because he had been adopted as a very young child in Pakistan. Mr Whitwell submitted that there had been two occasions, in 2011 and then in 2014, when members of the Pakistan High Commission had visited the Appellant in prison, while he was serving a sentence, to see if he could be given documents to return back to Pakistan. However, because an exit permit was limited by time there was no point in the visiting Pakistani Officials issuing one at that stage. Nevertheless, it would doubtless be the case that, if the Appellant's appeal was dismissed, and he stood to be removed, then matters would be put in hand to ensure that he is returnable to the country of his nationality. With these preliminary matters having been flagged up, the hearing then proceeded to deal with the evidence.

5. The first witness called by Mr Harding was the Appellant himself. He confirmed his name as "Omar [M]" and gave his date of birth as 1st January 1993. He was asked to adopt his witness statement (which appears at pages 2 to 7 of the Appellant's bundle and is dated 23rd January 2018). There were no further questions asked in evidence-in-chief.

6. In cross-examination, Mr Harding asked the Appellant how it was that he had moved from [~], Ilford, to [~], in Walsall, in the West Midlands, and the Appellant explained that he had moved because in Ilford he had been with bad company, and he wanted to move away from a bad crowd. He was asked if his wife would accompany him if he were to be removed to Pakistan. He answered that she would not. He said that the reason for this was that his parents were never happy about him marrying his wife. He was a Muslim and his wife was a Hindu, and of Hindu parents, and they had objected to the wedding. So if he was removed she would stay in her own house now in Walsall. As for any help from them, this could not be counted on. He was then asked how often his wife sees her parents. He said it was very difficult to say this. He would not give an answer. He then said that it would be perhaps every two months, and it may even be more. He was then asked when he and his wife last saw his parents-in-law. He said they only saw them yesterday, when they stayed with them, prior to coming to the hearing today. He was then asked to confirm the date when he moved to Walsall and he said this was February 2018.

7. There was no re-examination by Mr Harding. I asked the Appellant to take the opportunity to say anything to the court that he wished, given that he had given his evidence in a rather constricted and restrained manner. He said that, "whatever I have done in the past, I have done by mistake. When I was in jail I was thinking I have two kids and I want to be a father. I cannot live without the children".

8. The second witness called was the Appellant's wife, [RR], and she adopted her witness statement (at pages 8 to 12 of the Appellant's bundle) which was dated 23rd January 2018. Mr Harding on this occasion did have some questions-in-chief. He asked the witness when she moved to the new address in Walsall. She said this was in February 2018. She was asked why she could not live in Pakistan. She said that she had never been to Pakistan. She had converted from Hinduism to Islam. She did not pray. However, she was born in England, and her mother came from Tanzania and her father came from Malawi, but they were of the Hindu religion, and were quite devout. They had come when they were very young, around 6 to 8 years. She had family in India but she did not know these family members. She had been twice to India herself. She spoke English and she spoke Gujarati. Her husband, the Appellant, spoke English and he spoke Punjabi. The children only spoke English. Both parents spoke to them in English. Her daughter was now 5 years of age and her son was now 2 years of age.

9. Mr Harding proceeded to ask the second witness why she had moved to Walsall, and she said that her husband, the Appellant, was in trouble a great deal, and they had friends in Walsall who had helped them find accommodation. She was asked

whether her husband still drank. She said that he did not drink. She was asked how she knew. She said she knew because every morning he dropped off the daughter at school and he picked her up in the evening and in between he was at home. She was asked whether her parents were practising Hindus. She said that they were and they had celebrated *Diwali.* Her parents were not happy at all that she had converted to Islam. They had raised her as a Hindu. They did not want anything to do with her. She was asked if she went to the mosque. She said she did not do so. The only time she had ever gone to the mosque was when she married. She was asked if she considered herself to be a Muslim and she replied, "I don't practise Islam". She was then asked if she practised Hinduism and she replied, "no!".

10. Mr Harding then proceeded to ask the witness when she last saw her parents, and [RR] replied that she did so, "last Christmas". She was asked whether she had since last Christmas seen her parents and she replied, "no!". It was put to her that her husband had said that they had only visited yesterday, the witness now said, "we only popped in". At this stage, Mr Harding asked her where she stayed the night and she replied, "with my parents".

11. Mr Harding then proceeded to ask [RR] what her relationship was like with her parents and she replied, "it is okay. Obviously they are not happy with my marriage". She was asked whether she could stay with her parents. She said that "I do not believe my parents would have that much input in me". She was then asked whether they would help if her husband was not around. She said that they would not. She said her parents were not supportive. They were not happy with her marriage. They do not want to help her at the moment. She was asked how often she speaks to them. She replied that she speaks to them, "couple of times a week". The witness was then asked to explain the nature of the relationship that the children had with the Appellant. She said that the eldest child, the daughter aged 5, was "close" to the Appellant and that she sees him every day, and that without him "it would be very difficult". As for the son, he was 2 years old but the Appellant played with him and they had also "a very close relationship". When asked what had happened to them she said, "it would be very difficult. If he was not there it would be quite upsetting for her". She then went on to say that "we have been together for ten years, and it would be very difficult. Obviously I am at work now, but I would not be able to work, until my son was old enough".

12. In cross-examination by Mr Whitwell, she was asked why her parents would not support her, given that she had stayed with them last night, before coming to this hearing. She replied, "I am the only child and obviously they still love me, but they do not agree with what I did". She was then asked how often she went to see them and she explained that she goes to see them from the Midlands during every school holidays with the children, and stays overnight for a couple of days. Mr Whitwell also enquired why the Appellant had stopped working at John Lewis. She explained that she had to stop working in March 2018 when she had moved to Walsall, although she had asked the London office to find her a placement in the John Lewis department in Birmingham, but none were available. She had been on maternity leave for one year from 24th December 2016, and the last two or three months of these

were not paid. It was put to her that whilst the Appellant was in prison for 449 days, from 6th October 2016 to 29th December 2017, she managed to cope quite well. She said that she had friends in London who were helping her. However, if the Appellant was deported then she would not be able to cope. She herself would not leave Walsall to go and live either with her parents or near them because it would not be fair on her daughter to be uprooted again. When asked again how she coped when her husband was in jail for 449 days, she said, "I was at home then with my second baby". Finally, she was asked again what would happen if he was deported and she said that she would stay in the UK. She would not go to Pakistan.

13. There was no re-examination.

14. In his closing speech, Mr Whitwell submitted that the starting point was the decision of the earlier judge, IJ Kainth, promulgated on 19th February 2018, as earlier agreed between the parties, given the application of the **Devaseelan** principle. The earlier judge had accepted that the Appellant and his partner were in genuine and subsisting relationship.

15. The earlier judge had also come to the firm view that the Appellant was a Pakistani national. In fact, in all the correspondence between the Appellant and his representatives, and the parties, he uses the name of "Omar [M]". If the Appellant were to be removed, the Pakistan High Commission would issue him with a limited travel document to enable him to leave this country and go to Pakistan. That was not a question that this Tribunal needed to consider right now. The question, however, was whether, given the circumstances that had been described by both the witnesses before this Tribunal, whether it would be "unduly harsh" for the Appellant to be removed. The question was whether it would be "unduly harsh" for the Appellant's wife and children to remain in the UK. The second Appellant, his wife, had made it quite clear that she would remain in this country. That, indeed, was the most likely scenario.

16. However, the witnesses had not been truthful. There was a discrepancy in their evidence. The second witness had stated that she had only seen her parents last Christmas. It required Mr Harding himself to inform her that her husband had only just said that they had stayed with her parents last night, before coming to this hearing, and at this stage, she had to own up and say that "we had just popped in".

17. What this suggested was that she was in a good relationship with her parents, although it was entirely understandable that they did not approve of her marriage to somebody in another faith, as she claimed. Nevertheless, the fact remained that there was a greater level of contact between the Appellant's wife and her parents than we were being led to believe. She had given evidence that her parents had travelled twice to see them in Walsall. The Appellant herself takes the children during school holidays to go and live with her parents. Indeed, when the Appellant was in prison his wife stayed with her parents at [Ilford]. This ties in entirely with the finding of the judge (at paragraph 26) which was that, "she has an extended close-knit family community in her local area of Ilford, Essex" (paragraph 26). What this means is that

the situation would be just as it was in the past. She would have the family support that she has always had in the past when the need has arisen. The family has not fallen apart, even during the time when her husband was in prison for 449 days.

18. That left the question of the application of the case law. It is not clear from **KO (Nigeria) [2018] UKSC 53** that there is authoritative guidance as to the meaning of "unduly harsh", as there is given by the Upper Tribunal in **MK (Sierra Leone) [2015] UKUT 223**, when Mr Justice McCloskey had stated that the test of "unduly harsh" is a "evaluative assessment". What this means is that:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher" (see paragraph 27).

19. This being so, submitted Mr Whitwell, the Appellant could not succeed, given that the evidence that she relies upon is simply that of inconvenience and hardship. This is clear, not only from what she has said today, but it is also clear from what she stated in her witness statement (at paragraph 12), which was that:

> "It would be unduly harsh for me to live together with the children here in the UK without my partner. I and my children cannot imagine living without him. Our children are very content when their father is around. It will be extremely difficult for the wellbeing of our children if their father is being removed. I could not express in words how it was difficult for me to live while my partner was in detention" (see pages 11 to 12 of the bundle).

This, submitted Mr Whitwell, was not the test of "unduly harsh".

20. For his part, Mr Harding submitted that the decision of Judge S Aziz back in July 2015 (IA/47316/2014) records the Appellant's complaint that the Appellant did not know his real name when he was growing up, as he was simply known by his nickname of "Chootoo". This was because he was unable to give the Home Office a proper name, so that the Home Office caseworker gave him the name of "Omar [M]". However, Mr Harding had to accept that in the next breath, Judge Aziz did say that, "I do not believe the Appellant. I do not accept that the caseworker manufactured a name for the Appellant", and that this was an Appellant who was "being deliberately obstructive about revealing his identity and nationality in the hope that it would frustrate any attempts by the Home Office to remove him to Pakistan" (see paragraph 105). At this stage, I asked Mr Harding whether, given the objection taken to the ascription of this name to the Appellant, there had been any appeal to Judge Aziz's finding that "Omar [M]" was not actually his real name, but was a name that had been wrongly ascribed to him. Mr Harding said that it had not been appealed. He was not in a position to explain why that was the case. He was not at that point representing the Appellant.

21. Second, nevertheless, Mr Harding proceeded to say that the Appellant had no support in Pakistan. This meant that paragraph 399A would apply (rather than paragraph 399B, which was altogether more difficult a provision to apply).

22. Third, the question remained whether separating a parent from the child would not in itself lead to circumstances that were "unduly harsh", given the impact of that separation on two very young children. The Appellant would have to stay in the country of his removal for ten years before he could make an application to return to this country.

23. Finally, in the grand scheme of things, the Appellant's offences were at the lower end, and the public interest did not necessarily mean that removal was proportionate.

24. He asked me to allow the appeal.

Reasons for Decision

25. I have given careful consideration to all the evidence before me, the submissions of both parties, and the previous determinations that have been made by judges beforehand. I am satisfied that the Appellant has not discharged the burden of proof that is upon him. My reasons are as follows.

26. First, paragraph 399(a) deals with a situation where an individual has a "genuine and subsisting parental relationship" with a child who is a British citizen or who has lived in the UK continuously for at least seven years. Paragraph 399(b) deals with a situation where the individual has a "genuine and subsisting relationship with a partner". It is trite law that where an individual has been sentenced to a period of imprisonment of less than four years (i.e. paragraph 398(b) or (c) applies) then he or she may rely on paragraph 399 (and paragraph 399A).

27. Where, however, the individual has been sentenced to at least four years' imprisonment then paragraph 399 (and indeed paragraph 399A) cannot apply and paragraph 398 states that the

> "public interest in deportation will only be outweighed by other factors where there are very compelling circumstances over and above those described in paragraphs 399 and 399A."

28. The requirement to establish "very compelling circumstances" also applies if the individual has been sentenced to a term of imprisonment of less than four years, whereas paragraphs 399 and 399A cannot apply.

29. In this case, as a factual matter, the Appellant's circumstances amount to no more than what has been said both in open court in oral evidence before me and in writing in the respective witness statements. This is best expressed by the Appellant's partner, [RR], who stated that *"it would be unduly harsh for me to live together with the children here in the UK without my partner. I and my children cannot imagine living without him"*. However, she does not explain precisely why this would not be

possible. She states that it is difficult to put in words what the impact would be. Be that as it may, however, the fact is that the Appellant's partner did manage tolerably well the last time when he was incarcerated for a period of 449 days. At that stage, she enlisted the help of her family members. The same can be done now if necessary.

30. This is not least because the proper approach to the test of 'unduly harsh' was identified by the Upper Tribunal in ***KMO* (section 117 - unduly harsh) [2015] UKUT 543 (IAC)**:

> "The Immigration Rules, when applied in the context of the deportation of a foreign criminal, are a complete code. Where an assessment is required to be made as to whether a person meets the requirements of para 399 of the Immigration Rules, as that comprises an assessment of that person's claim under article 8 of the ECHR, it is necessary to have regard, in making that assessment, to the matters to which the Tribunal must have regard as a consequence of the provisions of s117C. In particular, those include that the more serious the offence committed, the greater is the public interest in deportation of a foreign criminal. Therefore, the word "unduly" in the phrase "unduly harsh" requires consideration of whether, in the light of the seriousness of the offences committed by the foreign criminal and the public interest considerations that come into play, the impact on the child, children or partner of the foreign criminal being deported is inordinately or excessively harsh."

31. Second, this brings me to the context of the family circumstances. I do not accept that the Appellant's partner is not on good terms, in a way that she cannot rely upon the support from her parents, despite attempts by both the Appellant and his wife to suggest that this was the case. In this respect, I have found both witnesses to be less than truthful. This is clear from how the second witness attempted to avoid having to confirm that she had actually stayed with her parents only yesterday before coming to the hearing today. In fact, she misled the court. The plain fact is that although one can well imagine that her parents were less than happy with her marrying a person of a different faith, and are even less happy that she is married to a person who gets himself into trouble time and time again, the fact remains that they have been supportive, as and when required, at every stage during the Appellant's wife's time. Nothing demonstrates this better than her own evidence when she said that she was the only daughter and that obviously her parents still loved her. Every time she described the situation the Appellant's wife in the next breath went on to say that they did not agree with what she did. I accept that that is the case but that is not to say that they are not supportive of her when she needs them.

32. Third, in terms of her essential needs, the Appellant's wife has young children who go to school. She may well find it inconvenient to leave Walsall and return back to Ilford. She may well not like doing so. However, as the Supreme Court has affirmed in **KO (Nigeria)**, what the Upper Tribunal has explained in the case of **MK (Sierra Leone)** that the test is not one that is to do with finding things to be merely difficult. In fact, the reference to "harsh" denotes something that is "severe or bleak". Added to this is the adjective, "unduly", and this "raises an already elevated standard still

higher" (see paragraph 37). That is the position here. The Appellant's wife may well choose to remain in Walsall. At the same time, it is open to her to go back to [Ilford] or to live near her parents in Ilford, where she and the children would have the assistance of her parents. The children are young enough to be moved in this manner. Indeed, the support from her parents has been both constant and commendable. They have visited her in Walsall and she in turn goes to stay with them in Ilford during the school holidays of the children.

33. Finally, there is the question of the Appellant's nationality. I have not found the Appellant, (as did indeed the previous judges also), to be a person who was desperate to be helpful to the court and to tell the truth. Previous judges have described him as being deliberately obstructive. I have found him to be restrained and evasive. When he was asked whether, in the event of his removal to Pakistan, his wife would return as well, he had to be asked twice because he would not give a straight answer. He proceeded to explain that her parents were not happy. He said that they were Hindus. He said that they would reject her. When he was asked whether the parents would help in terms of the children's schooling he was absolutely adamant in saying that they would not. I am not by any means persuaded that they would not help the children were it to be the case that the Appellant's wife chose to move back to Ilford, or were it to be the case that the parents moved themselves for a time to be in Walsall with the Appellant's wife.

34. I do not accept that the name of "Omar [M]" is not his real name. It may well be that he had a nickname, as Mr Harding quite wisely accepted. However, he would have known what his real name was. This is the name that he has used moreover in all correspondence with all the parties at all the time. In any event, it is well-accepted that he was adopted and brought up in Pakistan. The previous judge found that he was a national of Pakistan. The finding in relation to his name and other matters has not been appealed. Mr Harding could not say why it had not been appealed if it was not the Appellant's real name. I find that there is nothing in the point in relation to his name.

35. The offences committed are serious. The Appellant has been given ample opportunities to mend his ways. It is not enough to say, as he did in his statement at the end of his evidence before me, that he now wishes to be a father, when he has known all along what his duties are as a father. He has committed one serious offence after another. The sentencing remarks of the judge are telling in this respect. The Appellant has been involved in "many previous convictions involving violence and most of them, it appears, connected to drink in some way" (see page 43 of the bundle). In August 2012 he was before the court "for possession of a bladed article, which I am told was a screwdriver and were given a community order" according to the judge. The judge observed that "the unfortunate victim here must have been absolutely terrified when you threatened him with scissors in his own restaurant. These aggravating features speak for themselves". It was the judge's clear view at the Crown Court at Snaresbrook on 27th September 2016 that "you have been given chance after chance and you threw those chances away. These matters you should

have thought of before you drank so much that, lacking control of yourself you committed these offences".

36. This is a case where the Appellant is a persistent offender. He has shown a complete disregard for the law. In terms of whether it would be "unduly harsh" as a whole, on the Appellant's wife, if he were deported I note that she has lived with her parents and siblings and has a network of relations. She has not been to Pakistan. However, she has made it quite clear she has no intention of going to Pakistan. In a case such as this, it is important that the Tribunal should not just focus on the child alone but should have regard to the wider public interest considerations, including the conduct and immigration history of the Appellant. The Appellant has a history of violence. He has possessed bladed articles and offensive weapons. I am not satisfied that the picture before me demonstrates a position of rehabilitation. It is true he has engaged with Probation Services. It is also true that he received support from drug and alcohol services in the community. Nevertheless, he has been a persistent offender, and his offences have gone from bad to worse. There is a significant public interest in his deportation.

37. This appeal is refused.

Notice of Decision

The appeal is dismissed.

No anonymity direction is made.

Signed Date

Deputy Upper Tribunal Judge Juss 23rd April 2019