**IN THE UPPER TRIBUNAL**
**IMMIGRATION AND ASYLUM CHAMBER**

Case No: UI-2024-003910
On appeal from: HU/58508/2023
LH/03710/2024

**THE IMMIGRATION ACTS**

**Decision & Reasons Issued:**

15th January 2025

**Before**

**UPPER TRIBUNAL JUDGE GLEESON**

**Between**

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

Appellant

**and**

**M H**
**(ANONYMITY ORDER MADE)**

Respondent

**Representation:**

For the Appellant: Mr Alan Tan, Senior Home Office Presenting Officer
For the Respondent: Mr Ishtiyaq Ali, Counsel, instructed by Brook Hill Law

**Heard at Field House on 7 November 2024**

**Order Regarding Anonymity**

**Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the claimant and his family members are granted anonymity.**

**No-one shall publish or reveal any information, including the name or address of the appellant, likely to lead members of the public to identify the claimant or any other member of his family. Failure to comply with this order could amount to a contempt of court.**

**DECISION AND REASONS**

1. The Secretary of State challenges the decision of the First-tier Tribunal allowing the claimant's appeal against her decision on 30 June 2023 to refuse to revoke a deportation order and to decide that the claimant could not bring himself within any of the Exceptions in section 33 of the UK Borders Act 2007. The claimant is a citizen of Pakistan and a foreign criminal.

2. **Mode of hearing.** The hearing today took place over video link (CVP). There were no technical difficulties. I am satisfied that all parties were in a quiet and private place and that the hearing was completed fairly, with the cooperation of both representatives.

3. For the reasons set out in this decision, I have come to the conclusion that the Secretary of State's appeal must be allowed and the appeal remitted to the First-tier Tribunal for remaking afresh.

**Background**

4. The claimant came to the UK as a spouse on 10 April 2018. At the time of his arrest in August 2022, the claimant was not settled in the UK but had leave to remain as his wife's spouse, which had been renewed to expire on 12 March 2024. The couple have two young children, aged 3 and 4 years respectively. The claimant's wife and children are all British citizens.

5. The claimant was convicted on 12 August 2022 on three counts of attempting to cause a child under 16 to engage in a sexual act, committed over a four month period between May and August 2022. The claimant believed that he was interacting with barely pubescent young girls, and his online engagement with the decoys was described by the sentencing judge as 'increasingly sexualised'. The Judge was aware only of the four months when the claimant engaged with the decoy children.

6. At the First-tier Tribunal hearing, the claimant said that his online activity with young girls began around March 2021, when his wife was in hospital with Covid-19. He continued with this activity until his arrest in August 2022. It is unclear with whom he was engaging between March 2021 and May 2022.

7. The claimant was sentenced to 18 months' imprisonment. On 2 December 2022, the Secretary of State made a deportation order. That order has not been revoked.

8. The sentencing judge imposed restrictions on the claimant. For 10 years, until 12 August 2032, he is required to register with the police and notify them where he is living, and he is the subject of a sexual harm prevention order, which imposes restrictions on his use of cameras and internet devices, and his access to females under 16.

9. The claimant was released from prison on 12 May 2023, then detained briefly in immigration detention, from which he was bailed on 13 May 2023. He was on licence from 13 May 2023 to 12 February 2024.

10. Following his release from prison, the claimant was not permitted to live in the same household as his children. However, he has been allowed to see his children daily, in a supervised environment. The claimant, his brother and his wife have completed various courses aimed at his rehabilitation and supporting him not to reoffend.

## Procedural matters

11. **Non-compliance with Electronic Bundle Guidance.** I record that the Secretary of State's representatives failed to comply with the Directions issued by the Upper Tribunal following the grant of permission to appeal. The Directions issued made it clear that:

    (a) No later than **10 working days** before the hearing of the appeal, the Secretary of State was required to provide to the Upper Tribunal and the respondent a composite electronic bundle complying with the Guidance on the Format of Electronic Bundles in the Upper Tribunal (IAC); and that

    (b) The composite bundle must contain identified documents in a structured way.

12. No bundle was filed by either party before the hearing date. I have reminded both representatives of the need to comply with the directions issued and that in the future, non-compliance, absent good reason, is likely to be met with sanctions.

## Sentencing remarks

13. When sentencing the claimant, the sentencing judge said this:

> "[The] risk that you pose arises from your obvious and denied sexual interest in very young girls who have gone through puberty but are under 16. …
>
> You are prohibited from using, owning or having control of any device which is capable of accessing the Internet unless you have notified your police sex offender manager within three days of acquiring it. …The device must have the capacity to retain information and history, and you cannot put software on it to delete the history. You must make it available to the police if they want to look at it.
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> You are prohibited from using any software which in any other way protects your identity from being obvious. You are not allowed to have any device such as a digital camera which can store images, unless you tell the police about it and make it available for inspection. You are prevented from using the Internet or any social media to attempt to contact any female child -- that is an amendment -- who you know or believe to be under 16, unless you have the permission of social services for the area in which you live or in which the child lives.
>
> You are prevented from creating any social media or social networking account without notifying your offender manager. You are prohibited from having any contact or communication of any kind with any female -- another amendment -- child under the age of 16, other than such as cannot be avoided in your normal life or with the consent of the child's parent or guardian who knows of your convictions, and the parent or guardian of the child has got written permission from social services. *The category of child this will most affect will be your own children.*" [*Emphasis added*]

14. The Judge considered making the three sentences run consecutively, not concurrently, before concluding that after appropriate reductions in accordance with the sentencing guidelines, the appropriate sentence was 18 months in total, with all sentences running concurrently.

15. When considering whether the sentences could be suspended, the sentencing judge said this:

> "I then need to turn to another guideline dealing with the question of whether the sentence can be suspended or not. It cannot, for these reasons. The author of the probation report says that you pose a medium risk of psychological harm to children in the future. I agree.
>
> I need to consider whether there is a prospect of rehabilitation in your case. The answers that you gave to the probation officer preparing the report leads me to conclude that, at present, there is very little prospect of rehabilitation. You were making excuses and very much in denial. Is there strong personal mitigation? No. Would imprisonment impose a significant impact upon other people such as your wife and children? The answer is no, not immediately because you are not living in the family home, for obvious reasons. Have you failed previously to comply with court orders? No, because you have not been subject to any.
>
> Finally, can appropriate punishment only be achieved by immediate custody? And the answer to that is a resounding yes, because your offending was repeated with three potential victims. It took place persistently over a period of four months and you were determined until you were caught.
>
> So, the sentence is eighteen months' imprisonment, of which you can expect to serve half in prison and the second half [in] the community on licence conditions. As long as you stick to those conditions and stay out of trouble, that will remain the case. If you breach your licence conditions or get into more trouble, you would be returned to prison."

## The human rights claim

16. Following the service of a one-stop notice, the claimant made private and family life representations on human rights grounds, arguing that he could bring himself within the Exceptions in section 33 of the UK Borders Act 2007 and section 117C of the Nationality, Immigration and Asylum Act 2002 (as amended).

17. The claimant's human rights claim was refused on 30 June 2023. He appealed to the First-tier Tribunal. His appeal was heard in the First-tier Tribunal on 14 June 2024, just over three months from the end of his licence period. He had not committed any further offences during his time on licence in the community, nor in the three months thereafter.

## First-tier Tribunal decision

18. The First-tier Judge found the claimant, his wife and his brother to be credible witnesses, who gave their evidence in a straightforward and clear manner and responded well to cross-examination. The Judge noted the Secretary of State's acceptance that there was a 'genuine and subsisting relationship' between the claimant and his two children. He was permitted up to 12 hours' supervised contact with them every day. He spent quality time with them, colouring in, cooking, and generally 'fulfilling the fatherly role'. The bond was close, and their maternal uncle could not fulfil that role: he had been willing to assist for a temporary period, both practically and financially, but not long term.

19. The First-tier Judge accepted, apparently without evidence and on submissions, that having their cousins next door (their uncle's children) would make the absence of their own father worse for his children, giving them 'a deep sense of shame'. The Judge placed weight on the wife's evidence that she felt partly responsible for the claimant's actions, as intimate relations between them had been absent for a time. Her guilt would be an additional burden and would detrimentally impact her ability to care for her children, albeit not at a level requiring social services intervention.

20. In concluding that the removal of the claimant would be unduly harsh for his children, the Judge's reasoning at [19] was as follows:

> "In light of the above matters considered cumulatively, I am satisfied that it would be unduly harsh for the children to be without their father. The representatives agreed that it was not necessary for me to reach discreet findings as to the impact on the appellant's wife because her situation is inextricably linked to that of their children."

21. The First-tier Judge then considered whether there were very compelling circumstances which outweighed the public interest in deportation. He reminded himself of the strong ties between the claimant and his wife and children, and also her brother and his wife, who live next door. He noted that the claimant's wife had visited him regularly in prison. He found the claimant to be socially and culturally integrated in the UK. If returned to Pakistan, he would have very significant difficulties in re-integrating as his family there had taken a very dim view of his behaviour: he might not be ostracised but 'it is clear that he would be living under a significant shadow'.

22. The core reasoning in the First-tier Judge's decision is at [23]-[27]:

> "23. I recognise that the offending was relatively serious, relating to grooming with people (decoys) whom the appellant believed to be young girls. *I do not have the benefit of an up-to-date OASys assessment as to risk of reoffending but find, in light of the totality of the evidence, that he poses a low risk of reoffending. The sentencing judge did not, at that stage, see much prospect of rehabilitation given some indication of denial.* I am, however, satisfied that he has made significant progress as regards rehabilitation. He has, for some time, consistently expressed remorse and I am persuaded having heard his evidence on this that he is contrite; feeling a genuine sense of shame and guilt for what he did. He referred to his actions as 'sins' and I am satisfied he regards them in that serious way: as morally reprehensible.
>
> 24. I note that he has undertaken 3 separate programmes for the purpose of addressing his offending, namely Safer Lives, the Lucy Faithful foundation course and Maps for Change; a one-to-one programme with probation. I consider that he has undertaken these out of a genuine motivation and has thoroughly recognised his need to require knowledge and skills to guard against reoffending. It is noteworthy that two of these courses are privately funded and this represents the appellant having voluntarily engaged in rehabilitative effort as opposed to merely doing what is in any event expected of him as a result of, say, licence conditions. A further relatively unusual feature of the appellant's efforts in this regard is that his wife and brother have also participated in the courses; his wife in the Lucy Faithful foundation work and Safer Lives and his brother in Safer Lives. This further reinforces the appellant's progress as he has necessarily had to be open with his family members about his offending. I therefore find this is an exceptional instance of rehabilitation.

> 25. I take into account that the appellant's wife and brother are important protective factors, having themselves learnt skills on the courses and thus have an awareness of risk factors. It is clear that they have a proactive attitude as regards the risk of reoffending. They are extremely supportive of the appellant.
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> 26. I further take into account the context in which I have found that the offending took place. As indicated above, *I have accepted the appellant's wife's candid evidence that she and the appellant were not having sexual relations following her admission to hospital in March 2021 and her subsequent recovery from COVID. She was focused on herself and her young child. It was clear that this has weighed heavily on her. I am, however, satisfied that they are in a stable relationship and enjoy a loving relationship and that it is most unlikely that the appellant will drift into isolation and detachment which appear to have been the principal drivers of his offending. I am satisfied that he is fully focused on his wife and children.*
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> 27. In light of the above, cumulatively, I find that the appellant presents a low risk of reoffending and a low risk of serious harm and in this particular case I attach significant weight to the rehabilitative efforts. In addition, there is strong family life extending beyond the appellant's immediate own family. These amount to very compelling circumstances."
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> [*Emphasis added*]

23. The First-tier Tribunal allowed the appeal. The Secretary of State appealed to the Upper Tribunal.

**Permission to appeal**

24. Upper Tribunal Judge Bulpitt granted permission to appeal for the following reasons:

> "…2. The assertion in ground one that the Judge has erred by failing to apply the self-direction set out at [41] of the Supreme Court decision in *HA (Iraq) v Secretary of State for the Home Department* [2022] UKSC 22 when considering the "unduly harsh test" is arguable. Whilst the Judge refers to *HA (Iraq)* at [10] of his decision and was not required to spell out the recommended self-direction within his decision, it is arguable that his reasons for finding the unduly harsh test met at [18] do not demonstrate that the self-direction has been made.
>
> 3. Ground two is also arguable as, notwithstanding he makes repeated reference to the public interest in deportation, it is arguable that the Judge has not conducted the required balancing exercise before concluding that public interest to be outweighed by the appellant's very compelling circumstances (see [51] of *HA (Iraq)*). "

**Rule 24 Reply**

25. In his Rule 24 Reply, the claimant argued that the findings of fact and credibility made by the First-tier Judge were open to him on the evidence before him, which included witness statements and oral evidence from the claimant, his wife, and his brother-in-law.

26. As regards the unduly harsh test, the Secretary of State had accepted that it would be unduly harsh to expect the claimant's wife and children to go with him to Pakistan (the 'go' scenario). The dispute between the Secretary of State and the claimant was about the 'stay' scenario, where the claimant would be removed and his family members remain in the UK without him. The question was one of fact, with which the Upper Tribunal should not interfere unless it was

'plainly wrong' or 'rationally insupportable': see *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022).

27. Regarding the balancing exercise for 'very compelling circumstances' in section 117C(6), the First-tier Judge had treated the offences as 'relatively serious' and had regard to the very strong public interest in deportation. There was no material error of law in the First-tier Judge's decision which should be upheld.

28. There was no mention in the Rule 24 Reply of any change in circumstances, and no application to adduce further evidence pursuant to rule 15(2A).

29. That is the basis on which this appeal came before the Upper Tribunal.

**Upper Tribunal hearing**

30. The oral and written submissions at the hearing are a matter of record and need not be set out in full here. I had access to all of the documents before the First-tier Tribunal, albeit in an incoherent form and across a number of electronic documents.

31. For the Secretary of State, Mr Tan argued that the evidence of any adverse impact on the children was limited to assertions in the witness statements of the claimant and his wife, which was really not much more than a bare assertion. There was no social worker evidence, nor evidence from school or nursery. The Judge's findings were 'blind speculation'. There was no detailed consideration of the evidence of very significant obstacles to reintegration in Pakistan, save to assert that his family there 'take a dim view' of the claimant's activities.

32. In relation to section 117C(6) which required the claimant to demonstrate very compelling circumstances over and above those in the Exceptions at sub-paragraphs 117C(4) and 117C(5), the Judge's approach had been erroneous. He did not engage properly with the sentencing judge's remarks, which were based on the claimant having engaged in these activities for four months, not for the much longer period to which he now admitted. Had he done so, he might not have considered that the claimant was a 'candid' witness.

33. There was no probation or OASys evidence to support the finding that, contrary to the sentencing judge's remarks, the claimant should now be regarded as presenting a low risk of harm. The weight given to the wife's feelings of guilt at not being able to engage sexually with the claimant during her Covid-19 recovery and when she had a young child had been given inappropriate weight, especially as the children with whom the claimant thought he was engaging online were 12, 13 and 14 years old.

34. For the claimant, Mr Ali accepted that there was no expert evidence about the children's circumstances in the 'stay' scenario. What the Judge did have was the witness evidence, both oral and in the witness statements. There was no record of the witnesses' answers in cross-examination in the decision. Mr Ali accepted that the Judge could have gone further in his reasoning, but argued that it was sufficient. The sentence of 18 months was relatively short.

35. Mr Ali said that there had been a change in circumstances in August 2024: Social Services had permitted the claimant to move back in and live with his children. He had made significant progress in rehabilitation and to remove him

now would punish his wife and children, who were not to blame. I am not seised of that evidence in establishing whether there is a material error of law, but it may be relevant to the remaking of the decision in this appeal.

**Conclusions**

36. I remind myself of the narrow circumstances in which an appellate Tribunal may interfere with a finding of fact: *Volpi & Anor v Volpi* [2022] EWCA Civ 464 (05 April 2022) at [2]-[5] in the judgment of Lord Justice Lewison, with whom Lord Justices Males and Snowden agreed, emphasised that the Upper Tribunal may interfere with findings of fact and credibility only where such a finding is 'plainly wrong' or 'rationally insupportable'. The First-tier Tribunal is recognised as a specialist fact-finding Tribunal and the Upper Tribunal is required to exercise judicial restraint in its oversight of the First-tier Judge's reasoning: see *Ullah v Secretary of State for the Home Department* [2024] EWCA Civ 201 at [26] in the judgment of Lord Justice Green, with whom Lord Justices Lewison and Andrews agreed.

37. However, in this appeal, I have come to the conclusion that the First-tier Judge's findings of fact and credibility are contrary to the evidence, plainly wrong, and rationally insupportable. The First-tier Judge took into account matters which should not have been taken into account and fails to have proper regard to the strength of the sentencing judge's remarks. His characterisation of these ofences as a mere blip in the appellant's life is unsound and inadequately reasoned. There is speculation as to the risk of reoffending which is based on no evidence whatsoever, there is speculation as to the effect on the children if their father is removed again from them and there is speculation as to whether the appellant can live in Pakistan without encountering very significant obstacles to reintegration there.

38. There is also reliance on the appellant's contention that he drifted into what appears to have been a seventeen month engagement with internet paedophilia because his wife would not have sex with him. It is of concern that his evidence now is that there was a longer period of grooming before the four months engaging with decoys which led to his three convictions.

39. The emphasis on the wife's failure to provide intimate relations to her husband when she was unwell, and/or a new mother, does not explain why the claimant felt the need to engage with barely pubescent girl children online. The absence of marital relations is no excuse and should not have been given weight in the Judge's reasoning.

40. The Judge's findings construct an edifice of supposition about the future feelings of the claimant's children and the effect of having a close and supportive uncle, aunt and cousins who live just next door. There was nothing on which to build that edifice, even in the witness statements: it is just as likely that the wife and children will be treated as extended family by her brother and that his concern will be a positive factor for all of them.

41. The claimant is an adult, who spent most of his life in Pakistan before coming to the UK six years ago as a spouse. There was nothing in the evidence which could properly be characterised as 'very significant obstacles' to reintegration, just that his family 'take a dim view' (short of ostracism) of what he did. Nor does anything in the evidence reach the demanding standard of 'very compelling

circumstances', at least as far as can be discerned in the First-tier Judge's decision.

42. The First-tier Judge's reasoning is inadequate at the level of a material error of law and the decision will be set aside for remaking.

**Disposal**

43. At the hearing, I considered that this was a case where it was possible to remake the decision immediately. It has since been drawn to my attention that the hearing notice specified that the hearing was for error of law only. I therefore invited written submissions on disposal from both parties. Having read those submissions, and bearing in mind the claimant's assertion (on which I have heard and seen no evidence) that he has been allowed to return to his family home and live with his children, I consider that it is in the interests of justice for this decision to be remade afresh in the First-tier Tribunal, with no findings of fact or credibility preserved.

**Notice of Decision**

44. For the foregoing reasons, my decision is as follows:

The making of the previous decision involved the making of an error on a point of law.

I set aside the previous decision. The decision in this appeal will be remade in the First-tier Tribunal.

Judith Gleeson
Judge of the Upper Tribunal
Immigration and Asylum Chamber

**Dated: 4 January 2025**