Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00226/2014

THE IMMIGRATION ACTS

Heard at Field House	**Determination Promulgated**
On 6 January 2015	**On 12 January 2015**

Before

UPPER TRIBUNAL JUDGE MOULDEN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MOHAMMED MUSHTAQ KHAN
(No Anonymity Direction Made)

Respondent

Representation:

For the Appellant: Mr T Melvin a Senior Home Office Presenting Officer
For the Respondent: the respondent attended but was not legally represented

DETERMINATION AND REASONS

1. The appellant is the Secretary of State for the Home Department ("the Secretary of State"). The respondent is a citizen of Pakistan who was born on 6 August 1955 ("the claimant"). The Secretary of State has been given permission to appeal the determination of Upper Tribunal Judge Freestone ("the FTTJ") who allowed the claimant's appeal against the Secretary of State's decision of 28 January 2014 to make a deportation order against him under the provisions of the UK Borders Act 2007 on the basis that she was required to do

so by section 32 (5) of that Act because he was a foreign national who had been convicted in the UK of an offence and sentenced to a period of imprisonment of at least 12 months and he did not fall within one of the exceptions set out in section 33.

2. The claimant appealed and the FTTJ heard his appeal on 4 August 2014. The Secretary of State was legally represented but the claimant was not. The FTTJ heard oral evidence from the claimant in English.

3. The claimant argued that to remove him from the UK would breach his Article 8 human rights. The FTTJ found that the claimant could not meet the requirements of paragraphs 399 or 399A of the Immigration Rules because he had been sentenced to more than four years imprisonment. In these circumstances the public interest in deportation would only be outweighed by other factors where there were very compelling circumstances. The claimant had committed a number of offences. The index offence was very serious and he had been sentenced to 7 years imprisonment.

4. The FTTJ referred to section 117C of the Nationality, Immigration and Asylum Act 2002 which came into effect for all appeals heard on or after 28 July 2014. She heard the appeal on 4 August 2014. She found that the claimant had been lawfully resident in the UK for most of his life and there would be very significant obstacles to his integration into Pakistan. He was in a genuine and subsisting relationship with his adult sons notwithstanding a lack of contact for several years. He had medical problems. The FTTJ found that these factors were not enough to satisfy the requirements of section 117C(6) but there was one exceptional factor which made the case very exceptional and amounted to very compelling circumstances. This was the claimant's length of residence in the UK. He came here when he was 12 and had been here for 47 years. He was now aged 59. He had been granted indefinite leave to remain in 1989. Even if his periods of imprisonment were disregarded he had 37 years lawful residence during which he had become fully integrated in the culture and language of the UK. It was accepted that although he had visited Pakistan he did not have any ties there particularly because his first visit was not until 22 years after his arrival in the UK.

5. The FTTJ concluded that this was one of the very rare cases where the very compelling circumstances of the claimant's length of residence outweighed the very significant weight to be attached to the public interest in deportation. She allowed the appeal under the Immigration Rules and on human rights grounds.

6. The Secretary of State applied for and was granted permission to appeal. The grounds submit that the FTTJ erred in law in reaching the conclusion that the claimant's circumstances, namely his long residence, outweighed the pressing public interest in deporting him. Paragraph 117C(6) applied unless they were very compelling circumstances over and above those described in Exceptions 1 and 2. The exception in paragraph 117C(4) where a foreign criminal had

been lawfully resident in the UK for most of his life could not apply and the appellant was required to demonstrate compelling circumstances over and above this exception. The FTTJ's finding failed to pay proper regard to paragraph 117C(6). Applying these provisions there were not any compelling or exceptional circumstances that could outweigh the very pressing public interest in deporting the claimant.

7. I have been provided with written submissions from Mr Melvin which include an application to amend the grounds of appeal by adding an additional ground which argues that the FTTJ also erred in law by failing to apply the amended provisions of the Immigration Rules which came into effect on 28 July 2014, in particular paragraph 399A (a), (b) and (c) or the fact that the amended Immigration Rules should have been treated as a complete code in considering the Article 8 human rights grounds. I was also provided with copies of YM (Uganda) v SSHD [2014] EWCA Civ 1292 and SSHD v AJ (Angola) [2014] EWCA Civ 1636.

8. Mr Melvin submitted that it was not clear whether the FTTJ had applied the provisions of the Immigration Rules in force before 28 July 2014 or those which came into force on that date. YM Uganda made it clear that at a hearing after that date the new Rules should have been applied. It was not clear which set of Rules the FTTJ had applied although it looked as if she applied the old Rules. It was an error of law not to apply the new Rules and to make it clear that this had been done.

9. Mr Melvin went on to argue that in effect the FTTJ treated the claimant's length of residence as a very compelling circumstance. This was not enough; more was needed. Length of residence was a factor which was already covered. The FTTJ also allowed the appeal on Article 8 human rights grounds apparently outside the Immigration Rules. Firstly, it was an error of law to do so because the Article 8 tests under the Rules were a complete code. Secondly, even if she had been entitled to consider Article 8 grounds outside the Rules there was no indication that she had followed Razgar principles.

10. In reply to my question, Mr Melvin accepted that the facts found by the FTTJ were not in dispute as opposed to the conclusions drawn from those facts. I was asked to find that there were errors of law, to set aside the decision, and to remake it without the need for an adjournment or further evidence.

11. I explained to the claimant the purpose of the hearing, what was being alleged as errors of law and the likely consequences if I found that there were errors and set aside the decision. An interpreter had been provided but was not needed as it was clear that the claimant spoke good English. The claimant was brought to the hearing from immigration detention accompanied by three officers. He was not restrained in any way and sat in the body of the court, although a secure dock was available. His two sons attended the hearing.

12. The claimant said that he had been in the UK since he was aged 11 ½. He would be 60 years of age on 6 August 2015. He first visited Pakistan when he was 35. He had made further visits since then. The only people he knew were in the UK. Originally he came from somewhere in Kashmir. He had two sons by his wife from whom he was divorced. He had no other family. In reply to my question he said that there had been no change in his circumstances since the evidence he gave to the FTTJ. If I set aside the decision he would not wish to give any further evidence. He had been in immigration detention for approximately 11 months and had never made any application for bail. One of his sons had attended the hearing before the FTTJ but because of a mix-up at the court never made it into the hearing room.

13. I reserved my determination.

14. In paragraphs 15 of YM Uganda Aikens LJ helpfully set out the current and former provisions of the Immigration Rules;

> "The 2012 Rules were modified by ***Statement of Changes to the Immigration Rules of 10 July 2014 (HC 532)*** which were laid before Parliament on 10 July 2014. I will call these the 2014 Rules. I have set out below the relevant 2012 Rules, as amended by the 2014 Rules. I have put the new 2014 provisions in square brackets and I have crossed through the provisions of the 2012 Rules which are deleted by the 2014 Rules, in the hope that both the 2012 Rules and the 2014 Rules modifications can be plainly seen:
>
> A362. Where Article 8 is raised in the context of deportation under Part 13 of these Rules, the claim under Article 8 will only succeed where the requirements of these rules as at [28 July 2014] are met, regardless of when the notice of intention to deport or the deportation order, as appropriate, was served.'
> …
> 397. A deportation order will not be made if the person's removal pursuant to the order would be contrary to the UK's obligations under the Refugee Convention or the Human Rights Convention. Where deportation would not be contrary to these obligations, it will only be in exceptional circumstances that the public interest in deportation is outweighed.
> [A.398. These rules apply where:
> (a) a foreign criminal liable to deportation claims that his deportation would be contrary to the United Kingdom's obligations under ***Article 8*** of the Human Rights Convention;
> (b) a foreign criminal applies for a deportation order made against him to be revoked.]
> 398. Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and (a) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of at least

four years; (b) the deportation of the person from the UK is conducive to the public good [and in the public interest] because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months; or (c) the deportation of the person from the UK is conducive to the public good [and in the public interest] because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, ~~it will only be in exceptional circumstances that the public interest in deportation will be outweighed by other factors~~ [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.]

399. This paragraph applies where paragraph 398(b) or (c) applies if – (a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK and (i) the child is a British citizen; or (ii) the child has lived in the UK continuously for at least the seven years immediately preceding the date of the immigration decision; and in either case (a) ~~it would not be reasonable to expect the child to leave the UK~~ [it would be unduly harsh for the child to live in the country to which the person is to be deported]; and (b) ~~there is no other family member who is able to care for the child in the UK~~ [it would be unduly harsh for the child to remain in the UK without the person who is to be deported]; or (b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British citizen, [or] settled in the UK, ~~or in the UK with refugee leave or humanitarian protection,~~ and ~~(i) the person has lived in the UK with valid leave continuously for at least the 15 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and (ii) there are insurmountable obstacles to family life with that partner continuing outside the UK~~ [(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and (ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and (iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported].

399A. This paragraph applies where paragraph 398(b) or (c) applies if – ~~(a) the person has lived continuously in the UK for at least 20 years immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK; or (b) the person is aged under 25 years, he has spent at least half of his life living continuously in the UK immediately preceding the date of the immigration decision (discounting any period of imprisonment) and he has no ties (including social, cultural or family) with the country to which he would have to go if required to leave the UK.~~

[(a) the person has been lawfully resident in the UK for most of his life; and (b) he is socially and culturally integrated in the UK; and (c) there would be very significant obstacles to his integration into the country to which it is proposed he is deported].
399B. ~~Where paragraph 399 or 399A applies limited leave may be granted for periods not exceeding 30 months. Such leave shall be given subject to such conditions as the Secretary of State deems appropriate. Where a person who has previously been granted a period of leave under paragraph 399B would not fall for refusal under paragraph 322(1C), indefinite leave to remain may be granted.~~
[where an ***Article 8*** claim from a foreign criminal is successful:
(a) in the case of a person who is in the UK unlawfully or whose leave to enter or remain has been cancelled by a deportation order, limited leave may be granted for periods not exceeding 30 months and subject to such conditions as the Secretary of state considers appropriate;
…….]
[399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave.]
[339D. Where a foreign criminal has been deported and enters the United Kingdom in breach of a deportation order enforcement of the deportation order is in the public interest and will be implemented unless there are very exceptional circumstances]."

15. The provisions of the Immigration Act 2014 set out where the public interest lies in paragraphs 117A, 117B, 117C and 117D as follows;

"117A Application of this Part
(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—
(a) breaches a person's right to respect for private and family life under Article 8, and
(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
(2) In considering the public interest question, the court or tribunal must (in particular) have regard—
(a) in all cases, to the considerations listed in section 117B, and
(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.
(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2).

117B Article 8: public interest considerations applicable in all cases
(1) The maintenance of effective immigration controls is in the public interest.

(2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
(a) are less of a burden on taxpayers, and
(b) are better able to integrate into society.
(3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
(a) are not a burden on taxpayers, and
(b) are better able to integrate into society.
(4) Little weight should be given to—
(a) a private life, or
(b) a relationship formed with a qualifying partner, that is established by a person at a time when the person is in the United Kingdom unlawfully.
(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.
(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—
(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

117C Article 8: additional considerations in cases involving foreign criminals
(1) The deportation of foreign criminals is in the public interest.
(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.
(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.
(4) Exception 1 applies where—
(a) C has been lawfully resident in the United Kingdom for most of C's life,
(b) C is socially and culturally integrated in the United Kingdom, and
(c) there would be very significant obstacles to C's integration into the country to which C is proposed to be deported.
(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.
(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

117D Interpretation of this Part
(1) In this Part—
"Article 8" means Article 8 of the European Convention on Human Rights;
"qualifying child" means a person who is under the age of 18 and who—
(a) is a British citizen, or
(b) has lived in the United Kingdom for a continuous period of seven years or more;
"qualifying partner" means a partner who—
(a) is a British citizen, or
(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).
(2) In this Part, "foreign criminal" means a person—
(a) who is not a British citizen,
(b) who has been convicted in the United Kingdom of an offence, and
(c) who—
(i) has been sentenced to a period of imprisonment of at least 12 months,
(ii) has been convicted of an offence that has caused serious harm, or
(iii) is a persistent offender.
(3) For the purposes of subsection (2)(b), a person subject to an order under—
(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),
(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or
(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),
has not been convicted of an offence.
(4) In this Part, references to a person who has been sentenced to a period of imprisonment of a certain length of time—
(a) do not include a person who has received a suspended sentence (unless a court subsequently orders that the sentence or any part of it (of whatever length) is to take effect);
(b) do not include a person who has been sentenced to a period of imprisonment of that length of time only by virtue of being sentenced to consecutive sentences amounting in aggregate to that length of time;
(c) include a person who is sentenced to detention, or ordered 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; and
(d) include a person who is sentenced to imprisonment or detention, or ordered or directed to be detained, for an indeterminate period, provided that it may last for at least that length of time.

(5) If any question arises for the purposes of this Part as to whether a person is a British citizen, it is for the person asserting that fact to prove it."

16. I will adopt the description of the two sets of Rules in YM Uganda and refer to them as the 2012 Rules and the 2014 Rules. I find that it is not clear which set of Rules the FTTJ applied. There is reference to paragraphs 399 and 399A in paragraph 27 but they are not set out in full. However, I find that the provisions of paragraphs 117A, 117B, 117C and 117D of the Immigration Act 2014 were designed to fit in with and reflect the provisions of the 2014 Rules. The FTTJ set out the provisions of Section 117C in paragraph 30. I find that if the FTTJ correctly applied the provisions of the Immigration Act 2014 then she correctly applied the provisions of the 2014 Rules. If there is an error of law in the application of the Immigration Act 2014 then there is also an error in the application of the provisions of the 2014 Rules. In substance, although I allow the application to amend the grounds of appeal, the amendment adds nothing material to the original grounds of appeal to the Upper Tribunal.

17. I find that the FTTJ erred in law in her application of the Immigration Act 2014 and the 2014 Rules. The provisions of section 117C are accurately set out in paragraph 30. However section 117C(6) has not been correctly applied. The fact that the claimant had been lawfully resident in the UK for most of his life was a factor properly taken into account under Exception 1. What was needed if the claimant was to succeed were very compelling circumstances, over and above those described in Exceptions 1 and 2 (my emphasis). The FTTJ treated the claimant's length of residence in the UK as an additional factor amounting to very compelling circumstances which made his case a very exceptional one. This was, in effect, double counting. It had already been taken into account, or should have been. The claimant had not established very compelling circumstances, over and above those described in Exceptions 1 and 2 and the FTTJ erred in law in finding that he had. I find that this is a material error of law and I set aside the decision.

18. It appears from the fact that the FTTJ allowed the appeal both under the Immigration Rules and, separately, on human rights grounds that she considered the Article 8 grounds outside the provisions of the Immigration Act 2014 and the 2014 Rules. In doing so she erred in law because the provisions of the Immigration Act 2014 and the 2014 Rules are a complete code.

19. Both sides agree that in these circumstances there is no need for further evidence or an adjournment. Both have said all that they wish to say.

20. There is no dispute as to the FTTJ's findings of fact, which I adopt. I do not follow the conclusions drawn from those findings. In paragraph 29 it is said that the claimant has committed a number of offences. That is correct, but needs to be read in conjunction with paragraphs 11 to 17. The claimant has been a persistent offender for a variety of offences some of them serious for

the lengthy period between 1977 and 2010. The offences included burglary, theft, endeavouring to obtain money or goods by a forged instrument, obtaining property by deception, taking a vehicle without consent, driving whilst disqualified, breach of a suspended sentence, using documents with intent to deceive, forgery, drunk driving and, finally, producing a Class B controlled drug. For the last and index offence he was sentenced to 7 years imprisonment. The judge's sentencing remarks set out in paragraph 16 are relevant including the fact that the claimant, unlike most of his co-defendants, did not plead guilty and ran what the judge described as a "hopeless and last-ditch" defence. The enterprise in which he was involved was described as a "massive episode of cultivating cannabis". At that stage the claimant was assessed as posing a medium risk of reoffending. In one sense the claimant is socially and culturally integrated into the UK. In another sense he is not because over a long period he has neither respected nor observed the laws of this country. The Probation Officer observed that he expressed remorse for his offending but this appeared to be predominantly associated with the consequences for himself rather than his victims.

21. It is accepted that the claimant is in a genuine and subsisting relationship with his sons despite a lack of contact for several years. However, they are now aged about 30 and 32 and live with their mother. They do not live with the claimant. There is no evidence of any relationship beyond the normal emotional ties existing between a parent and adult children. There is no indication that they are financially dependent on the claimant and the claimant does not suggest that he is in a relationship with anyone else.

22. The claimant suffers from hypertension and hepatitis B both of which can be treated in Pakistan. Whilst he did not visit Pakistan for a long time after he came to this country he visited on at least five occasions between 2003 and 2008. At one stage he claimed that his family owned a business in Pakistan. He is clearly an intelligent and resourceful man.

23. I find that the deportation of foreign criminals is in the public interest and the claimant is a foreign criminal. He has committed serious offences, particularly the last index offence and has been a persistent offender over a long period which reinforces the public interest. He was sentenced to a period of imprisonment of more than four years. Exception 1 does not apply because, whilst he has been lawfully resident in the United Kingdom for most of his life and is socially and culturally integrated in the United Kingdom there would not be very significant obstacles to his integration into the country to which it is proposed he be deported. In this respect I do not reach the same conclusion as the FTTJ. The claimant is an intelligent and resourceful man whose inconsistent evidence as to the extent of his contacts and connections in Pakistan together with the fact that he has made at least five visits to that country does not persuade me that he has established that there are very significant obstacles to his integration. Exception 2 does not apply because the claimant does not have a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a

qualifying child. He has not shown that the effect of his deportation on his sons would be unduly harsh.

24. I find that the claimant cannot bring himself within either Exception 1 or 2. Even if he had been able to show that there were very significant obstacles to his reintegration into Pakistan which brought him within Exception 1 he has not established that there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

25. I find that in the circumstances of this case the provisions of the Immigration Act 2014 and the 2014 Rules provide a complete code by which to judge the claim on Article 8 human rights grounds. There is no need to consider the claim outside these provisions. However, had it been necessary to do so, I would have reached the same conclusion.

26. I have not been asked to make an anonymity direction and can see no good reason to do so.

27. Having set aside the decision of the FTTJ I remake the decision and dismiss the claimant's appeal.

……

Signed Date 7 January 2015

Upper Tribunal Judge Moulden