Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: DA/00964/2014

THE IMMIGRATION ACTS

Heard at Field House	**Oral Decision & Reasons**
On 11th March 2015	**Promulgated On 24th March 2015**

Before

UPPER TRIBUNAL JUDGE JORDAN

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

SIKANDER PAYANDA MOHAMMAD
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:

For the Appellant: Miss A. Fijiwala, Home Office Presenting Officer
For the Respondent: Mr D. Sellwood, Counsel, instructed by Rashid & Rashid, Solicitors

DECISION AND REASONS

1. The Secretary of State appeals against the determination of Judge of the First-tier Tribunal Maxwell promulgated on 16 December 2014 allowing the appeal of Mr Mohammad both under the Immigration Rules and on human rights grounds. He however dismissed the appeal on asylum grounds and no challenge was made to that finding. For the purposes of continuity I

shall refer to Mr Mohammad as the appellant as he was in the First-tier Tribunal.

2. The appellant is a citizen of Afghanistan who was born on 15 May 1993. He reached his majority on 15 May 2011. On 21 January 2013 he told me that he committed an offence for which he was subsequently sentenced on 3 April 2013 in the Crown Court at Isleworth. He was then sentenced to a period of detention in a Young Offenders Institution. The period of detention was set at fourteen months. As a result of the decision attempts were made to deport the appellant.

3. The background of the case is that having arrived on 16 August 2003 he subsequently claimed asylum and that was refused but he was granted discretionary leave as a result of the Secretary of State's policy in respect of unaccompanied minors. That was confirmed, as it were, by a grant of indefinite leave to remain on 9 November 2010. That grant of course predated the commission of the offence on 21 January 2013.

4. The judge in the Criminal Court gave a sentence of fourteen months which was analysed by Judge Maxwell in paragraph 41 of his determination where he says that he was assisted to an extent by the sentencing remarks, a copy of which were in his bundle. Looking at the types of offence which fall within a Section 20 wounding, he reasonably took the view that this was a category 2 offence. Whilst it would properly be regarded as serious, the offence was not one of the most serious within category 2, let alone the most serious offence that can occur in a case of Section 20 wounding. It was to be contrasted with the Section 18 offence; there being no intention on the part of the appellant to cause serious harm.

5. It was as a result of that conviction that the process of deportation was begun.

6. The judge heard evidence both from the appellant and his sister who was already living in the United Kingdom, having entered as a spouse. He also heard other evidence from witnesses. In paragraph 11 he records that the appellant said he had little command of Pashtu and it was apparent that evidence was given as to the extent to which he and his sister and family were “westernised”.

7. The judge also heard of the appellant’s relationship with a European Union citizen who described herself as being in full-time education studying for an undergraduate degree at Westminster University. It provides insight into the degree of integration which the family had achieved in the years since their arrival in the United Kingdom.

8. There is no doubt that the judge was in error in referring to a prior version of the Immigration Rules. However the applicable parts of the Rules are now encapsulated in statute in the form of ss. 117A, B and C of the 2002 Act as inserted by s. 19 of the 2014 Act. The judge set out those

requirements and in particular the requirements of public interest considerations. Those public interest considerations fall into two sections. Those set out in s. 117B which refer to all applications but also those set out in s. 117C which relate solely to the deportation of foreign criminals.

9. It is noteworthy that a foreign criminal includes a person who is sentenced to a term of detention in a Young Offenders Institution. It is also clear that the appellant fell into the definition a foreign criminal as a person who had been sentenced to a period of twelve months' imprisonment or more.

10. However, he did not fall within the more serious category for the purposes of the exceptions, namely a person who has been sentenced to at least four years' imprisonment. The judge set out those provisions. In my judgement it is clearly these provisions which carry greater weight than the Immigration Rules as they amount to primary legislation couched in mandatory terms.

11. The process by which the courts and the tribunal have been invited to place weight on the policies put forward by the Secretary of State have led to a path where the courts have consistently stated that where the requirements are elevated to the status of primary legislation, the greatest weight should be attached to such statutory provisions. It follows accordingly that if the judge properly considered the terms of ss. 117B and C, he could not have made any error in relation to identifying the wrong Immigration Rules since the statutory provisions are the over-arching control and guide as to what amounts to the public interest.

12. In the circumstances of this case the judge was concerned to consider Exception 1 and it was plain that the appellant had been lawfully resident in the United Kingdom for most of his life. He was required to consider whether the appellant was socially and culturally integrated into the United Kingdom and he was also required to consider whether there would be significant obstacles to the appellant's integration into Afghanistan were he to be deported there.

13. The exceptions fit into the scheme of things in that the starting point is that the public interest requires the appellant's deportation unless the relevant exceptions applied. Accordingly it is clear from the determination that the judge pursued the application of the requirements of Exception 1. He considered the material in relation to the appellant's integration into the United Kingdom and he concluded that the appellant spoke English, which he considered to be idiomatic and without a trace of a non-English accent. He also considered the question of financial independence but took into account the fact that he could work and was capable of working had he not been prevented from doing so. He took into account his education and he also took into account the milieu in which the appellant lived as part of the family of his sister and her husband. He came to the conclusion that the appellant was socially and culturally integrated into the United Kingdom. That is a finding which was properly open to the judge on the material that was provided to him.

14. The issue, however, remains whether there would be very significant obstacles in appellant's integration into the country to which it was proposed he be returned. This was dealt with by the judge principally in paragraph 34. He considered the fact that the appellant's sister had returned to Afghanistan but appears to have accepted that she had done so twice but in order to see the parents of her husband. He concluded that on the basis of the material that he had before him, he was satisfied on the balance of probabilities that the appellant and his sister were unaware of the whereabouts of their own parents or siblings, if indeed they were still alive, and he was also satisfied that the sister's parents-in-law could not be regarded as family members for the purpose of providing him any support. The appellant's sister told the judge that they would not support him and he accepted what she had to say on that tissue.

15. In those circumstances he concluded that on balance of probabilities the appellant had proved he had no cultural, family or other ties to Afghanistan and it was on that basis that he went on to consider the fact that he had lived in the United Kingdom for a minimum period of fifteen years and had in that time developed a private life. He therefore concluded in paragraph 38 that he was satisfied that the appellant fell within Exception 1: that there would be significant obstacles to the appellant's integration into the country into which he was to be deported.

16. There are a number of criticisms which are made by the Secretary of State as to the application of s. 117C and the exception set out in subparagraph (4), namely Exception 1. It is apparent that the judge did not treat this as being determinative. That was a correct decision to make. It is clear that the outcome of a s. 117 consideration is not in mandatory terms. It is, as part of Part of 5A, a mandatory duty to take into account, to have regard to, various considerations. They are called considerations both in ss. 117B and 117C and the obligation is a mandatory requirement to have regard to or to take into account the various factors, but there is no obligation that treats that as being determinative. That was the approach that was adopted by the judge and it is supported by the words of s. 117C(7) which expressly states that the various considerations are to be taken into account but no more.

17. So the issue before me is whether the judge was right in making the crucial finding that there would be significant obstacles into his integration.

18. In paragraph 43 the judge describes those obstacles. He says that the appellant has been lawfully resident in the United Kingdom for most of his life and that, as a fact, he is socially and culturally integrated into the United Kingdom. Both of those facts are not in dispute. He then went on to say

> "Given that he has a poor command of his native language coupled with the difficulties met by 'westernised' Afghanis upon their return (as conceded by the respondent in the reasons letter) and the absence of any network of

> support by way of family or friends anywhere in Afghanistan, I find there are very significant obstacles to his integration into Afghanistan."

19. The reference to the refusal letter and the difficulties faced upon return appears to be a reference to paragraph 73 of the refusal letter in which the Afghanistan Independent Human Rights Commission in its fifth report dealing with the situation of economic and social rights in Afghanistan looked at the situation of returnees. Its report dated November/December 2011 spoke of a lack of employment opportunities; the difficulties faced by reintegrating into a different society and the effect of societal treatment of those returned, in the sense that they are discriminated against and humiliated. Whilst it is not for me to judge whether that is an adequate description of the difficulties faced by returnees, it was certainly a matter that was mentioned by the Secretary of State and mentioned without comment in the refusal letter.

20. It follows that the judge was correct in saying that the Secretary of State appears to concede that there are difficulties faced by those who are returning. It also followed from his previous finding in paragraph 34 of the determination that the appellant and his sister are unaware of the whereabouts of his parents and siblings and that there were no obvious persons to whom he could return.

21. The issue before me is whether it was an error of law on the part of the judge to reach a conclusion that there were very significant obstacles to his integration into Afghanistan. It is plain that they *were* obstacles and the judge gave a number of reasons why he considered those obstacles were very significant. It is in my judgement very easy in cases such as this to impose one's one judgment of what are or are not very significant obstacles but I should avoid simply imposing my own view in deciding whether or not the judge made an error of law in that finding of fact.

22. In my judgment, it is a finding of fact. It is not a finding of law and accordingly the only issue before me is whether it was open to the judge on the material that was before him to conclude without being irrational or perverse that there were very significant obstacles to his integration into Afghanistan. He referred to the links that the appellant had. He referred to his presence in the United Kingdom. He referred to the family as being westernised. He referred to the appellant speaking idiomatic English without a trace of a non-English accent and that the circumstances in Afghanistan would not be assisted, as far as he was concerned, by support mechanisms there.

23. In such circumstances I do not think it is open to me to say that this was a finding that was perverse or irrational or otherwise unlawful in that the decision was not properly reasoned. As I have already said, the issue in this case is not the application of the Immigration Rules but the application of ss 117B and C. I am not able to say that the judge erred in law in the judge's handling of those matters.

24. It is true that there was little evidence about his poor command of his native language except that he himself said that. He did not speak Pashtu save to a limited extent as recorded by the judge in paragraph 11. But then the judge took into account the fact that there was a considerable degree of integration about which the appellant had provided information and which supported the fact that the appellant had to a large extent become as if he were a settled British citizen. I would not regard that finding as being perverse.

25. I need say only one other thing and I can direct that to the appellant directly:

    You have committed a serious offence. You have been sentenced to a significant period of imprisonment as a result of that. There is no doubt that you did considerable harm to your victim as is reflected in the sentence of imprisonment. Some may say that you were lucky in the course that was adopted by Judge Maxwell in the First-tier Tribunal. What he said and what I repeat to you is that you have now had a full warning as to what the consequences will be of any falling below the standard that is expected of you. If you commit further acts of criminal misconduct you will once again come before a Tribunal if a decision has been made to deport you. When that event occurs the words that I am now speaking will be played back to you and you will recall them. You cannot afford to commit any further offence or you will be returned to Afghanistan and the balance which has operated so far in your favour will operate against you. You must be made fully aware of that.

DECISION

The First-tier Tribunal made to error of law and the Secretary of State's challenge to the Judge's decision is dismissed. The determination of the First-tier Tribunal Judge shall stand, namely, appeal of Mr Mohammed is allowed on human rights grounds.

No anonymity direction is made.

I have dismissed the Secretary of State's appeal and therefore there can be no fee award.

ANDREW JORDAN
JUDGE OF THE UPPER TRIBUNAL