



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/00321/2018

THE IMMIGRATION ACTS

Heard at Field House
On 1 June 2018

Decision Promulgated
On 19 June 2018

Before

DEPUTY UPPER TRIBUNAL JUDGE SYMES

Between

MUJAHIDUL ISLAM
(ANONYMITY ORDER MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondents

Representation:

For the Appellant: Mr Khan (for Taj Solicitors)
For the Respondent: Mr E Tufan (Home Office Presenting Officer)

DECISION AND REASONS

1. This is the appeal of Mujahidul Islam, a citizen of Bangladesh born 10 June 1995, against the decision of the First-tier Tribunal of 20 March 2018, dismissing his appeal against deportation proceedings, itself brought against the deportation order of 24 November 2017 which had included a refusal of his human rights claim resisting expulsion.
2. The Appellant was convicted in December 2016 of possessing Class A drugs with intent to supply and sentenced to two counts of two years' imprisonment, to run concurrently. The Secretary of State considered his deportation to be conducive to the public good as he had not established any particular strength in his relationship with [RA], a British

citizen, and there was nothing exceptional in his family life with his parents. As to his private life, he had been offending since the age of 12 which undermined his claim to be socially and culturally integrated here.

3. The Appellant had received 21 convictions at ten court appearances from September 2007 to January 2017, many for driving offences, four for theft, one for fraud, four for drug offences, of which the most recent was the most serious.
4. The First-tier Tribunal heard his appeal and dismissed it on 20 March 2018. It began its task by making findings of fact.
5. His relationship with his partner was no more than that of girlfriend and boyfriend, notwithstanding that it had begun when they were at school and [RA]'s evidence of the hope which she held for the relationship developing further; and whilst his family would be extremely upset by his expulsion, that was not an exceptional circumstance. Their claims to be heavily reliant upon him suffered from the lack of any detail as to how they had managed during his extended period of imprisonment. His father doubtless suffered from the claimed health problems he mentioned such as high blood pressure and cholesterol, but was not old and provided no medical evidence showing any particularly serious problems. Doubtless his mother spoke the truth when she said that she would become psychologically and physically unwell if her son was deported: this would be a natural reaction, and was the sad consequence of deportation; overall it had to be accepted that there was extant family life given the strong family bond between Appellant and his parents.
6. The Appellant spoke English. He was socially and culturally integrated in the UK given he had lived here for most of his life, including a very lengthy period with indefinite leave to remain. Whilst it would be very challenging for him to reintegrate in Bangladesh, this would not reach the high threshold specified in the Rules and legislation. He could receive guidance from his parents in this country and financial remittances were probably feasible (given the obscurity over the evidence regarding their financial situation), and he had a strong foundation from which to master Sylheti, and could anticipate some support from relatives and family and friends currently living in Bangladesh. He had no significant health problems or disabilities, and would in due course be able to find work, given he could speak English, and had IT skills and work experience in the UK. He was at an age where he could be readily expected to adapt to change.
7. The Appellant's claim to have no support in Bangladesh had to be assessed in the light of the fact that he had referred to staying with his father's relatives during holidays there; his father had described those individuals as friends. It was improbable that these people were not known to the Appellant, having regard to the length of the trips as being 17 days, two and three months respectively.
8. Assessing the material regarding reoffending risks and dangers that the Appellant might pose to the public, the Judge was concerned as to the ambiguity identified in the

Appellant's evidence, between his witness statements which indicated an open acceptance of guilt for the offences for which he had been convicted, and his oral evidence which downplayed his responsibility for the crimes thus indicating a lack of genuine remorse. Although the sentencing judge had adjusted his sentence to take account of the guilty pleas, an element of exploitation and the Appellant's youth, the prison sentences were at the higher end of the scale given his relative youth. Overall the Appellant was found to pose a risk of further harm to the public in the future, given that the influence of his family had not slowed down, let alone stopped, his offending. He had reoffended after attending a thinking skills programme and his April 2015 conviction was whilst a community order was in force.

9. Whilst his family and friends had provided statements attesting to his character in glowing terms, there was a lack of independent objective evidence by way of probation report, or a pre-sentence or OASys report. Whilst he presented as somewhat naïve, there was a limit to which he could be given credit for his liability to influence by others in the context of having been convicted some 21 times of offences of escalating seriousness in under a decade.
10. In the light of those findings of fact, the First-tier Tribunal went on its conclusions having regard to the matrix of Rules and primary legislation. The scales were heavily weighted against the Appellant given the public interest in deporting serious offenders; whilst his offending was not at the most serious end of the scale, there was a very troubling escalation shown therein and the lack of credible remorse was of concern. Whilst the Appellant had strong ties to the UK via his private life and his relationship with his partner and parents, he did not have a settled partner for relevant purposes and most young people would be expected to leave home to gain independence as they grow older. His close supportive family and long-term girlfriend in fact represented "fairly ordinary circumstances" rather than anything "very compelling". Thus the appeal fell to be dismissed.
11. Grounds of appeal contended that the appeal had been conducted unfairly given the refusal of an adjournment application given that essential documents, by way of a pre-sentence report, OASYS report and the sentencing judge's remarks, had not been available before the hearing date. Nevertheless a Duty Judge had refused an adjournment application made in good time some eight days before the hearing. Furthermore, as to the substantive disposition of the appeal:
 - (a) There was an inconsistency in the approach to the Appellant's evidence regarding the responsibility he took for his offending;
 - (b) This was the Appellant's first significant offence, and the sentencing judge had acknowledged that the Appellant had acted under some pressure from other individuals;
 - (c) No reasons were given for finding that the Appellant continued to pose an offending risk notwithstanding the influence of his family members;

- (d) There was no evidence that there were any family members present in the country of origin who might offer the Appellant support on a return to Bangladesh;
 - (e) Relevant evidence had been overlooked as to whether there were very significant obstacles to integration back in Bangladesh.
12. The First-tier Tribunal granted permission to appeal on 13 April 2018 on the basis that the adjournment refusal was arguably flawed, particularly given that the Respondent had only disclosed relevant documents the day before the hearing. It did not expressly grant permission regarding the substantive challenges to the decision below, but nor did it rule them out.
 13. Mr Khan submitted that there had been a procedural irregularity by the Tribunal proceeding below without actively reconsidering the question of an adjournment. It had failed to take account of relevant evidence and come to conclusions that were irrational regarding the strength of the Appellant's UK ties, and it had applied the wrong legal test when assessing the public interest in his expulsion, effectively directing itself that very compelling circumstances had to be established.
 14. Mr Tufan pointed out that *Bossade* demonstrated that even a young person who entered the UK when aged 4, and was granted indefinite leave to remain at the age of 14, could be legitimately subject to successful deportation proceedings where their offending extended into adulthood; *Mwesezi* showed that the normal kind of relationships between a man and their family members exhibiting only ordinary love and affection fell well below anything amounted to compelling circumstances.

Findings and reasons

15. I indicated at the hearing that I was not impressed by the argument regarding the necessity of an adjournment. It does not appear that the Appellant's advocate before the First-tier Tribunal actively pursued the question of an adjournment, doubtless because of the strong provisional view expressed by the experienced Judge that no such application would be granted. Nevertheless, I accept that there are cases, and deportation appeals involving close family ties with the UK might well be such, where the case management history requires that the propriety of an adjournment be properly considered, however disinclined the Judge before whom the matter is listed may be to entertain such an application.
16. In *Nwaigwe* [2014] UKUT 00418 (IAC) the Upper Tribunal cited *SH (Afghanistan)* [2011] EWCA Civ 1284 for the proposition that fairness generally was to be assessed by the court or tribunal directly, on appeal without deference to public law notions of relevancy or rationality. I accordingly review the adjournment question with that enjoiner in mind. The Tribunal also noted that adjournment refusals could be assaulted on public law grounds such as a failure to take into account all material considerations, permitting immaterial considerations to intrude, failing to apply the correct test, and acting irrationally. However, in practice most cases will raise the issue of whether the refusal deprived the affected party of his right to a fair hearing.

17. However, this is not an appeal where there appears to have been any material unfairness. There was a debate before me, in which even the Appellant himself at one point participated (stating that he had been told by his own Probation Officer that reports would only be issued at the instance of the Secretary of State), as to upon whom responsibility lay for obtaining the missing documents. Mr Tufan was adamant that the Secretary of State was not permitted to obtain Probation Service reports of his own motion. Mr Khan stated that his own experience was that the Secretary of State routinely produced these reports from his own custody.
18. I am not satisfied on the material to which I was directed at the hearing that adequate attempts had been made to obtain the material on the Appellant's behalf. It may be that his probation officer was under some misapprehension as to the appropriate process, but I have not seen any sustained effort by his representative to resolve matters. One would expect to see letters copied both to the Secretary of State and Probation Service, making it clear that wherever the fault lay, it was not at the door of the Appellant. However no such letters were drawn to my attention.
19. Furthermore, given no reports have been produced even now, it is not possible to be satisfied that any *material* unfairness has been suffered by the Appellant. The assessment by the First-tier Tribunal that his offending history was getting worse rather than better was inevitable given the trajectory of his convictions, and the inconsistencies it identified as to his evidence of rehabilitation and genuine remorse certainly justified a finding that he might well pose a future risk of offending, given the nature of the index offence. Reports such as OASys reports are undoubtedly important documents where they are available, but I do not consider that their unavailability for an indefinite period can prevent the determination of an appeal on deportation grounds. Besides, evidence of reoffending risks is only a modest aspect of the overall enquiry: as Macfarlane LJ stated in *VC (Sri Lanka)* [2017] EWCA Civ 1967 §47:
- “A lack of re-offending behaviour will, in cases that would otherwise qualify for deportation as a foreign criminal under the rules, carry little weight ...”
20. I move on to consider the challenge to the substantive decision below.
21. The Immigration Rules lay down two routes by which deportation might be resisted for a person sentenced to between one and four years' imprisonment. There are then specific thresholds to be met depending on whether there is a relationship with a relevant child, family life with a partner, or private life. There is the partner route by which family life is established via a genuine and subsisting relationship with a British citizen or settled partner (r399(b)):
- where the relationship was formed at a time when the deportee was in the UK lawfully and their immigration status was not precarious
 - where it would be unduly harsh for their partner to live with the deportee abroad or without them in the UK, because of compelling circumstances over and above the Appendix FM level as expressed in EX.2, i.e. exceeding “very significant difficulties/very serious hardship.”

22. It was unsurprisingly conceded below and before me that the kind of relationship between the Appellant and his girlfriend, however devoted they might be to one another, was not one where either their enforced separation or their joint departure to Bangladesh could reach this highly elevated level (of compelling circumstances exceeding very significant difficulties) on the available evidence.
23. Qualification for the private life route may be established via (r399A) by showing lawful residence in the UK for most of the deportee's life, that they are socially and culturally integrated here, and that there would be very significant obstacles to their integration into the country of return. It was the Appellant's claim below that he could qualify under this route, and before me that the First-tier Tribunal's adjudication of the question was defective.
24. It seems to me that the First-tier Tribunal's decision on the absence of very significant obstacles to integration was based on a legitimate application of the relevant Rules. As stated by Sales LJ in *Kamara* [2016] EWCA Civ 813, the concept of integration
- "... is not confined to the mere ability to find a job or to sustain life while living in the other country. It is not appropriate to treat the statutory language as subject to some gloss and it will usually be sufficient for a court or tribunal simply to direct itself in the terms that Parliament has chosen to use. The idea of "integration" calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life."
25. Moylan LJ stated in *AS* [2017] EWCA Civ 1284 that "generic" factors such as intelligence, employability and general robustness of character are relevant to the "broad evaluative judgment" required in assessing whether there are very significant obstacles to integration abroad and may demonstrate that the person is "enough of an insider" in the *Kamara* sense. These are precisely the kinds of factors to which the First-tier Tribunal understandably attributed significant weight when it referred to the Appellant's relatively strong foundation, via a supportive family of Bengali origin and his own educational achievements, to make a new life for himself. I do not consider that any material aspect of the Appellant's claim was overlooked, and the reasoning is certainly not irrational or perverse.
26. Those who do not qualify for these routes under the Rules for one reason or another face a very high residual test if they are to avoid deportation. This is the same whether the question is posed within or outwith the Rules. Rule 398 states that "the Secretary of State in assessing that claim will consider whether paragraph 399 or 399A applies and, if it does not, 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."

27. Outside the Rules, the public interest in deportation is expressed by the considerations identified in sections 117C-117D of the NIAA 2002, and will only be outweighed by other factors where there are very compelling circumstances over and above the three private and family life routes just described. As stated in *NA (Pakistan)* [2016] EWCA Civ 662, vis-à-vis medium offenders (i.e. those convicted of between one and four years' imprisonment) §27:

"... [F]all back protection of the kind stated in section 117C(6) avails both (a) serious offenders and (b) medium offenders who fall outside Exceptions 1 and 2. On a proper construction of section 117C(3), it provides that for medium offenders 'the public interest requires C's deportation unless Exception 1 or Exception 2 applies or unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.'"

28. In seeking to make such a case, the Court of Appeal in *NA (Pakistan)* went on to explain §29 that

"A foreign offender who has to demonstrate very compelling circumstances over and above those described in the exceptions is not disentitled from seeking to rely on (factual) matters which fall within the scope of exceptions 1 and 2. A person in that position is entitled to rely both on circumstances that fall within and outside the exceptions in order to establish that his article 8 claim is sufficiently strong."

29. The Supreme Court in *Hesham Ali* makes a series of important points as to how an appeal is to be considered outside the Rules including these:

- (a) The overall question is whether a fair balance has been struck between the private and family life in existence, and the public interest;
- (b) A national government is permitted to weight the balance in favour of the public interest if it considers that is necessary – the United Kingdom has done this very thing via the Immigration Rules cited above, alongside section 117C-D of the Nationality Immigration and Asylum Act 2002;
- (c) That weighting of the balance is achieved by the requirements expressed in various government policy statements and in the Rules: in general the focus now is on the existence of a compelling rather than an exceptional case (in *Hesham Ali* the Rules then in force made exceptionality the reference point). Given the expertise that government had in assessing the public interest, courts and tribunals should attach considerable weight to the Secretary of State's assessment;
- (d) It would be necessary to show "a very strong case indeed" where the Rules and statute required "very compelling circumstances" to be demonstrated;
- (e) Nevertheless, whatever the public interest to which considerable weight had to be given, it was necessary to feed into the analysis the facts of the particular case.

30. One specific feature of this appeal is the nature of the offending involved. The Strasbourg Court regularly remarks, for example in *Khan* [2010] ECHR 27, that the devastating effects of drugs on people's lives requires that the authorities show great

firmness with regard to those who actively contribute to the spread of this scourge. That factor was a further obstacle to the appeal's success.

31. It seems to me that the First-tier Tribunal had regard to all relevant considerations when assessing the case outside the Rules. Its decision reads as a very balanced assessment of the relevant factors.
32. Contrary to the assertion in the grounds, I can see no material inconsistency in the way in which the Appellant's offending was approached; the analysis cited above is a measured and sophisticated one that takes account the approach of the sentencing judge, having regard to positives such as the discounting of sentence because of age and outside influence, as well as negatives such as the fact that the sentence was at the higher end of the possible scale having regard to those factors. There was careful attention given to the nature of the index offence and its place in the overall catalogue of offending. The fact that offending had continued notwithstanding the potential availability of family support was clearly in the forefront of the Judge's mind. There was overt material from which an inference as to the potential availability of connections in Bangladesh by way of extended family or close family friends could legitimately be made, given the lengthy holidays taken there.
33. The authorities at Court of Appeal level post-*Hesham Ali* make clear the height of the hurdle that confronts putative deportees. In *NA (Pakistan)* [2016] EWCA Civ 662 Jackson LJ stated that "The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient." In *WZ (China)* [2017] EWCA Civ 795 Sir Stanley Burnton opined that it was not sufficiently out of the ordinary for a man living with his wife and two British citizen children to establish a low risk of reoffending where he had been sentenced to two years' imprisonment for drugs offences. A similar point is made, on facts even closer to those here, by Sales LJ in *Mwesezi* [2018] EWCA Civ 1104. He emphasises at §22 that the circumstances in *Maslov*, where the Strasbourg Court indicated that "very serious reasons" were required to justify the deportation of a youthful criminal who had only offended during their minority, were to be distinguished from the situation where very serious offences were committed well into adulthood. Also at §22 Sales LJ notes that the ordinary love and affection between family members falls well below anything amounting to compelling circumstances.
34. Unfortunately, as the many citations above establish, the hurdle is an especially high one where, as here, none of the available routes under the Rules are accepted by the Tribunal as satisfied: then the Appellant is thrown back on the necessity of confronting the highest test of all, that which requires the establishment of "very compelling" obstacles to their expulsion. The kind of everyday relationships between parents and adult children and between loving and committed partners, however close their bonds and whatever strength of mutual affection they feel, fall well short of that threshold. Indeed, any other decision than that reached by the First-tier Tribunal would have been a rather surprising one.

35. There being no material error of law established within the decision of the First-tier Tribunal, the appeal must be dismissed.

Decision:

The decision of the First-tier Tribunal stands.
The appeal is dismissed.

A handwritten signature in black ink, appearing to read 'M.A.S.', with a long, sweeping underline that extends to the left and then curves back under the signature.

Signed:
Deputy Upper Tribunal Judge Symes

Date: 12 June 2018