



Upper Tribunal
(Immigration and Asylum Chamber)

Appeal Number: HU/07178/2017

THE IMMIGRATION ACTS

Heard at Field House
On 27 June 2018

Decision & Reasons Promulgated
On 04 July 2018

Before

UPPER TRIBUNAL JUDGE PLIMMER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR AJMOL ALI

Respondent

Representation:

For the Appellant: Mr I Jarvis, Senior Home Office Presenting Officer

For the Respondent: Mr B Mutebuka, Solicitor, instructed by Mutebuka & Co.

DECISION AND REASONS

Introduction

1. The Respondent, Mr Ali, is a citizen of Bangladesh. In a decision dated 28 September 2017 the First-tier Tribunal ('FtT') allowed his appeal against a decision by the Secretary of State for the Home Department ('SSHD') dated 7 June 2017 to refuse his human rights claim and make a decision to deport him. The SSHD has appealed against that decision.

Background

2. Mr Ali entered the UK as a child with his parents in 1988 when he was approximately 12. He was granted indefinite leave to remain to enter alongside his mother. From 1999 to 2011/12 Mr Ali committed a number of criminal offences. These are set out in detail in the SSHD's decision letter at [3-28]. As summarised at [27] these involved one fraud offence, three theft offences, one public disorder offence, eight offences relating to the police or courts or prisons, eleven drug offences, two firearms offences and two miscellaneous offences. At some distance the most serious offence relates to his conviction of robbery and possessing an imitation firearm when committing an offence on 8 December 2000, when he was sentenced to 54 months' imprisonment.
3. The decision letter makes it clear at [26] and [28] that the SSHD actively reviewed Mr Ali's case and deemed that as a result of his conviction on 8 December 2000 for robbery, for which he received a sentence of over four years, deportation would be pursued. This is further clarified at [28] where the SSHD says this, "*as a result of your criminality your deportation is considered to be conducive to the public good*".
4. Mr Ali has a British citizen partner and four British citizen children born in 2011, 2015, 2016 and 2018.

Procedural history

5. The FtT heard the appeal on 5 September 2017. The FtT heard oral evidence from Mr Ali, his partner and a neighbour. The FtT also had a report prepared by Dr Halari, a Chartered Consultant Clinical Psychologist dated 3 September 2017, available to it. Dr Halari described Mr Ali's partner as having been diagnosed with complex pain syndrome and suffering from depression. Dr Halari also described the eldest child as suffering from developmental delay and learning difficulties, hyperactivity and inattention. Dr Halari summarised family life in the following manner. Mr Ali was described as a very loving father who played an active role in his children's lives and who were particularly reliant upon him considering his partner's health problems and that this was particularly the case for Yassin given what Dr Halari described as "*his complex developmental challenges*". Dr Halari conducted a family global health and wellbeing test and concluded that given the partner's particular emotional and physical difficulties, she would particularly struggle without Mr Ali in the UK. Dr Halari said that Mr Ali played a significant role in the lives of the children and was instrumental in providing them with social, emotional and intellectual stimulation and praise and they would suffer significant emotional distress if their father had to leave. Dr Halari concluded that the removal of Mr Ali from the UK would have a highly disruptive impact on all the children.
6. Having considered the oral evidence and all the documentary evidence including the nature and extent of Mr Ali's criminal offending the FtT

concluded that although Mr Ali was a foreign criminal who had been sentenced to a period of imprisonment of at least four years, the particular facts were such that his deportation gave rise to very compelling circumstances over and above those described in sections 117C(4) and (5) of the Nationality, Immigration and Asylum Act 2002 and he therefore met the requirements of section 117C(6). The FtT allowed the appeal on Article 8 grounds.

7. In widely drafted grounds of appeal, the SSHD argued that the FtT applied out of date case law and failed to give adequate reasons for the conclusions reached.
8. Permission was initially refused by the FtT but then granted by Upper Tribunal Judge Bruce in a decision dated 12 February 2018 which says this:

“Whilst the grounds come perilously close to simply regurgitating the submissions made in the First-tier Tribunal, I am prepared to grant permission. In particular it is arguable that the Tribunal may have misdirected itself in its reliance on ‘pre-Part V’ guidance.”

Legal Framework

9. It is important to recall that Mr Ali must meet a very demanding test, having been sentenced to a term of imprisonment of four years. Section 117C of the 2002 Act provides as follows:
 - “(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.”
10. These statutory provisions provide a “*particularly strong statement of public policy*” (see NA (Pakistan) v SSHD [2017] 1WLR 207 at [22]) such that “*great weight*” should be given to it and cases in which that public interest will be outweighed other than those specified in the statutory provisions and Rules themselves “*are likely to be a very small minority (particularly in non-settled cases)*”

- see Hesham Ali v SSHD [2016] UKSC at [38]-[50] and NA Pakistan at [33]. Ali was a case which involved the consideration of the Immigration Rules before Part V of the 2002 Act came into effect. Ali however continues to provide important guidance on the approach to deportation in cases such as this. The Court of Appeal have recently helpfully summarised the relevant legal framework for cases involving a sentence of over four years in SSHD v KE (Nigeria) [2017] EWCA Civ 1382 per Hickinbottom LJ:

“33. More importantly for the purposes of this appeal where an offender has been sentenced to at least four years’ imprisonment or otherwise falls outside the paragraph 399 and 399A exceptions, the decision-maker, court or tribunal entrusted with the task must still consider and assess whether they have very compelling circumstances that justify a departure from the general rule that such offenders should be deported in the public interest. That requires the decision-maker to take into account not only that general assessment (and give it the weight appropriate to such an assessment made by Parliament), but also the facts and circumstances of the particular case which are not and indeed cannot be taken into account in any general assessment. As Lord Reed, giving the majority judgment, said in Ali:

‘49... It is necessary to feed into the analysis the facts of the particular case and the criteria which are appropriate to the context, and, where a court is reviewing the decision of another authority, to give such weight to the judgment of that authority as may be appropriate. In that way, relevant differences between, for example, cases where lawfully settled migrants are facing deportation or expulsion, and cases where an alien is seeking admission to a host country, can be taken into account.

50. In summary, therefore, the tribunal carries out its task on the basis of the facts as it finds them to be on the evidence before it, and the law as established by statute and case law. Ultimately, it has to decide whether deportation is proportionate in the particular case before it, balancing the strength of the public interest in the deportation of the offender against the impact on private and family life. In doing so, it should give appropriate weight to Parliament's and the Secretary of State's assessments of the strength of the general public interest in the deportation of foreign offenders, and also consider all factors relevant to the specific case in question. The critical issue for the tribunal will generally be whether, giving due weight to the strength of the public interest on deportation of the offender in the case before it, the article 8 claim is sufficiently strong to outweigh it. In general, only a claim which is very strong indeed - very compelling, as it was put in MF (Nigeria) will succeed’.”

11. The Court of Appeal also referred to NA (Pakistan) and the judgment of Jackson LJ when considering the correct approach to section 117C(6) and said this:

“It will often be sensible for us to see whether his case involves circumstances of the kind described in Exceptions 1 and 2, both because the circumstances so described set out particularly significant factors bearing upon respect for private life (Exception 1) and respect for family life (Exception 2) and because that may provide a helpful basis on which an assessment can be made. Whether there are very compelling circumstances over and above those described in Exceptions 1 and 2 as is required under Section 117C(6). It will then be necessary to look to see whether any of the factors falling within the Exceptions 1 and 2 are of such force whether by themselves or taken in conjunction with any other relevant factors not covered by the circumstances described in Exceptions 1 and 2 as to satisfy the test in Section 117C(6). I respectfully commend such an approach.”

Hearing

12. At the beginning of the hearing Mr Jarvis sought to place reliance upon a skeleton argument dated 26 June 2018. That skeleton argument only came to my and Mr Mutebuka’s attention on the morning of the hearing. We were both however able to consider it. I raised with Mr Jarvis whether or not he was seeking to amend the grounds of appeal to rely upon certain discrete aspects raised within the skeleton argument or whether he was making submissions in order to clarify the grounds of appeal pleaded, by adding substance and specificity to those grounds. Mr Jarvis confirmed that I should approach the skeleton argument from the point of view of the latter and that he did not wish to make any application to amend the grounds. It is fair to say that Mr Jarvis reformulated but did not amend the grounds pleaded. Mr Jarvis agreed with my observation that in essence there were two grounds of appeal.
13. First, Mr Jarvis submitted that the FtT relied upon out of date case law, that predated Part V of the 2002 Act and failed to recognise the importance to be placed upon the public interest as set out at Section 117C. Mr Jarvis submitted that this error played a material role because the FtT underestimated the importance of the statutory underpinning of the public interest, deterrence as well as the SSHD’s explanation and reasons for making the decision.
14. The second ground of appeal focused upon what was said to be inadequate reasons for concluding that Exceptions 1 and 2 were met and the conclusion that there were very compelling circumstances over and above Exceptions 1 and 2.
15. I invited Mr Jarvis to also address me on the FtT’s findings as to section 72 of the 2002 Act. The FtT found at [11] that the appeal required a consideration of whether or not Mr Ali constituted a danger to the community but at [18] appears to acknowledge that the Refugee Convention played no part in the appeal. Mr Jarvis confirmed that the FtT appeared to err in law in making findings for the purposes of section 72, because this is not a case in which the Refugee Convention has ever been relied upon or raised, but that this error was not material. Mr Mutebuka agreed with that approach.

16. Mr Mutebuka relied upon a Rule 24 notice and invited me to conclude that the findings that were made by the FtT were open to it and had not in fact been challenged but that the grounds really amounted to no more than a disagreement with the conclusions that were reached by the FtT.

Discussion

Danger to the community

17. Although not raised directly in the grounds of appeal I am satisfied that the FtT made a clear error of law insofar as it found that it was important to make a determination for the purposes of section 72 as to whether or not Mr Ali constituted a danger to the community. The FtT may have been erroneously taken down this path by the decision letter itself which address section 72 at [31]-[40] but both representatives agree it was not relevant to this case. Indeed, the FtT appears to acknowledge that at [18]. I am however satisfied that although the FtT addressed this at [11]-[17] of the decision the assessment under Article 8 takes place later on from [19] of the decision and there has been no 'cross contamination' between the two.
18. I turn now to the first ground raised by Mr Jarvis.

Ground 1

19. Mr Jarvis was correct to point out that the structure of the FtT's decision was not as clear as it might be and that the FtT referred to authorities of limited assistance because they predated Part V of the 2002 Act. Turning first to the structure of the decision, the FtT begins its assessment of Article 8 from [19] where it sets out the relevant Rules. At [20] the FtT records that 399 and 399A do not apply because Mr Ali was sentenced to a period of imprisonment of at least four years. At [21] the FtT then said this:

“It follows therefore that the test that this Appellant has to meet is that the public interest in deportation is outweighed because there are **very compelling circumstances** (my emphasis) over and above Section 117C(5) Exception 2, Nationality, Immigration and Asylum Act 2002 (as amended) (see below).”

20. From [22] under the sub-heading “*Very Compelling Circumstances*” the FtT referred to authorities of some vintage that as I have already said did not address section 117C. Having considered those authorities the FtT noted at [24] that it did not have a copy of the sentencing judge's comments, and then at [25] that full account had been taken of the developments since the relevant sentence in 2000 and that is stated in terms at [25] in this way:

“25. I fully take into account all the Appellant's offences which postdate the offence for which he was convicted on 8 December 2000.

26. I also take into account that the Appellant has not served a physical term of imprisonment since that sentence which was imposed upon him in December 2000.”
21. The FtT then went on to consider that Mr Ali was granted a further ‘no time limit’ stamp on his Bangladeshi passport on 13 May 2004 and said this at [27]:
- “I find that this factor merits consideration in the balancing exercise. The Respondent, in full knowledge of the Appellant’s serious criminal offending in the year 2000, granted the Appellant a No Time Limit stamp on 13 May 2004. The offence which the Respondent (mainly) relies upon to effect the deportation of the Appellant is that which dates from 8 December 2000. Sixteen and a half years has passed since the Appellant’s conviction for that offence and the Respondent’s decision in this appeal. That is a long time. The length of that delay is also something which I must take into consideration in the balancing exercise.”
22. The FtT went on to consider rehabilitation and accepted that Mr Ali had been rehabilitated, (see [30]) before referring itself to OH (Serbia) [2008] EWCA Civ 694 at [32]. The FtT then paused in its consideration of the public interest to address the best interests of the children and a sub-heading of “*Best Interests of the Children*” appears after [32] of the decision and is to be found between [33] and [42]. The FtT then came back to the issue of the public interest from [43] onwards. It would have been preferable for the FtT to have firstly dealt with the public interest in one place and by reference to the more up to date authorities and, secondly, to have considered the best interests of the children having already identified and directed itself to the full ambit of the public interest. The question that is really raised by ground 1, in my judgment, is whether the clumsy structure employed by the FtT, constitutes a material error of law. Mr Jarvis submitted that it did because there was a stark difference between the older case law and the newer case law bearing in mind that Part V, in effect, provided an important statutory underpinning for the very compelling circumstances test. In my judgment, when the decision is read as a whole as it must be, I am satisfied that the FtT correctly directed itself to Part V of the 2002 Act and correctly applied the relevant test.
23. Firstly, it is plain that the FTT made express reference to Part V (see [43]) and the reproduction of sections 117A to 117D that followed [43]. At [44] the FtT correctly found Mr Ali to be a foreign criminal who had been sentenced to a period of imprisonment of at least four years and directed itself to that which followed, that is the public interest required his deportation unless there were very compelling circumstances over and above those described in Exceptions 1 and 2.
24. What then followed in my judgment was the FtT considering first of all whether Exception 1 applied, then considering whether Exception 2 applied, before reviewing whether there were very compelling circumstances over and above

Exceptions 1 and 2. That mirrors the approach that was recommended and endorsed in KE (Nigeria), albeit there was no self-direction to that authority.

25. Mr Jarvis however pointed out that the FtT did not simply fail to appreciate the statutory underpinning of the very compelling circumstances test but also failed to address the importance of deterrence. He relied upon AM v SSHD [2012] EWCA Civ 1634. That is a case that emphasised that whilst the landscape for qualification for deportation had changed, at that time deterrence remained a material and necessary consideration. The FtT however directed itself expressly to OH at [32] and had fully in mind the issue of deterrence – see what is said at [32(b)]. I acknowledge that the FtT only made express reference toward the end of paragraph [32] to society’s revulsion and the need to build confidence but when that is read together with the whole of [32] in my judgment the failure to expressly repeat the relevance of deterrence was not a material error of law.
26. Mr Jarvis further relied upon what he said was an inaccurate representation of the SSHD’s case and reasons for making the deportation decision. I have already outlined [27] of the FtT’s decision. I acknowledge that the SSHD based the deportation decision on Mr Ali’s criminality as opposed to the single offence of over four years from the year 2000. However, it is important to note that when the SSHD actively reviewed the case, the SSHD deemed that as a result of Mr Ali’s 2000 conviction - deportation was being pursued – see [26] of the decision letter. In those circumstances the FtT was entitled to bear in mind two matters: (i) that after the 2000 conviction there was a ‘no time limit’ stamp placed on Mr Ali’s passport in 2004, and (ii) that a substantial period of time had elapsed since the 2000 conviction. The FtT did not over-elevate the importance of these two matters and was entitled to take them into account in the particular circumstances of this case.
27. I do not accept that the FtT left out of account Mr Ali’s continued criminal offending from 2000 up until 2011/2012. Indeed, the FtT was well aware that the SSHD relied upon the 2000 criminal offence “*mainly*” – see [27] of the FtT decision. In addition, the FtT took express account and acknowledged that the whole of the offending history was relevant – see [25] of the FtT decision. In my judgment the FtT was clearly well aware of the extensive criminal offending that followed the 2000 offence and took it into account. It follows that the FtT understood the SSHD’s case and identification of the public interest, and properly attached weight to it.
28. I have referred to the criminal offending stopping in 2011/2012. This is because the FtT made a finding that the criminal offending stopped in 2011. Mr Jarvis however pointed out by reference to a PNC sheet that was not available to the FtT, that that offence actually took place on 26 January 2012. He invited me to note this for the sake of completeness only. For the avoidance of doubt, I am not satisfied that that led to any material error of law. Whether the criminal offending stopped at the end of 2011 or the beginning of 2012 still meant that the FtT’s findings on Mr Ali’s rehabilitation were open to it. As the FtT pointed

out Mr Ali's rehabilitation and ceasing of serious criminal activities stopped at around the same time as his family commitments became more established in 2011.

29. I turn then to rehabilitation. Mr Jarvis did not emphasise this in his oral submissions but the issue is referred to in his skeleton argument. He submitted that the FtT failed to bear in mind the significantly reduced relevance of rehabilitation in cases with serious offending. In SSHHD v Olarewaju [2018] EWCA Civ 557, the Court of Appeal noted that the significance of rehabilitation is limited by the fact that the risk of re-offending is only one facet of the public interest. When giving judgments Lord Justice Newey referred to the Court of Appeal decision in Taylor v Home Secretary [2015] EWCA Civ 845. This emphasises that the cases in which rehabilitation can make a significant contribution to establishing compelling reasons were likely to be rare. When reading the FtT decision as a whole it does not appear to me that the FtT was saying that Mr Ali's rehabilitation was significant in terms of establishing very compelling circumstances, but that it was a relevant factor to be borne in mind. What is key in this case is that the FtT considered the ultimate or critical question, that is whether or not there were very compelling circumstances over and above Exceptions 1 and 2.

Ground 2

30. I now turn to the reasons challenge raised in ground 2, which I can deal with more succinctly and in three parts: Exception 1, Exception 2 and the approach to very compelling circumstances over and above Exceptions 1 and 2. Although the FtT's decision on all three matters might be described as generous, in my judgment there is no irrationality or perversity and indeed that was not argued before me.
31. The FtT has given adequate reasoning for finding Exceptions 1 and 2 to be met. As to Exception 1, the FtT correctly concluded at [45] that Mr Ali lived lawfully in the UK for most of his life, having arrived at the age of 12, he was 41 before it and that he was socially and culturally integrated in the UK. The FtT accepted that he worked as a chef, a job that he had held for three years, that there were letters from members of the community testifying to him being a hardworking, loyal father of three children and a devoted family man. Mr Jarvis reminded me that the FtT had to balance that against Mr Ali's criminal convictions which took place over an extended period of time. Whilst the FtT did not expressly refer to those at [45] it cannot be said when the decision is read as a whole that they were left out of account. Finally, as to Exception 1, the FtT found that there would be very significant obstacles to Mr Ali's integration into Bangladesh. This was based upon a number of factors and included: (i) he had not lived in that country since he was 12; (ii) he had no family links any longer in Bangladesh because his siblings and his mother and immediate family lived in the UK; (iii) he had only gone back to Bangladesh for a brief holiday in 1998, and (iv) perhaps most significantly, he would remain responsible for his partner

and their soon to be (but now) four children and would find it very difficult to become integrated into Bangladesh whilst remaining committed to his family in the UK.

32. That last finding needs to be considered in context. It needs to be considered in light of the findings made by Dr Halari that this is a family that were particularly reliant upon Mr Ali, the father/partner, in emotional, practical and financial terms. The FtT was entitled to bear in mind that if Mr Ali were to return to Bangladesh he would be entirely consumed by trying to sort the family out in the UK: no mean feat given the plethora of challenges within the family unit. That in itself is not capable of giving rise to a very significant obstacle but that is not what the FtT found. The FtT found that in the particular circumstances of this case, including Mr Ali's age when he came to the UK, his family and other links to Bangladesh, and all matters considered together there were very significant obstacles. I conclude therefore that the FtT gave adequate reasons for finding the requirements of Exception 1 were met.
33. I am also satisfied that the FtT gave adequate reasons for finding Exception 2 was met, vis a vis the qualifying British citizen children. The FtT referred expressly to Dr Halari's report and accepted that the impact of Mr Ali's deportation would be devastating upon the children. The FtT then said this at [48]:
- "It follows from all that I have said above that in this particular case which I decide upon its particular facts there are very compelling circumstances over and above those described in Section 117C(4) and (5). The possible devastation of Miss Dunton and the three children as described by Dr Halari describes a domestic situation significantly more serious than the 'unduly harsh' required by the Act. Furthermore the unborn child presently being carried by Miss Dunton would, if the Appellant were deported, be born into a family which would be suffering the effects of the devastation described by Dr Halari. That would most certainly not be in the best interests of that newly born child."
34. The FtT accepted Dr Halari's analysis and concluded that this meant that the impact on the children would not just be unduly harsh but would be significantly more serious than unduly harsh. That is a finding of fact that the FtT made having considered the oral evidence from three witnesses and having considered the particular detail contained in Dr Halari's report. In my judgment the FtT has adequately reasoned why the impact would be unduly harsh and why there were very compelling circumstances over and above both Exceptions 1 and 2: the FtT focused upon the impact upon the children given their mother's vulnerabilities and their complete dependence on their rehabilitated father, and cannot be said to have lost sight of the weighty public interest that favoured deportation.
35. The FtT was aware of the ultimate question in this case, albeit it could have been addressed with greater clarity. However, when the decision is read as a whole I am satisfied that the FtT has given very significant weight to the public

interest in deporting Mr Ali, bearing in mind the seriousness of the 2000 offence and the duration of the criminal offending and has correctly directed itself in accordance with section 117C.

36. The FtT ended at [50] by saying this:

“The Appellant should not be under any illusion that if he should commit any further criminal offences those new criminal offences will be bound to be taken into consideration in any future appeal before this Tribunal which might well in any future proceedings tip the balance against the Appellant.”

I end this decision by repeating that observation. Should there be any repeated reoffending I have no doubt that the SSHD will seek to actively review the consideration as to whether or not Mr Ali should be subject to deportation proceedings. For the reasons that I have given however, on the evidence available to it and bearing in mind the findings of fact that were made, the decision of the FtT does not contain a material error of law as advanced in the grounds of appeal and Mr Jarvis’s very helpful oral submissions.

Decision

The decision of the FtT does not contain a material error of law and is not set aside.

Signed

Date

Ms Melanie Plimmer

Upper Tribunal Judge Plimmer

2 July 2018