



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08632/2017

THE IMMIGRATION ACTS

Heard at Field House  
On 10 May 2018

Decision & Reasons Promulgated  
On 22 May 2018

Before

UPPER TRIBUNAL JUDGE GLEESON

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

FOYAZUR RAHMAN  
[NO ANONYMITY ORDER]

Respondent

Representation:

For the appellant: Mr Esen Tufan, a Senior Home Office Presenting Officer  
For the respondent: Ms Frances Shaw, instructed by Kuddus Solicitors

DECISION AND REASONS

1. The Secretary of State appeals with permission against the decision of the First-tier Tribunal allowing the claimant's appeal against his decision to make a deportation order against him as a foreign criminal pursuant to section 32(5) of the UK Borders Act 2007.

**Background**

2. The claimant is a citizen of Bangladesh. He is now 33 years old and has a drug-related criminal history in the United Kingdom dating back to his early twenties.
3. The claimant came to the United Kingdom as a baby on 4 August 1986 with a settlement visa, accompanied by his mother and sister, and all of them were granted indefinite leave

to enter on 15 August 1986. On 2 August 1999, then age 14, the claimant received a 'No Time Limit' (NTL) endorsement on his passport. He has never applied for or received British citizenship.

4. He married a British citizen wife on 25 December 2010 and they have a son, also a British citizen, born on 28 August 2013. On 17 January 2014, when his son was 3 months old, the claimant was convicted of one count of possession of a Class A controlled drug (heroin) and another count of possession with intent to supply. He was sentenced to 7 years and 5 months imprisonment on the first charge, and 5 years on the second, to run concurrently. It is not disputed that this makes him a foreign criminal within the meaning of the statute.
5. The claimant seeks to bring himself within Exception 1 at section 33 of the 2007 Act, on the basis that removal would breach his Convention rights, in this case under the ECHR. The claimant relies on his relationship with his son, who was 3 months old when the claimant went to prison. At the date of decision, the claimant was still in prison and had been so for 4 years. His son had visited him in prison regularly and the claimant's case is that his wife was struggling to raise the child alone, although both of their families had stepped in to help her. She had been diagnosed with depression, anxiety and panic attack disorder.
6. The claimant says that English language education in Bangladesh is fee paying, which he and his wife would be unable to afford, and that other schools are taught in Bengali, a language which the claimant himself does not speak (he speaks a Sylheti slang dialect of Bengali). He fears that in Bangladesh, his son might fall in with the wrong crowd, as the claimant himself did, and get into trouble. The claimant expressed regret for his past actions and said that he had changed and matured, now wishing to make amends to his wife, his child, his family and society. He had completed courses which had helped him kick his drug addiction.
7. The claimant was in court for the hearing. He was released from prison on 9 March 2018 and therefore had spent 2 months living as a family with his wife and his 4-year-old son, whom previously he had known only through prison visits. There were no new witness statements or evidence.

### **First-tier Tribunal decision**

8. The First-tier Tribunal found that it was in the best interests of the claimant's child to remain with both his parents, despite the separation, and that there was also a very close emotional connection between the claimant and his family in the United Kingdom. The Judge did not consider that the claimant was of previous good character: he had a large number of convictions preceding the index offence, mostly for possession of class A and Class B drugs, including a previous imprisonment for 5 months in August 2007 for a number of offences. He had been a user of cannabis since his early twenties (so from about 2004 onwards) and from his mid-twenties, he had graduated to cocaine. He owed about £15000 to a drug dealer, but he was given credit by the sentencing Judge for pleading guilty at the earliest possible opportunity, and for being an accomplice, not a leader, in the conspiracy. However, the Judge did consider that 'nevertheless he was

involved in an operational management function within the chain at a very high level given the amount of trust that was placed in the claimant and his accomplice.

9. The Judge accepted that the claimant had shown remorse, that in prison when offered drugs, he had refused, and that in prison he continued to work on 'stop supplying' and 'motivation and change' sessions run by Lifeline Suffolk. He had positive references from persons of good standing at HMP Highpoint, and no adjudications.
10. The Judge allowed the appeal, considering that there were 'very compelling circumstances' over and above those described in Exceptions 1 and 2 to section 117C of the 2002 Act, for which the claimant's deportation was neither conducive to the public good, nor in the public interest.
11. The Secretary of State appealed to the Upper Tribunal, arguing that the circumstances relied upon fell well short of 'unduly harsh' let alone 'very compelling circumstances' and relied upon *Hesham Ali v Secretary of State for the Home Department* [2016] UKSC 60, *Treebhawon and others* (section 117B(6)) [2015] UKUT 674 (IAC); *LC (China) v Secretary of State for the Home Department* [2014] EWCA Civ 1310 and *CT (Vietnam) v Secretary of State for the Home Department* [2014] EWCA Civ 488. He contended that insufficient reasons had been given for finding that the best interests of the claimant's child outweighed the public interest in removal.

### **Permission to appeal**

12. Permission to appeal was granted on the basis that despite the First-tier Tribunal Judge's detailed and comprehensive decision, she had not clearly identified how, cumulatively, those factors and the child's best interests outweighed the public interest.

### **Rule 24 Reply**

13. There was no Rule 24 Reply.
14. That is the basis on which this appeal came before the Upper Tribunal.

### **Upper Tribunal hearing**

15. The claimant's Counsel, Ms Shaw, relied on her previous and a revised skeleton argument, and on the decision of the Supreme Court in *Hesham Ali*. She contended that the First-tier Tribunal had been entitled to carry out the analysis it had and that applying *The Secretary of State for the Home Department v JZ (Zambia)* [2016] EWCA Civ 116 and *The Secretary of State for the Home Department v ZP (India)* [2015] EWCA Civ 1197, it had been open to the First-tier Tribunal to reach the conclusion it had on the evidence before the Tribunal.
16. In her oral submissions, Ms Shaw argued that the balancing exercise had been properly carried out, particularly in the light of the mental health difficulties experienced by the claimant's wife. The claimant was an eldest son and was also responsible for his widowed mother. His family life had been established when he was lawfully in the United Kingdom and the child was now 4 years old and had begun school.

17. For the Secretary of State, Mr Tufan argued that *Hesham Ali* was not a decision on the post-2014 situation and in particular, preceded the tighter regime in part VA of the Nationality, Immigration and Asylum Act 2002 (as amended) and section 117C thereof, which required an claimant to show not just that he could meet the Exceptions therein (which Mr Tufan did not dispute were met) but that there were very compelling factors over and above those Exceptions, which Mr Tufan argued was not the case here. *Treebhawon* was not a deportation case, and *OP (Jamaica) v Secretary of State for the Home Department* [2008] EWCA Civ 80 on which the claimant also relied, was a case where the sentence did not exceed 4 years, and therefore the 'very compelling circumstances' test at section 117C(6) was not triggered.
18. Ms Shaw relied on the decision in *Secretary of State for the Home Department v Thierno Barry* [2018] EWCA Civ 790 which she said was on similar facts, although again the sentence was less than 4 years. If the appeal were to be allowed, Ms Shaw asked that it be remitted for rehearing afresh, in order that evidence about the claimant's schooling and the wife's health could be adduced.

## Discussion

19. The point about the decision in *Hesham Ali* is well taken: it precedes the statutory provisions which form the basis of the present deportation regime. I turn, therefore, to section 117C, inserted in the 2002 Act by the Immigration Act 2014, and which replicates in statutory form the provisions of paragraphs 398 and 399A of the Immigration Rules HC 395 (as amended):

**"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."

20. Dealing Class A drugs is a very serious offence, and I bear in mind that deportation of foreign criminals is stated to be in the public interest. The matters concerning the bond between the claimant and his young son, and his wife's mental health difficulties, come within Exception 2. Both Exceptions are met, as Mr Tufan has conceded.

21. I turn next to subsection 117C(6), which is at the heart of this appeal. The First-tier Tribunal Judge did not address her mind adequately to that subsection, and nothing in her findings amounts, or is capable of amounting, to 'very compelling circumstances over and above those described in Exceptions 1 and 2'.
22. Accordingly, this decision will be set aside and remade by dismissing the claimant's appeal.

## DECISION

23. For the foregoing reasons, my decision is as follows:  
The making of the previous decision involved the making of an error on a point of law. I set aside the previous decision. I remake the decision by dismissing the appeal.

Date: 16 May 2018

Signed *Judith AJC Gleeson*  
Upper Tribunal Judge Gleeson