Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/09233/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 21 May 2019	**On 07 June 2019**

Before

THE HONOURABLE MR JUSTICE MURRAY
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE BLUM

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

ORHAN [D]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr S Kotas, Senior Presenting Officer
For the Respondent: Ms Amy Childs of counsel, instructed by Duncan Lewis Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State for the Home Department ("the Secretary of State") against the decision of First-Tier Tribunal Judge Onoufriou promulgated on 22 February 2019 allowing the appeal of Mr Orhan [D] against the Secretary of State's refusal to revoke the deportation order made against Mr [D] on 18 November 2016 ("the Deportation Order") and his refusal on the same date of Mr [D]'s human rights claim.

2. Mr [D] is a citizen of Turkey, born on 30 March 1974. He has been in a relationship with his now wife, who is a British citizen, since October 2013, and they have been married since 3 February 2016.

3. Mr [D] entered the United Kingdom on 12 May 2016 with a valid spouse visa with permission to enter from 9 May 2016 to 9 February 2019. Upon entry his passport was endorsed with a valid visa for 30 days only, and he was recommended to collect his Biometric Residence Permit within 10 days of arriving in the United Kingdom.

4. Shortly after his arrival in the United Kingdom, on 9 July 2016 Mr [D] assaulted Mrs [D] causing her actual bodily harm. He pleaded Guilty to Assault Occasioning Actual Bodily Harm and was sentenced at Blackfriars Crown Court on 8 August 2016 to 8 months' immediate custody and made subject to a statutory surcharge of £140.

5. On 6 October 2016 the Secretary of State served Mr [D] with a letter dated 24 August 2016 notifying him of the Secretary of State's decision to deport him. He did not respond to that letter, but Mrs [D] sent an undated letter to HMP Thameside where Mr [D] was then serving his sentence, asking that Mr [D]'s immigration status be reassessed. The Secretary of State decided to treat this as a claim by Mr [D] that to remove him from the United Kingdom would breach his rights under Article 8 of the Council of Europe Convention for the Protection of Human Rights and Fundamental Freedoms of 4 November 1950 ("the ECHR"). He made further representations on 2 November 2016 in support of that claim, which were received by the Secretary of State on 7 November 2016.

6. On 21 November 2016 Mr [D] was served with the Deportation Order together with a letter of the same date setting out the Secretary of State's reasons for refusing Mr [D]'s human rights claim and certifying that claim under section 94B of the Nationality, Immigration and Asylum Act 2002 ("the 2002 Act"), with the effect that Mr [D] would only be permitted to appeal against the decision after he had left the United Kingdom.

7. Upon Mr [D]'s release from custody, he was detained pending the making of a deportation order under paragraph 2 of schedule 3 to the Immigration Act 1971. After some months in immigration detention, he was released on immigration bail on 20 March 2017.

8. On 3 June 2017 Mr [D] voluntarily left the United Kingdom for Turkey. His stated motivation for doing so was to help his son in Turkey with certain difficulties his son was then experiencing. The Secretary of State considered this to be his voluntary compliance with the Deportation Order.

9. On 21 January 2017 Mr [D] had issued a judicial review claim to challenge the decision of the Secretary of State to certify his human rights claim under section 94B of the 2002 Act. He was refused permission to proceed with the judicial review claim on 15 May 2017. He successfully appealed this refusal, and he was granted permission to proceed with the judicial review on 18 August 2017.

10. On 10 November 2017 Mr [D] filed an out-of-country appeal against the Deportation Order, but this was struck out on 17 November 2017. Mr [D]'s challenge to the striking out was rejected on 18 December 2017. On 3 January 2018 a consent order was agreed withdrawing his judicial review claim against the section 94B certification if he was granted permission to appeal against the Deportation Order. The judicial review claim was treated as withdrawn.

11. On 3 March 2018 Mr [D] submitted a second judicial review claim challenging the decision of the First-Tier Tribunal that his appeal was invalid.

12. On 18 April 2018 Mr [D] filed a further appeal against the Deportation Order and the refusal of his human rights claim, together with an application to extend time to file his out-of-country appeal. His application to extend time was granted. The second judicial review claim was withdrawn pursuant to a consent order concluded on 3 May 2018. On 8 May 2018 the Secretary of State received notice of his appeal.

13. The appeal was heard by Judge Onoufriou on 14 February 2019, on which occasion he was represented by Ms Childs, who also represented him at the hearing of this appeal. Before the judge Ms N Bell represented the Secretary of State.

14. The judge allowed the appeal as he was satisfied, after considering the evidence presented at the hearing, that:

    a. Mr [D]'s offence had not caused "serious harm". The Secretary of State provided inadequate reasons for his conclusion to the contrary. The judge also found that the Secretary of State's conclusion was inaccurate based on the judge's own review of the evidence. In the absence of serious harm, Mr [D] was not a "foreign criminal" within the meaning given that term in section 117D(2) of the 2002 Act. The Secretary of State's reasons for concluding under section 3(5)(a) of the Immigration Act 1971 that Mr [D]'s deportation was conducive to the common good being inadequate, the appeal "succeed[ed] at the first hurdle".

    b. Even if Mr [D]'s offence had caused serious harm, the exception to deportation under paragraph 399(b) and section 117C(5) of the 2002 Act applies, for the following reasons:

        i. Mr [D] has "a genuine and subsisting relationship" with Mrs [D], who is a British citizen;

        ii. their relationship was formed at a time when Mr [D] was in the UK lawfully and his immigration status was not precarious;

        iii. it would "unduly harsh" for Mrs [D] to live in Turkey because of compelling circumstances over and above those described in paragraph EX.2 of Appendix FM; and

iv. it would be unduly harsh for Mrs [D] to remain in the United Kingdom without Mr [D].

15. The judge noted that the Secretary of State had taken into account that Mrs [D] was a fluent speaker of Turkish who had travelled extensively in Turkey and was familiar with its customs and culture in reaching his conclusion that it would not be unduly harsh for Mrs [D] to live in Turkey. However, in reaching his conclusion to the contrary, the judge relied on evidence relating to Mrs [D]'s various mental and physical health problems, set out in two reports dated 22 May 2017 and 20 September 2018 prepared by Ms Gail Lewis, a psychodynamic psychotherapist with the Tavistock and Portman NHS Foundation, and in a letter from Dr Alexander Todd dated 7 December 2016.

16. The judge considered section 117C of the 2002 Act in light of the Article 8 claim raised by Mr [D], deciding that section 117C(5) applied as an exception to Section 117C(3), so that the latter provision did not apply. It was therefore not necessary for the judge to go on to consider whether there were "very compelling circumstances" over and above those in paragraphs 399 and 399A of the Immigration Rules that would outweigh the public interest in Mr [D]'s deportation to Turkey under paragraph 398 of the Immigration Rules.

17. Mr [D]'s appeal therefore succeeded.

18. The Secretary of State was given permission to appeal against the judge's decision by Upper Tribunal Judge Martin on 25 March 2019 on the basis that there were arguable errors of law in the judge's approach to the gravity of the offending, the time Mr [D] spent in the United Kingdom and whether it would be "unduly harsh" for Mrs [D] to be required to live in Turkey with Mr [D] or for Mrs [D] to live in the United Kingdom without Mr [D].

19. The Secretary of State appealed on 1 March 2019 on the following grounds:

    a. The judge's approach to whether Mr [D]'s offence represented serious harm was irrational.

    b. The judge failed to making findings on whether it would be unduly harsh for Mrs [D] to remain in the United Kingdom without Mr [D], which is a material error of law.

    c. The judge's conclusion that it would be unduly harsh for Mrs [D] to accompany Mr [D] to Turkey is based on his determination that she would not be able to access the medical treatment she needs in Turkey. That determination is not supported by adequate reasons and is therefore irrational.

20. Before making his principal submissions, Secretary of State made an application for permission to amend his Grounds of Appeal to include a point raised at paragraph 5 of his skeleton, namely, that the judge had failed to take into account that

paragraph 399(b)(i) of the Immigration Rules requires that the relationship between the person seeking to resist deportation must have formed their relationship with their partner who is a British citizen or settled in the United Kingdom "at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious". Mr Kotas frankly acknowledged that the Secretary of State had not raised this in his reasons for making the Deportation Order, nor had he raised it in his Grounds of Appeal. The point was not canvassed at the hearing before Judge Onoufriou. He urged that we nonetheless allow it as it was a point of law, was "almost a jurisdiction point" and was pleaded in the Secretary of State's skeleton, so Mr [D] was not prejudiced and had forewarning so that his counsel could deal with it.

21. In relation to this, Ms Childs for Mr [D] said that it was raised too late and did cause prejudice, although in response to a question from the Panel as to why she would not be in a position to deal with it, she then proceeded to do so. She noted that the "settled status" point does not arise in relation to section 117C of the 2002 Act, so that even if we find that Mr [D] could not meet the requirements of paragraph 399(b)(i), he could meet the requirements of section 117C(5) of the 2002 Act. The judge clearly had both provisions in mind, having set them out at paragraphs 29 and 30 of his judgment.

22. We reserved our position on the application to amend and proposed to proceed *de bene esse*.

23. Mr Kotas then made the following submissions for the Secretary of State on the question of whether Mr [D]'s offence had caused serious harm:

    a. First, he reminded us of the Secretary of State's guidance on this point (extracted from Home Office Guidance, "Criminality: Article 8 ECHR Cases" (version 7.0)):

> "It is at the discretion of the Secretary of State whether he considers an offence to have caused serious harm.
>
> An offence that has caused 'serious harm' means an offence that has caused serious physical or psychological harm to a victim or victims, or that has contributed to a widespread problem that causes serious harm to a community or to society in general.
>
> The foreign criminal does not have to have been convicted in relation to any serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions.

> Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm."

b. Mr Kotas acknowledged that the Secretary of State's view on serious harm did not, however, bind the tribunal below or this Tribunal, which was required to form its own view.

c. In the Decision the Secretary of State had quoted a substantial portion of the sentencing judge's remarks and was clearly relying on them for the conclusion that the offence caused serious harm to the victim, Mrs [D]. Judge Onoufriou was therefore wrong in paragraph 35 of his judgment to characterise the Secretary of State's position as he did, as simply concluding that serious harm was made out by virtue of the fact that there was a conviction "of a very serious crime" and a custodial sentence, "but no other reason for reaching this conclusion".

d. There was no recognition in the judgment below of the more salient aspects of the judge's sentencing remarks, and the judge was quite selective in what he took from them.

e. The sentencing judge noted in her sentencing remarks that Mr [D] had no prior convictions in the United Kingdom or in Turkey and took that into account. The sentencing judge described the circumstances of Mr [D]'s assault on his wife, which included threatening her with a knife and putting his hands around her neck, trying to choke her and pushing his knuckles into her throat, leaving her very distressed, having difficulty breathing and, later at hospital, complaining of difficulty swallowing and pain in the neck and jaw. The medical evidence showed that Mrs [D] had generalised swelling of the upper neck, some redness around the throat and a faint bruise by the chin. In her sentencing remarks, the sentencing judge said:

> "I have been told of the impact on [the victim] of your behaviour that day. It has been described as profound. She has difficulty sleeping, needs extra bolts on the door and her confidence is affected, making her scared of going out."

f. These aspects of the sentencing remarks were not given their proper weight by the judge. The distinct "flavour" of the judge's analysis is that he was seeking to mitigate Mr [D]'s offending and doing so selectively in relation to the effect on Mrs [D] as the victim of the offence. In this case there was an immediate custodial sentence for someone with no previous convictions, which underlines the seriousness of the original offence. It was committed shortly after his arrival in the United Kingdom. Having proper regard to the sentencing judge's sentencing remarks as well as the sentence imposed, we were invited to conclude that the judge's approach was flawed and therefore irrational.

24. In submissions on the question of the "unduly harsh" criteria, Mr Kotas noted that the judge had only performed half of the necessary exercise, failing to consider or give reasons why it would be unduly harsh for Mrs [D] to remain in the United Kingdom without her husband. Had the judge done so he would have needed to take into account that Mr [D] had spent less than three months at liberty in the United Kingdom from his initial entry on 12 May 2016 to his departure for Turkey on 3 June 2017, after deducting the periods of time he spent in custody and in immigration detention before being released on immigration bail on 20 March 2017. The judge had failed, therefore, properly to consider the question of whether Mrs [D] was able to cope without Mr [D] while he was detained or abroad. That was a material error of law.

25. Mr Kotas also submitted that the judge's conclusion that it would be unduly harsh for Mrs [D] to live with her husband in Turkey in light of her health problems was irrational, given that she had been able to access medical treatment in the United Kingdom without significant assistance from her husband. Her fluency in the Turkish language and familiarity with Turkish culture and customs show that there is no reason why she could not access the necessary treatment in Turkey. The judge's reasons were inadequate, and therefore his conclusion was irrational.

26. Ms Childs made the following submissions on behalf of Mr [D] on the question of serious harm:

    a. She noted, first of all, that if we found that there was no "serious harm", then the Secretary of State could not establish that it was conducive to the public good that Mr [D] should be deported, and therefore we would not need to consider the "unduly harsh" criteria.

    b. As to the judge's treatment of the sentencing remarks, he would have read them in their entirety and borne them in mind. He was not required, however, to quote them in full. He was entitled to select what he considered relevant. As the sentencing remarks referred to the psychological impact of the offence on Mrs [D], it was appropriate for the judge to have regard to the two reports prepared by Ms Lewis. It was clear from Ms Lewis's report dated 20 September 2018 that she was aware of the incident and that, in her view, the incident had not had a lasting psychological impact on Mrs [D], as submitted by Mr [D]'s counsel at the hearing below (paragraph 20 of the judgment).

    c. It is clear from all the evidence, including Mrs [D]'s own evidence, that the offence did not cause serious physical or psychological harm to Mrs [D]. Therefore, in accordance with the Secretary of State's own guidance on criminality in the context of deportation and Article 8 claims, Mr [D] did not cause "serious harm".

    d. The judge was entitled to rely on the sentencing judge's assessment that the offence did not constitute "greater harm" under the relevant Sentencing

Council Definitive Guideline for Assault. The emphasis in the sentencing judge's remarks was on his comparative greater culpability, but that does not mean that "serious harm" was inflicted. Culpability is a different issue.

e. The judge was entitled also to have regard to the evidence at the hearing before him, including Mrs [D]'s evidence as to points that had been relied upon by the sentencing judge as indicating the level of harm, for example, Mrs [D] needing "extra bolts" on her door. Mrs [D] explained that this was a misunderstanding. She was fearful because Mr [D] was not with her and wanted the extra security of the extra bolts.

f. The Secretary of State had relied on the fact that Mr [D] got an immediate custodial sentence despite it being a "one-off" incident and his being of previous good character as indicative of "serious harm". But those factors are irrelevant. If anything, a history of domestic violence is likely to indicate that there is higher harm. In this case Mr [D] was acting out of character. Also, the Secretary of State's emphasis on this incident occurring shortly after his arrival in the United Kingdom is misplaced. That factor does not go to serious harm.

g. It cannot be that a custodial sentence necessarily indicates serious harm requiring deportation on the basis that it is conducive to the common good. That would obviate the need for a distinction between shorter sentences and sentences of 12 months or over, which is reflected in the legislation and rules, in effect eliding paragraphs 398(b) and (c) of the Immigration Rules. The judge took into account, and weighed in the balance, his perception that Mrs [D] has "tried to minimise what actually occurred on the evening the assault took place" (paragraph 34 of the judgment). The judge was required to carry out his own assessment, and it cannot be said it was irrational.

27. If we conclude, despite those submissions that Mr [D]'s offence had caused "serious harm", Ms Childs made the following submissions in relation to the judge's assessment of whether it would be unduly harsh for Mrs [D] to be required to live with her husband in Turkey:

a. Contrary to the Secretary of State's submission that the judge failed to address whether it would be unduly harsh for Mrs [D] to live in the United Kingdom without her husband, it is clear, considering the judgment as a whole, that he considered and reached a view on this. The judge found that the success of Mr [D]'s therapy was dependent on the presence of her husband. This reason clearly applies to the question of whether it would be unduly harsh for Mrs [D] to have to live in the United Kingdom without her (see the first of the two paragraphs numbered 38 in the judgment). The judge relied on the evidence of Ms Lewis and was entitled to do so.

b. It cannot be said that the judge's conclusion that it would be unduly harsh for Mrs [D] to live in Turkey was irrational. It is a high test. The Secretary of

> State is simply seeking to reargue his case on the proper assessment of unduly harsh in this context. No error of approach by the judge has, however, been identified. Once again, the judge relies on the evidence of Ms Lewis and concludes that she would be unlikely to establish the same trust and bond that she has with her current psychotherapist with a new therapist in Turkey. This is not an irrational conclusion.

28. In our view, on the question of serious harm, although we have some reservations about the judge's analysis of the sentencing remarks, we do not consider that his reasons are inadequate so as to amount to an irrational conclusion. We note, first, that the offence was very serious. Mr [D] received an immediate custodial sentence despite his previous good character. The sentencing judge assessed the offence as falling at the top of category 2 in the Assault guideline on the cusp of category 1. This was due to high culpability and "lesser harm", but the latter term should not be taken as indicating necessarily that the harm was not serious. The term is used for a specific purpose in the Assault guideline to indicate where within a range of sentencing possibilities an offence might fall. The circumstances of an offence could indicate "lesser harm" within the Assault guideline and still constitute "serious harm" for purposes of the deportation analysis.

29. The judge said at paragraph 34 of his judgment that the fact the defendant received an immediate custodial sentence of 8 months against a statutory maximum of 5 years, such that the sentence was "clearly at the lower end of the sentencing scale and reflects the [sentencing] Judge's view concerning the seriousness of the offence". There are a couple of difficulties with this. First, the 8-month sentence was after discount for guilty plea, so the starting point for the sentence was 12 months. The normal range of sentences for the offence of which Mr [D] was convicted runs from a fine to 3 years' custody, notwithstanding that 5 years is the statutory maximum. The sentence imposed on Mr [D] fell at the lower end of the range appropriate for category 1 in the Assault guideline and therefore was not "at the lower end of the sentencing scale" given the nature of the offence. The judge also noted that the sentencing judge had commented that the assault was an "isolated incident and not likely to be repeated", but those factors go to culpability rather than harm.

30. In our view, it is important not confuse culpability with harm when assessing whether a person has caused serious harm so as to engage the deportation provisions. Mr [D]'s assault on Mrs [D] was undoubtedly a serious offence, particularly as it was committed against her in her home in a domestic context, she was threatened with a knife and for the other reasons highlighted by the sentencing judge. Nonetheless, whether the offence caused "serious harm" for purposes of the deportation provisions is a fact-specific enquiry, and it is not necessarily the case that the imposition of a custodial sentence of less than 12 months means that serious harm in the necessary sense was caused. Whilst the view of the Secretary of State or the sentencing judge may be of assistance to a tribunal in deciding whether an offence has caused serious harm, the statutory wording in section 117D (C) does not compel any particular weight to be given to the Secretary of State's view (*SC (Zimbabwe)* [2018] EWCA Civ 929). In our view the judge clearly must have had the whole of the

sentencing remarks in mind. He was entitled to highlight what he considered to be relevant from them. He was also entitled to have regard to Mrs [D]'s evidence and the evidence of Ms Lewis in assessing whether serious harm was caused. Although the judge may not have done full justice to the Secretary of State's case in his summary of it in paragraph 35 of his judgment, he does summarise the submissions on serious harm that were made for the Secretary of State at paragraphs 14 to 15, and we have no reason to consider that he did not have regard to all of the submissions made, even where he does not summarise them in full detail.

31. We find that the Secretary of State has failed to persuade us that the judge's conclusion that the offence did not constitute "serious harm" for purposes of the deportation provisions was irrational. The Secretary of State's appeal therefore fails on this point. As the Secretary of State's view that Mr [D]'s deportation is conducive to the public good is solely predicated upon his contention that Mr [D] was convicted of an offence which has caused serious harm, and given the sustainability of the judge's finding to the contrary, the refusal of the human rights claim constitutes a disproportionate interference with Mr [D]'s Article 8 rights.

32. In light of our conclusion on the question of serious harm, it is not necessary for us to determine whether the "unduly harsh" aspect of the judge's decision contains any legal error.

Notice of Decision

The Secretary of State's appeal is dismissed.

No anonymity direction is made.

3 June 2019

Signed Date

Mr Justice Murray and Upper Tribunal Judge Blum sitting as Upper Tribunal Judges.