Upper Tier Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/13923/2018

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 10 December 2019	**On 30 December 2019**

Before

Mr Justice Goss
Upper Tribunal Judge Pickup

Between

Secretary of State for the Home Department

Appellant

and

A R
[Anonymity direction made]

Claimant

Representation:
For the claimants: Ms S Iengar, instructed by David Benson, Solicitors
For the appellant: Ms S Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Pursuant to Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008 (SI 2008/269), I make an anonymity direction. Unless the Upper Tribunal or a Court directs otherwise, no report of these proceedings or any form of publication thereof shall directly or indirectly identify the appellant(s).

1. This is a decision to which both judges, sitting as a panel at a hearing on 10th December 2019, have contributed.

2. This is the Secretary of State's appeal against the decision of First-tier Tribunal Judge Griffith promulgated on 1st October 2019, allowing the respondent's appeal against the decision of the Secretary of State dated 15th June 2015 to refuse his human right claim brought in response to a deportation order made on 16th March 2018. Permission to appeal this decision was granted by Upper Tribunal Judge Martin on 18th October 2019. For the avoidance of confusion we shall refer to the respondent as 'the claimant'.

3. The Secretary of State contends that the First-tier Tribunal Judge's was materially flawed by reason of errors of law and should be set aside. We are grateful to the parties' advocates for their written and oral submissions.

Relevant background & Chronology

4. The claimant is a citizen of Sri Lanka of Tamil ethnicity, born on 26th April 1990, so now aged 29 years, who claimed to enter the UK on 28th April 2005, aged 15 years. His asylum claim was refused but he was later granted discretionary leave to remain. On 7th September 2014 he committed an offence of wounding with intent to cause grievous bodily harm. Two weeks later he was attacked and seriously injured. On 4th November 2015, having been convicted of offences of theft from employer and making false representations for gain on 29th September 2015, he was sentenced to 12 weeks' imprisonment suspended for 2 years with a supervision requirement. On 19th May 2016 he went through religious ceremony with PR, a British citizen. Their son, AA, was born on 27th November 2016. He failed to attend his trial for the offence of wounding with intent in November 2016 and was convicted in his absence. On 12th March 2017 he was arrested when attempting to fly to Canada using a false passport and, on 7th April 2017, was sentenced to 7½ years' imprisonment with the suspended sentences being activated. The claimant remains in detention with a release date on licence of 11th December 2020.

5. On 16th March 2018 the Secretary of State made a deportation order and, on 15th June 2018, his human rights claim was refused.

6. Following a hearing on 17th September 2019 First-tier Tribunal Judge Griffith, in her decision promulgated on 1st October 2019, allowed the appeal, in summary, on the grounds that

   (a) there were sufficient adverse reasons making it unduly harsh for the claimant's child to be expected to follow him to Sri Lanka;

   (b) it would be unduly harsh for his wife to remain in the UK without him;

   (c) he would face very significant obstacles to his integrating into Sri Lanka; and

   (d) there were very compelling circumstances which outweighed the public interest in deportation.

The Grounds of Appeal to the Upper Tribunal

7. There are two grounds of appeal. First, it is submitted that the judge erred in law in failing to resolve challenges to the content of the psychiatric report, to which she attached considerable weight and upon which she relied in making findings in the claimant's favour, and did not explain why. Second, she erred in that her finding that it would be unduly harsh for the claimant's wife and child to live in the UK without him were devoid of sufficient reasons and that any identified harshness did not go beyond the commonplace, so she applied the wrong test. Reliance is placed on SSHD v PG (Jamaica) [2019] EWCA Civ 1213, in particular, on paragraphs [43] and [46].

The relevant statutory provisions

8. The claimant is a foreign national as defined in section 32 of the UK Borders Act 2007, having been convicted of an offence and sentenced to a period of imprisonment of more than 12 months. He is required to be deported subject to the exceptions set out in section 33 of the Act, the material parts of which provide:

> "33 **Exceptions**
>
> (1) Section 32(4) and (5) –
>
> (a) do not apply where an exception in this section applies (subject to subsection (7) below),
>
> …
>
> (2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach –
>
> (a) a person's Convention rights, …"

9. Part 5A of the nationality, Immigration and Asylum Act 2002 makes specific provision in relation to the consideration of Article 8 in the claimant's circumstances. Section 117A provides:

> "**117A Application of this Part**
>
> (1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts –
>
> (a) breaches a person's right to respect for private and family life under Article 8, and
>
> (b) as a result would be unlawful under section 6 of the Human Rights Act 1998.
>
> (2) In considering the public interest question, the court or tribunal must (in particular) have regard –
>
> (a) in all cases, to the considerations listed in section 117B, and
>
> (b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), "the public interest question" means the question of whether an interference with a person's right to respect for private and family life is justified under Article 8(2)."

10. Section 117 C provides

"**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.

…

(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."

11. The relevant Immigration Rules, as amended, provide:

"**398.** Where a person claims that their deportation would be contrary to the UK's obligations under Article 8 of the Human Rights Convention, and

…

(b) the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months;

…

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.

399. This paragraph applies where paragraph 398 (b) … applies if –

(a) the person has a genuine and subsisting parental relationship with a child under the age of 18 years who is in the UK, and

(i) the child is a British Citizen; or

(ii) the child has lived in the UK continuously for at least the 7 years immediately preceding the date of the immigration decision; and in either case

(a) it would be unduly harsh for the child to live in the country to which the person is to be deported; and

(b) it would be unduly harsh for the child to remain in the UK without the person who is to be deported; or

(b) the person has a genuine and subsisting relationship with a partner who is in the UK and is a British Citizen or settled in the UK, and

(i) the relationship was formed at a time when the person (deportee) was in the UK lawfully and their immigration status was not precarious; and

(ii) it would be unduly harsh for that partner to live in the country to which the person is to be deported, because of compelling circumstances over and above those described in paragraph EX.2. of Appendix FM; and

(iii) it would be unduly harsh for that partner to remain in the UK without the person who is to be deported.

…

399C. Where a foreign criminal who has previously been granted a period of limited leave under this Part applies for further limited leave or indefinite leave to remain his deportation remains conducive to the public good and in the public interest notwithstanding the previous grant of leave."

First-tier Tribunal Judge's Assessment

12. The First-tier Tribunal Judge recited in paragraphs 15-31 inclusive of her decision the reasons why the Secretary of State did not accept there were very compelling circumstances to outweigh the public interest in deporting the claimant. She heard oral evidence from the claimant, his wife, and 2 friends. There was a social worker's report and a psychiatric report from Dr Dhumad, who interviewed the claimant and his wife on the day before the hearing. After setting out the evidence and respective submissions of the parties, the First-tier Tribunal Judge, having rejected any claim under Articles 2 and 3 of the ECHR, found that the claimant's removal would very likely have adverse consequences for his wife's parenting abilities on the basis of the detrimental effect of separation on her mental health and, in turn, on the child's best interests. The claimant's wife had made it plain that she would not return to Sri Lanka with her son and the First-tier Tribunal Judge was satisfied that there were sufficient adverse reasons to make it plainly harsh to expect her son to follow the claimant to Sri Lanka. She also found it would be unduly harsh for his wife to remain in the UK without the claimant, even though she is a British citizen and have access to the NHS and Social Service, making reference to the 'significant factor' of the long-term effect of separation from him and her ability to parent the child adequately. She had a history of self-harming, and made two attempts at suicide; in the opinion of Dr Dhumad, her mental health would deteriorate dramatically if he were removed and her risk of suicide would increase. Further, she found that the claimant was socially or culturally integrated in the UK and would face very

significant obstacles to his integration in Sri Lanka, stating that the most significant factor was his mental health, referring to the report of Dr Dhumad, which she described as "fragile" and for which he is receiving treatment, with a moderate risk of suicide, with the risk of suicide increasing if removed. In relation to the public interest she acknowledged that the claimant needed to show very compelling circumstances over and above those set out in Paragraphs 399 and 399A. Adopting the balance sheet approach, she referred to the effect of alcohol in the offence, his wishing to be a better person and live a positive life, his own state of health and that of his wife and it being "doubtful that his medical health needs could be adequately monitored and treated" if he was returned to Sri Lanka and "although not specifically mentioned" she had not dismissed the possibility that if there is deterioration in his wife's mental health, which is the opinion of both the ISW and Dr Dhumad, there was a risk that the child might be taken into care which would not be in his best interests. The First-tier Tribunal Judge concluded her judgement in these terms:

> *"My decision is finely balanced, bearing in mind the strong public interest in the appellant's deportation, but I am prepared to find that cumulatively, there are very compelling circumstances in this case that outweigh the public interest in deporting the [claimant]."*

The submissions in the appeal

13. It is submitted on behalf of the Secretary of State that, by reason of conflicts in the medical evidence relating to the claimant and the absence of a credible medical history in relation to his wife, it was a material error on the First-tier Tribunal Judge's part to attach the significant weight to the medical evidence that she did. Reference is made to paragraph 8.11 of Dr Dhumad's report reciting a letter relating to his counselling sessions between 22 May 2019 and 3rd July 2019 as a result of which "his anxiety and post-traumatic symptoms have reduced from severe to moderate… At the point of discharge [the claimant] feels fairly stable emotionally and presents no risk to self or others". It was submitted that this was "at odds" with Dr Dhumad's opinion that he "remains unwell despite receiving the recommended treatment for his condition". This is said to undermine the ensuing view of Dr Dhumad that "he is very likely to suffer a serious deterioration in his mental health if he were to be returned to Sri Lanka..."

14. In relation to RP, reference is made to the First-tier Tribunal Judge at [92] noting that "… no credible medical history has been provided and it is unclear how the psychiatrist was able to make the conclusions he did in the absence of documents. His findings were clearly speculative. She told the psychiatrist that she barely goes out, but today states that she goes to work five days a week". However, Dr Dhumad did have her medical notes and, within his report (at 13.1 and 13.4 respectively), he stated "she feels settled in the UK and has a good job" and "… she has very poor social network and has been socially isolated".

15. So far as the second ground is concerned, complaint is made that the First-tier Tribunal Judge failed to identify why the psychiatric report should be deemed

forceful and of weighty consideration, given the absence of corroborating medical documents and its alleged speculative nature. There was a failure to engage with the evidence of RP's ability to care for their child during the claimant's imprisonment and the speculative nature of the risk of the child having to go into care if he was removed.

16. But for all these alleged material errors, it is said that the First-tier Tribunal Judge would not have found that it would be unduly harsh nor would she have found the circumstances to be very compelling.

17. An additional submission, made in oral argument, was that PR was complicit in the claimant's attempt to flee the jurisdiction to Canada in 2017 and that this was in conflict with medical evidence of Dr Dhumad that the impact of separation from her husband would be detrimental to her mental health, which would "deteriorate rapidly" if he was removed to Sri Lanka, "coupled with the risk of suicide" . However, it was clear from the evidence that she was unaware of his intended flight and this submission and was not pursued.

18. In response, in addition to those matters already addressed, it was emphasised on the claimant's behalf that no issue was or is taken with the claimant's credibility or of any of the First-tier Tribunal Judge's findings of fact or her application of the correct test in relation to assessing criminal deportations within the remit of Article 8. Nor was there any challenge to the expertise or clinical methodology of Dr Dhumad or any conflict within the expert medical opinion. Dr Dhumad conducted examinations of PR as well as the claimant and the working five days a week (her evidence was for four hours a day namely 8 am to 12 noon) was not in conflict with her other evidence of social isolation and so there was no conflict in the evidence requiring resolution or capable of undermining the psychiatric opinion.

19. In relation to the second ground, the First-tier Tribunal Judge conducted a two-fold unduly harsh assessment, first assessing the child's position, then his ability to remain in the UK without the claimant. No issue as taken with her conclusion that there were sufficient reasons to make it unduly harsh to expect his child to follow him to Sri Lanka. In relation to separation from the claimant, the First-tier Tribunal Judge assessed and linked PR's ability to parent their child if the claimant was removed. In particular, she relied on Dr Dhumad's opinion in paragraphs 13.3 and 13.4 of his report that

> "In my opinion the risk of self harm and suicide is very significant in case (*sic*) of her husband's removal to Sri Lanka. She has a history of self-cutting and suicide attempt (*sic*) which is very likely to increase significantly at times of high stress and hopelessness. In my opinion the risk to her child would also increase in such event, it is very unlikely she would mentally [be] capable of care for her child.
>
> … Therefore in my opinion, her mental health will deteriorate dramatically if her husband [is] removed to Sri Lank, coupled with [an] increased risk of suicide."

20. Accordingly, the First-tier Tribunal Judge, in reliance on this report, found that, as separation from the claimant would be dramatically detrimental to PR's mental health, this would naturally have adverse consequences for her ability to parent and this informed her conclusion that it would be unduly harsh for her and their son to remain in the UK if the claimant were deported.

Discussion

21. It is clear that a thorough Hesham Ali balancing sheet exercise was undertaken. It is not for this court to re-make the assessment. We accept the submissions made by Ms Iengar on behalf of the claimant. There was no error in law in the conclusions to which the First-tier Tribunal Judge's came, or in her reasoning. She took full account of the claimant's offending behaviour and the facts of the case and reached a conclusion to which she was entitled to come, recognising that it was finely balanced, and to find that the consequences for the claimant's child of deportation would be unduly harsh. The evidence of Dr Dhumad was not flawed by reason of any contradictions in the report. The evidence of PR working part-time did not mean that she could not, in other respects be socially isolated. On the evidence, the First-tier Tribunal Judge was entitled to rely on the medical evidence to conclude that separation from the claimant would be dramatically detrimental to PR's health, and, in consequence, on her ability to parent their child. This conclusion was supported by cogent reasoning and, in consequence, the effect on both mother and child amounted to very compelling reasons, and she was thereby entitled to find as she did. Although another judge may have come to a different conclusion, the one to which this judge came was open to her on the evidence for the reasons she gave and, therefore, we find no error in her assessment.

22. It follows that we find no material error in the making of the decision of the First-tier Tribunal so the appeal of the Secretary of State must be dismissed.

Decision

23. The making of the decision of the First-tier Tribunal did not involve the making of an error of law such that the decision should be set aside.

We do not set aside the decision.

The decision of the First-tier Tribunal stands and the appeal of the claimant remains allowed.

Signed

Mr Justice Goss

Dated 16 December 2019