Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: PA/09249/2018

THE IMMIGRATION ACTS

Heard at Birmingham Civil Justice Centre	**Decision & Reasons Promulgated**
On 21 January 2019	**On 11 April 2019l**

Before

UPPER TRIBUNAL JUDGE PERKINS

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

COLIN [R]
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mrs H Aboni, Senior Home Office Presenting Officer
For the Respondent: Mr M Mohzam, Solicitor with Burton & Burton Solicitors

DECISION AND REASONS

1. This is an appeal by the Secretary of State against the decision of the First-tier Tribunal dismissing the appeal of the respondent, hereinafter "the claimant", against the decision of the Secretary of State on 12 July 2018 refusing him leave to remain on human rights grounds having decided that the claimant should be deported because his deportation is conducive to the public good.

2. In summary, the First-tier Tribunal decided that the Secretary of State should not have made the claimant the subject of a deportation order. The First-tier Tribunal then allowed the appeal on human rights grounds.

3. The Secretary of State contends that the First-tier Tribunal Judge's approach was entirely wrong. It was not the role of the First-tier Tribunal to decide if the Secretary of State should have made a deportation order and the appeal should not have been allowed. These assertions have to be considered separately.

4. It is helpful to consider exactly what decisions were made and what decisions are the subject of appeal.

5. The decision to refuse an application for leave on human rights grounds is dated 12 July 2018. It deals with the claimant's immigration history. It notes that he arrived in the United Kingdom as a visitor in 1993 and again in 1996. In January 2002 he applied unsuccessfully for entry clearance as a visitor. He made a further application the same year for leave to enter as a spouse of a British citizen. That application was successful and he was given leave until July 2003. He did not regularise his stay and he remained unlawfully. He was arrested on suspicion of being an overstayer in November 2005. He was subject to administrative removal and left the United Kingdom. In October 2008 he sought leave to enter for six months to visit his wife and was given leave to enter as a visitor on compassionate grounds. He did not embark when he should have done and when he was identified as an overstayer he applied for indefinite leave to remain as the spouse of a British citizen. The application was rejected. He resubmitted the application in October 2010 and it was refused in January 2011. He appealed and was allowed discretionary leave to remain. He failed to make an application to renew his leave and remained without permission. He now has new partner, Ms H, and at the time of the hearing in the First-tier Tribunal his wife had resolved divorce him.

6. He had been convicted of offences in 2004 and 2017 and on 27 February 2018 at the Crown Court at Lincoln he was convicted of being involved in the production of a class B drug, namely cannabis, and he was sentenced to four months' imprisonment. He was in the United Kingdom without permission when he was arrested in January 2018 for the matters that led to his being sentenced to four months' imprisonment.

7. He was served papers identifying him as an overstayer in January 2018. The Secretary of State decided that his deportation was conducive to the public good as a result of his criminal activity and that he should be removed. He responded to receiving notice of the decision to deport him with an application for leave to remain on human rights grounds. That application was refused and the decision was appealed. The appeal was allowed by the First-tier Tribunal and it is the decision to allow the appeal that is the subject of the appeal before me.

8. The Secretary of State's decision was said to be consistent with the policy commitment made by the then Secretary of State at a Labour Party conference in 2007. It is described conveniently as the "Bournemouth Commitment". It is policy that "those involved in gun crime or selling drugs would not be allowed to remain in the United Kingdom, irrespective of the length of sentence handed down or served".

9. The Secretary of State has decided that the claimant should be deported. The Secretary of State noted that the claimant had been convicted of possessing a controlled drug of class B and fined in July 2017 and that he was in trouble again in January 2018. The Secretary of State took a very serious view of producing class B drugs and commented on the "severe and negative impact on society" caused by the trade in illicit drugs. The Secretary of State said at paragraph 59 of the Decision to Refuse a Human Rights claim:

> "Whilst you do not have an extensive criminal record the Home Office takes the view that the serious harm which would be caused as a result of any similar instances of offending is such that it is not considered reasonable to leave the public vulnerable to the potential for you to reoffend."

10. The Secretary of State then considered submissions relating to the claimant's private and family life and particularly the relationship between the claimant and his partner and went on to refuse the application on human rights grounds.

11. It is apt to remember that the First-tier Tribunal was concerned with an appeal against a decision refusing leave on human rights grounds and that the only ground of appeal is that "the removal of the appellant from the United Kingdom would be unlawful under section 6 of the Human Rights Act 1998…" (Nationality, Immigration and Asylum Act 2002, section 84)(1)(c).

12. The First-tier Tribunal looked carefully at the relevant Rules. They are set out in the decision and the judge had particular regard to paragraph 398(c) of HC 395. It comes under the heading "Deportation and Article 8". The Rule states:

> "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
>
> (a) …
>
> (b) …
>
> (c) the deportation of the person from the UK is conducive to the public good and in the public interest because, in the view of the Secretary of State, their offending has caused serious harm or they are a persistent offender who shows a particular disregard for the law, 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."

13. In summary, paragraph 399 applies to relationship with a child or a partner and paragraph 399A applies when there has been long residence and integration. The claimant has not relied on a relationship with a child and he cannot come within the provisions of paragraph 399 because his relationship with his present partner was formed when his immigration status was precarious and for much of its duration when he did not have leave at all.

14. The First-tier Tribunal Judge looked carefully at the sentencing remarks made when the claimant was sent to prison. It was accepted that the claimant was growing cannabis for his own use. The claimant does suffer from significant back pain and some people do regard cannabis as a useful pain blocker. The claimant has now found more conventional treatment that has worked.

15. The First-tier Tribunal judge noted that the prison sentence was for only four months yet the Secretary of State relied on the contention that the claimant's offending "has caused serious harm". As far as I can ascertain that was never stated expressly in the Decision to Refuse a Human Rights Claim which referred to the "very serious harm that would be caused as a result of any similar incidents of offending". However I have not been able to find a copy of page 2 of the Decision to Deport amongst the many copies of that decision that are before me. Be that as it may, the judge was clearly satisfied that the Decision to Deport was made because the claimant's offending "has caused serious harm" because that is what the judge said at paragraph 45 of his decision. The judge then found the Secretary of State's reasons for making the order inadequate. He noted that the "Bournemouth Commitment" referred to the *selling* of drugs and there was no evidence that the claimant had ever been involved in selling drugs. The judge did not accept that the claimant's behaviour was capable of having caused or causing serious harm.

16. The judge then looked at the claimant's case based on his relationship with his partner. His partner is a British citizen. They were residing together when the offence was committed. The judge noted the Secretary of State's finding that:

> "… it is not accepted that your relationship with Ms H was formed when you were in the UK lawfully and your immigration status was not precarious."

17. The claimant said that he was in the United Kingdom lawfully when his relationship started. He had discretionary leave until 19 September 2017 and he started to become friendly with Ms H in February 2017. Although still married in law his close relationship with his wife was over when he and Ms H met. The judge found that the claimant was lawfully in the United Kingdom when his relationship with Ms H started as his leave had

not lapsed when the relationship began. The judge realised that the claimant's status had never been better than precarious and concluded that the claimant could not satisfy the Rules because the relationship was formed when the relationship status was precarious.

18. The judge noted guidance published by the Secretary of State about whether an offence has caused serious harm and concluded that the claimant had not caused serious harm by his offending. The judge decided that the Rules did not require consideration of "very compelling circumstances" to outweigh the public interest because the claimant should not have been subject to deportation.

19. The judge also considered part 5A of the Nationality, Immigration and Asylum Act 2002. He decided that the claimant and Mrs H were "soulmates" and found it unduly harsh to expect her to leave the United Kingdom or to live in the United Kingdom without her partner. He went on to allow the appeal.

20. The grounds complain that the judge should not have concerned himself with the application of the policy summarised as the Bournemouth Commitment. I agree. The requirement of the Rule is that "in the view of the Secretary of State", the offending has caused serious harm. Clearly if the Secretary of State reaches that conclusion irrationally then the decision is likely to attract judicial review but the case is before the First-tier Tribunal precisely because the Secretary of State has decided to make a deportation order and to refuse an application for leave to remain on human rights grounds. There is no right to appeal the decision to make the deportation order. That is a matter for the Secretary of State subject to the possibility of judicial review.

21. I appreciate it is difficult to conduct an "article 8 balancing exercise" when the judge deciding the appeal considers that decision that led to the balancing exercise was wrong. However, and with respect, the judge rather lost sight of his function which was to decide if a decision under the Immigration Acts breaches a person's rights to respect for private and family life. The judge did not decide the appeal properly by concluding that the claimant should not have been subject to deportation. That was not his function.

22. When conducting a balancing exercise it is always necessary to have regard to the Rules because it is hard to say that a person's removal is proportionate when he can show that he can satisfy the requirements of the rules that apply to his application. Even though there is no appeal under the rules a balancing exercising outside the rules can be illuminated by public policy expressed in the rules.

23. However Part 5A of the Nationality, Immigration and Asylum Act 2002 applies when a tribunal is required to determine with a decision under the Immigration Acts breaches a person's right to respect for his private and family life and must be considered by a judge deciding such an appeal.

24. Section 117C sets out "additional considerations in cases involving foreign criminals" but "foreign criminals" are defined at s117D(2) with reference to the length of sentence, being a persistent offender and having been convicted of "an offence that has caused serious harm". A person can be a national of a country other than the United Kingdom who has been convicted of a criminal offence without consequentially becoming a "foreign criminal" for the purpose of section 117C and such a person is not subject to the "additional considerations in cases involving foreign criminals" when a Tribunal is considering an article 8 balancing exercise.

25. A "foreign criminal" thus defined includes a person who "has been convicted of an offence that has caused serious harm" (Section 117D(2)(c)(ii)). It is plain from reading the Act that it is for the judge determining the appeal to decide if the claimant is a "foreign criminal" which, in this case, means if the clamant has been convicted of an offence that has caused serious harm. Clearly the trial judge will consider the Secretary of State's views but the judge is not bound by them. Part 5A does not apply to the Secretary of State but to the court or Tribunal determining a claim under the Immigration Acts.

26. It is quite clear here that the judge decided that the claimant had *not* been convicted of an offence that caused serious harm. On the judge's findings the claimant is not a "foreign criminal" for the purposes of Part 5A and, again on the judge's findings, the claimant has a genuine and subsisting relationship with his partner.

27. Notwithstanding his (irrelevant) reservations about the underlying reasons for the Respondent making a Deportation Order the judge was clearly obliged to decide for himself if the claimant was a "foreign criminal" within section 117C. He concluded, rationally, that the claimant was not such a person and, correctly, did not apply the "additional considerations in cases involving a foreign criminal" to his deliberations.

28. It does not follow from this that he was right to allow the appeal and the Secretary of State maintains that the judge erred in allowing the appeal. However the decision to allow the appeal under the rules is criticised at point 4 of the grounds which states:

> "Therefore having found that the [claimant] could not meet the requirement of the rules [57, 61 and 75], the FTTJ was bound to consider very compelling circumstances rather than an outside a rules consideration. As such it is respectfully submitted that the FTTJ has erred in law in his approach and application of the deportation regime."

29. The reference to "very compelling circumstances" here is a reference to the requirement of paragraph 398(c) of the Rules where it is said "the Secretary of State in assessing that claim will consider whether paragraphs 399 and 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".

30. This criticism is misconceived. It is not for the Judge to follow rules directed to the Secretary of State. The Judge was obliged to apply Part 5A. On the facts of this case as he found them the Judge was obliged to rule that section 117C did not apply because the claimant is not a foreign criminal and to consider section 117B.

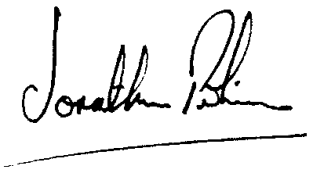
31. The Judge has given reasons for allowing the appeal. He found that the relationship was not established when then claimant was in the United Kingdom unlawfully and decided, particularly for reasons given at paragraphs 77-79 to allow the appeal. Those findings are not criticised in the grounds.

32. It follows that although the First-tier Tribunal clearly erred the Secretary of State has wholly failed to establish that the error was material

Decision

The Secretary of State's appeal is dismissed.

Signed
Jonathan Perkins
Judge of the Upper Tribunal



Dated 8 April 2019