



**Upper Tribunal
(Immigration and Asylum Chamber)**

Appeal Number: PA/09540/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 13 May 2019**

**Decision & Reasons
Promulgated
On 16 May 2019**

Before

UPPER TRIBUNAL JUDGE KAMARA

Between

SD
(ANONYMITY DIRECTION MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr R K Rai, counsel,
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. This is an appeal against the decision of First-tier Tribunal Judge Watson, promulgated on 19 June 2018. Permission to appeal was granted by Upper Tribunal Judge Blum on 29 October 2018.

Anonymity

2. A direction was made previously and is renewed below.

Background

3. The appellant was granted indefinite leave to remain in the United Kingdom on 6 June 2000 on the basis of his marriage. On 26 January 2015, the appellant was convicted of three counts of sexual touching a woman aged 16 or over without consent and one count of battery and was sentenced to 42 weeks' imprisonment. On 7 August 2015, the Secretary of State wrote to the appellant to inform him that deportation action was considered but not proceeded with as he did not meet the criteria for deportation. The same letter warned the appellant about his future conduct. The appellant was subsequently convicted of two breaches of the Sexual Offences Act 2003 for moving address without notification to the police and for failing to notify the police that he intended to travel abroad for which he received a sentence of 8 weeks' imprisonment on 29 June 2016. A deportation order was signed on 30 September 2016, following which the appellant made an asylum claim. On 11 September 2017 a decision was made to refuse his protection and human rights claim and deport him on the basis that his deportation was conducive to the public good. It is this decision which is the subject of this appeal.
4. In the decision letter dated 11 September 2017, the Secretary of State considered the appellant's claim to fear his brothers-in-law but concluded that acts complained of did not amount to persecution, that there was a sufficiency of protection in Pakistan and that he could reasonably be expected to internally relocate to avoid his wife's relatives. The respondent also considered the appellant's Article 8 claim which concerned his wife and children however, it was considered that his wife and children lived abroad and thus there was no family life. As for private life, it was considered that there were no very significant obstacles to the appellant's reintegration in Pakistan, where he had lived since the age of 21. Lastly, it was considered that the appellant's offending would have caused serious harm to the victims and that his deportation did not breach his rights under Article 8 ECHR.

The hearing before the First-tier Tribunal

5. The First-tier Tribunal dismissed the appeal on protection grounds, humanitarian protection grounds and under Articles 2, 3 and 8 ECHR.

The grounds of appeal

6. The grounds of appeal argued, in view of the respondent's earlier decision that the offences did not merit deportation, that there had been insufficient reasons given by the Tribunal for concluding that the appellant's offences were serious.

7. Permission to appeal was granted on the basis that there was arguably little assessment or reasoning in the judge's decision as to whether and why the appellant's offences caused serious harm.
8. This appeal came before The Honourable Mrs Justice Farbey and Upper Tribunal Judge Kebede on 15 January 2019. The appellant's appeal was allowed and the decision of the First-tier Tribunal set aside in so far as it related to Article 8 grounds.
9. The appeal was set down for a rehearing in the Upper Tribunal on Article 8 grounds alone. Directions were made for the respondent to send, within 8 weeks, further and better particulars of the appellant's criminal offences. A small bundle of unindexed material was received in advance of the hearing.
10. On 7 May 2019, Principal Resident Judge O'Connor transferred the appeal to be heard by a differently constituted Tribunal.

The hearing

11. The appeal proceeded by way of submissions alone. Mr Rai relied on the appellant's bundle which was submitted on 15 January 2019 and his brief skeleton argument. He submitted that the appellant was not a foreign criminal in that he had not been convicted of an offence which had caused serious harm and it was not in the public interest to deport him. He further submitted there was no definition of serious harm in the statute or in the Immigration Rules. Mr Rai placed emphasis on the respondent's decision not to deport the appellant after the sexual offences, the absence of any evidence of serious harm being caused to the victims, that the conviction was at the lower end of the sentencing scale and that it was unclear which conviction was seen as causing serious harm. He argued that it was open to me to reach my own conclusion as to what amounts to serious harm, *SC (Zimbabwe)* [2018] EWCA Civ 929 applied. Lastly, he referred me to the remarks of the previous panel who described the Secretary of State as having an "*uphill task*" in resisting the appeal.
12. Mr Tufan accepted that only one of the witness statements from the four victims made any reference to lasting effects of the sexual assault. He urged me to apportion weight to the respondent's guidance as to what amounts to serious harm, albeit without referring to any particular aspect of it. He argued that it was obvious that the appellant was a persistent offender, albeit he conceded this was an argument which had not been made previously.
13. At the end of the hearing I reserved my decision.

Decision on error of law

14. The appellant was granted indefinite leave to remain in the year 2000 and the basis of the decision to deport him was that his offending had caused serious harm. This is the sole issue before me. No indication was

given in the decision letter as to which of his offences had caused this harm. Nor were any facts provided to justify the Secretary of State's conclusion. The decision letter, in using the term "*would have*" in relation to harm caused, raised an assumption that the appellant's offences caused serious harm. It was not contended, in the decision letter, that the appellant was a persistent offender, however Mr Tufan introduced this issue during his submissions.

15. In response to directions, the respondent recently provided witness statements from appellant's four victims. As Mr Tufan conceded, just one of the four victims raised concerns about the harm caused by the sexual assault upon them.
16. The relevant witness statement is dated 26 January 2015 and was written in connection with the Victim Personal Statement Scheme. The statement addresses an assault which took place two days earlier, on 24 January 2015, regarding which the victim had already provided a statement which set out the facts. Those facts, as summarised in a summary of the key evidence provided by the respondent are as follows:

"(the victim) was walking her dog...A male approached her who engaged her in conversation and when she walked away from (him) he grabbed her bottom and pulled himself close to her. The victim confronted him and made off."

17. In her statement of 26 January 2015, the victim explained how the sexual assault affected her. She stated that she felt "*really apprehensive*" about going out and had only been going out during daylight, although the following day she was planning to go out in darkness. The victim further stated that she plans to avoid going to the area where the assault happened as she did not want to be reminded of what happened. In addition, on days when she had to go out very early in the day, she would ask her daughter to come and walk the dog. Finally, the witness adds that the assault has had a "*bad effect*" on her daughter and other relatives, whom she describes as very protective of her.
18. There was no challenge to the evidence setting out the impact on the victim. I have therefore placed considerable weight on that evidence and have no hesitation in accepting that the victim and her family were affected as claimed at the time the statement was written.
19. The respondent was required to make a deportation order (s32(5) UK Borders Act 2007) if he considered that the appellant was a foreign criminal as defined in section 117D of the 2002 Act and, which reads as follows;

117D (2) In this Part, "foreign criminal" means a person—

- (a) who is not a British citizen,

(b) who has been convicted in the United Kingdom of an offence, and

(c) who—

(i) has been sentenced to a period of imprisonment of at least 12 months,

(ii) has been convicted of an offence that has caused serious harm, or

(iii) is a persistent offender.

20. In *SC (Zimbabwe)* [2018] EWCA Civ 929, McCombe LJ said at [19]

"...It seems to me quite clear that once the matter comes before a tribunal or court, what has to be applied is s.117D(c) of the Act...the view of the Secretary of State or indeed of a judge in sentencing remarks may be of assistance to a Tribunal or court in deciding whether an offence has caused serious harm or whether an offender is a persistent offender, but I do not see that the statutory words compel any particular weight to be given to the Secretary of State's view on either in the assessment..."

21. The respondent's most recent guidance on criminality in relation to Article 8, published on 31 January 2019, sets out the Secretary of State's view. The following extracts are relevant to this appeal:

"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."

"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."

22. Having considered all the evidence before me, including the views of the Secretary of State as expressed in the publicly available policy guidance as well as the submissions made, I conclude that the appellant's offending has not caused serious harm for the following reasons.

23. Firstly, considering the statement of the only victim to provide an account of the impact of the sexual assault upon her and her family, I accept that it caused her to be apprehensive and caused her family concern. While I find that the victim and her family were caused harm, particularly in the two or three days immediately after the assault, I do not accept that there is any evidence that the offence caused serious psychological harm. Nor is there any evidence of long-term harm caused,

serious or otherwise, by the offence. Indeed, Mr Tufan did not seek to persuade me otherwise.

24. Secondly, it is relevant that the respondent considered deporting the appellant after he was convicted of the four counts of assault but, as of 7 August 2015, decided not to because "*he did not meet the criteria for deportation.*" It was open to the respondent to conclude that the appellant's assault convictions amounted to serious harm or that he was a persistent offender at that stage, however he declined to reach that conclusion after giving some thought to the matter.
25. Thirdly, deportation action was triggered by the appellant's failure to notify the authorities of his address and travel plans, as required by section 91(10)(a) and 2 of the Sexual Offences Act 2003, however the respondent has never explained how this second conviction caused serious harm.
26. Fourthly, the appellant's conviction for the assaults was towards the lower end of the sentencing scale, which according to the Sentencing Council Guidelines ranges from a community order to 7 years' custody.
27. Lastly, on this point, there is no evidence to suggest that the appellant has contributed to a widespread problem which causes harm to society in general.
28. Mr Tufan contended that the appellant was a persistent offender, albeit those submissions were undeveloped.
29. To summarise, the appellant has two convictions. The first relates to a series of assaults he carried out in January 2015 and the second to the notification offences which took place in June 2016.
30. According to the respondent's guidance, "*Persistent offender' means a repeat offender who shows a pattern of offending over a period of time. This can mean a series of offences committed in a fairly short timeframe, or which escalate in seriousness over time, or a long history of minor offences.*"
31. The term persistent offender was defined in *Chege* ("*is a persistent offender*") [2016] UKUT 00187 (IAC), with the conclusions being endorsed by the Court of Appeal in *SC (Zimbabwe)*. Headnote 3 of *Chege* states as follows:

"3. A "persistent offender" is someone who keeps on breaking the law. That does not mean, however, that he has to keep on offending until the date of the relevant decision or that the continuity of the offending cannot be broken. A "persistent offender" is not a permanent status that can never be lost once it is acquired, but an individual can be regarded as a "persistent offender" for the purpose of the Rules and the 2002 Act even though he may not have offended for some time. The question

whether he fits that description will depend on the overall picture and pattern of his offending over his entire offending history up to that date. Each case will turn on its own facts."

32. A further passage from Chege which is relevant to the appellant's case can be found at [54] of the decision and reasons:

"Plainly, a persistent offender is not simply someone who offends more than once. There has to be repeat offending but that repetition, in and of itself, will not be enough to show persistence. There has to be a history of repeated criminal conduct carried out over a sufficiently long period to indicate that the person concerned is someone who keeps on re-offending. However, determining whether the offending is persistent is not just a mathematical exercise. How long a period and how many offences will be enough will depend very much on the facts of the particular case and the nature and circumstances of the offending. The criminal offences need not be the same, or even of the same character as each other. Persistence may be shown by the fact that a person keeps committing the same type of offence, but it may equally be shown by the fact that he has committed a wide variety of different offences over a period of time."

33. Applying Chege to the facts of the appellant's case, in my view, he cannot be considered to be a persistent offender. Indeed, that was the view of the Secretary of State in 2015 when deportation was considered and rejected and in 2016 when a deportation action commenced.
34. The appellant's two convictions in 2015 and 2016 for different, albeit related, offences, do not amount to criminal offending over a sufficiently long period to indicate that he is someone who keeps on offending, when viewed against the backdrop of his residence in the United Kingdom since 1999 and the absence of any evidence of offending prior to his arrival, aged 20, in the United Kingdom.
35. In view of my foregoing findings, the appellant cannot be regarded as a foreign criminal and his removal would amount to a disproportionate interference with his Article 8 rights.

Notice of Decision

The appeal is allowed.

Directions Regarding Anonymity - Rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008

Unless and until a Tribunal of court directs otherwise, the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify

him or any member of their family. This direction applies both to the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

Signed

Date

Upper Tribunal Judge Kamara

TO THE RESPONDENT
FEE AWARD

As I have allowed the appeal and because a fee has been paid or is payable, I have considered making a fee award and have decided to make a whole fee award of any fee which has been paid or may be payable for the following reason. The respondent was unable to establish that the appellant's offending caused serious harm or that he is a persistent offender.

Signed

Date

Upper Tribunal Judge Kamara