Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/05007/2019

THE IMMIGRATION ACTS

At: Manchester Civil Justice Centre
On: 14th February 2020

Decision & Reasons Promulgated
On: 4th March 2020

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

RU
(anonymity direction made)

Appellant

And

The Secretary of State for the Home Department

Respondent

For the Appellant: **Mr Sobowale, Counsel instructed by Salam Solicitor**
For the Respondent: **Mr Bates, Senior Home Office Presenting Officer**

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born in 1984. The Respondent seeks to deport him on the grounds that he is a 'foreign criminal', the Appellant having been convicted in 2017 of possession of Class A drugs (MDMA, cocaine) plus a quantity of cannabis, with intent to supply, and he having been sentenced to 3 years in prison.

2. The Appellant seeks to resist deportation on human rights grounds; specifically, he contends that his removal would have 'unduly harsh' consequences for his

children and/or that there are very compelling circumstances in his case which render his deportation a disproportionate interference with his Article 8 rights.

Case History

3. The decision to deport was taken on the 10th January 2018. The Appellant appealed to the First-tier Tribunal.

4. On the 11th July 2019 the First-tier Tribunal (Judge Meyler) allowed the deportation appeal on Article 8 grounds, finding that it would be unduly harsh for the Appellant's children to remain living here without him.

5. The Secretary of State sought permission to appeal to the Upper Tribunal, which was granted on the 3rd October 2019 by First-tier Tribunal Parkes. Various grounds were advanced before me at a hearing on the 7th November 2019 but the crux of the Respondent's case was that the reasons for the First-tier Tribunal decision were unclear to her. Although the Tribunal plainly states its *conclusion* that life for the children without their father would be unduly harsh, its *reasons* for reaching that conclusion are left unspecified. The Secretary of State placed reliance on a number of Court of Appeal decisions which emphasise that there must be something out of the ordinary in a family's situation to elevate the distress that a child will face to the level of 'undue harshness'.

6. I find the grounds to be made out. At paragraph 34 the First-tier Tribunal decision records that the children are all close to the Respondent and that they would miss him if he were to be deported; at least in respect of the stepdaughters their biological father would not permit them to visit the Respondent in Bangladesh. Neither of these reasons are capable of supporting a finding that the deportation would have 'unduly harsh' consequences for the children of this family. Nowhere is the actual impact of family breakup explored. In my written decision of the 8th November 2019 I found that the Secretary of State was entitled to complain that she cannot understand the basis of the decision. The grounds having been made out, the decision of the First-tier Tribunal was set aside.

7. The case has now returned to me to be re-made.

The Evidence

8. I was given the following unchallenged evidence about the Appellant's immigration history. He arrived in the United Kingdom in April 1991 when he was 6 years old. He had leave to enter as a visitor; it appears that he was left in the United Kingdom by his mother who returned to Bangladesh without him.

He has lived here ever since. In December 2008 the Secretary of State accepted that the Appellant qualified for Indefinite Leave to Remain on the basis of the old 'fourteen years' concession in the Immigration Rules. That leave pertained until the 10th January 2018 when it was curtailed by the signing of the deportation order.

9. The Appellant has three criminal convictions, all accrued in 2016/2017; he was sentenced for all of them on the 5th November 2017. The most serious are the two counts of possession with intent to supply a Class A controlled drug (cocaine and MDMA); he was also convicted of one count of acquiring/using/possessing criminal property. The sentence imposed was 2 x 3 years, to be served concurrently.

10. At the hearing the Appellant explained the background to his convictions. He had never before been in trouble with the law. As a young man he did a lot of sport and in approximately 2013 he sustained an injury to his anterior cruciate ligament. He was in a lot of pain, for which he was prescribed painkillers by his doctor. A friend suggested that he supplement these painkillers by smoking cannabis. Although he had not before tried any street drugs the Appellant began to regularly smoke cannabis, and through this was introduced to other drug users, and dealers. He progressed to using cocaine. He started spending a lot of money that he didn't have. At one point he was spending about £200 per week on cocaine. He fell into debt with the dealers. He had no way of paying this debt off, and so it was suggested to him that he undertake some work for them. In his evidence before me the Appellant appeared genuinely exasperated at himself for having made that decision. He reckons that he was selling drugs, including Class A's, on the streets in Chester for approximately 5 months before he was arrested.

11. The Appellant then gave what was fairly described by Mr Bates, in his subsequent submissions, as unusually "candid and credible" evidence of his remorse and rehabilitation. He explained that in prison he undertook a victim awareness course specifically tailored to drug offenders. He came to understand that a single drug deal has a "butterfly effect" where multiple people are adversely affected. The drug user himself is impacted, in his health and wellbeing, but this in turn can have consequences for his family, his wife and children, not just emotionally but financially – because the money that is funding his habit he could be funding his family. Further afield it also impacts on medical staff and the NHS, which ends up having to foot the bill when things go wrong. The Appellant also explained that another consequence of dealing is further crime, as users like himself get sucked into offending to pay for their habit. For all of those reasons the Appellant avers that he feels ashamed of his criminal past and asks me to accept that he has learned his lesson. He regrets what he has done.

12. Although I had no up to date evidence from the probation service I did have an OAsys report prepared in May 2019 which stated that the service at that time predicted that there was a 3% chance of the Appellant reoffending within 3 years, and no risk at all of the Appellant committing any further serious offences. All drug tests conducted in prison came back negative and the Appellant avers that he has been drug free since 2016.

13. The Appellant married his wife Ms RS in 2012. They have two children together, and three step-children. Since I have made an order for anonymity to protect the identity of these children I shall refer to them, in descending age order, as C1-C5. All five are girls, currently aged 19, 15, 12, 5, and 3½. The three eldest girls, the Appellant's step-daughters, have always lived with their mother. They have regular contact with their father who lives nearby. Their father has written to the court to state that he would not permit them to go to Bangladesh.

14. I heard live evidence from Ms RS and received written statements from the three eldest children. I deal with those statements first.

15. C1 is now at university. She is reading law at Chester. C1 writes that she has lived with her stepfather since she was 11 years old and that she has in that time benefitted from a stable and secure family environment. She states that the Appellant plays an important and active role in the household and then when he was in prison she and her sisters all suffered emotionally and psychologically. Since he has been out he has resumed his position – he helps with chores, transports the little ones to and from school and encourages his stepdaughters to study hard. C1 expresses concern at her mother's ability to cope. Whilst she was in a position to help out when he was in prison, now that she is at university her capacity to do so will be limited. She writes that she and her sisters are "stressed and confused" about what will happen to their family should the Appellant be removed.

16. C2's letter is dated April 2019, when the Appellant was still in prison. Strikingly she opens it by describing him as her "best friend". She states that she and her sisters, and their mother, miss him a lot: "these past 18 months have been really tough for me and my family". She expresses concern about her mother's ability to cope without the Appellant, and sets out why she would not be able to leave Chester where she has established friends and extended family.

17. C3 states that she loves living in her family home with her mother, stepfather and sisters. They are a happy family. She knows that her step-father regrets what he has done and just wants to be there for them now. She explains the ties that she has to the United Kingdom – her father and extended family as well as her school and friends – and states that she does not know what would happen to her family if her step-father had to leave. She is worried about her little sisters who are "crazy about their dad" but who are also part of her family unit.

18. Ms RS adopted her witness statement and gave further oral evidence. She confirmed that she is the mother of the Appellant's three stepdaughters, two daughters, and that she has another on the way: her estimated date for delivery is in May of this year. She explains how she and the children endured serious hardship when the Appellant was sent away. She struggled to cope with the children on her own and had to look to her eldest daughter for help. She became emotional in her evidence as she described how she now owes her daughter money arising from money she borrowed during that period. C1 also spent a lot of time helping her with the younger kids and deliberately chose to attend university in her home town because she was worried about leaving her mum. This appeared to be personally distressing for RS, who feels like she has let her daughter down: "she's just a kid – I don't want to hold her back". RS described how she kept the truth from her youngest daughters because she didn't know how to explain to them that their father was in prison. She told them that he was working away. Every week they would go and visit him and the kids would cry when it was time to leave dad at "work". Sometimes the guards had to help her get them out of the visiting room because they would cling to him and shout. To this day C4 has lasting emotional issues arising from her father's imprisonment. She is very clingy to him and gets up most nights in the week to check that he is still in the house. He gets up and settles her. Despite all of that RS has no regrets about marrying the Appellant. She loves him and says that he is a "brilliant", "active and loving" father.

19. Various members of the Appellant's extended family and social network have written letters in support of his case. I do not propose to summarise all of this evidence but I can confirm that I have read all 12 of the letters written I have been sent. Three main themes emerge: that he is committed to his rehabilitation, has a strong bond with his family, and that his criminal behaviour was shockingly out of character. I summarise only two of the letters, which serve to convey the views of all of the writers.

20. The Appellant's British cousin LA has written a lengthy and detailed statement setting out how let down he and other family members felt by the Appellant's criminal behaviour, and how out of character they regard it as being. Mr Ali had regular contact with the Appellant in the two years he spent bailed on remand prior to sentence, and continued to visit him in prison. During that period he formed the impression that the Appellant was truly repentant for his crimes and was committed to his rehabilitation: "he did everything that was asked of him. He was like an open book with his heart visibly on his sleeves". LA comments that the Appellant is particularly close to C4 but that he has a "great bond of love and affection" with all of the children. LA further opines that the Appellant no longer belongs in Bangladesh, and that he must have experienced emotional "chaos" when his parents left him here. Conversely he has grown up in the United Kingdom and has a real sense of belonging here.

21. Another cousin, JN describes the Appellant as being someone who will always go out of his way for others – she gives several examples of his kindness towards her over the years and speaks warmly of his parenting skills. She writes:

> "For someone that got abandoned and neglected by his own parents during childhood I was very nervous before he embarked on the next chapter of his life…getting married and having children, but once again [the Appellant] proved his ability to love and give his children what he didn't have, got past his own unorthodox upbringing and personal struggles. When he was out on bail I spent many evenings with [the Appellant] and his wife his own children and stepchildren, in their family home. We would pop '*I'm a Celebrity*' on whilst he cooks up a big roast, talk and laugh around the dinner table, it was genuinely a beautiful environment and I was fortunate to have shared such fond memories with him".

22. When I asked the Appellant for his comment on this evidence he explained that after he was abandoned here by his mother his extended family closed in to take care of him. LA, JN, his other cousins, siblings, aunts and uncles are all extremely close to him. He feels deeply ashamed of how he let them down and knows how disappointed they all were in him. These relatives are regarded by the Appellant as the sum total of his natal family. He has no direct contact with either his parents or an elder brother who remains in Bangladesh, although he heard news about them from time to time from his aunty here. The Appellant explained that he has not had a relationship with his parents since they left him here, because as a young child he was resentful and heartbroken that they left him here. He did not want to talk to them. He understands that they migrated to the United States' several years ago. He has some memory of his brother from when they were children but has had no contact with him since he arrived here in 1991. He has been told by his aunt that his brother has significant mental health problems and has never been able to work. Although he is married he is not able to support his own family and in fact lives in his father-in-law's house.

23. The Appellant said that if he is allowed to remain here he hopes one day to run his own business. He has done lots of different jobs in the catering industry – he has worked back and front of house in restaurants and he believes that he has what it takes to do that alone – either a family run restaurant or maybe starting with a little take-away. One of the courses that he completed in prison was in relation to this (he also undertook further study in maths and English).

The Law

The Legislative Framework

24. The Respondent's decision to deport is taken pursuant to section 32(5) of the UK Borders Act 2007 which requires the Secretary of State to make a deportation order against any person who is a) not a British citizen and b) is convicted in the UK of an offence for which he is sentenced to a period of imprisonment of at least 12 months. Such an individual is a 'foreign criminal'.

25. The foreign criminal may resist deportation is he can show that one of the 'exceptions' to the automatic deportation procedure applies. The exceptions are set out at s33 of the Borders Act 2007. In this appeal the Appellant submits that his case engages the exception at s33(2)(a): he submits that his deportation would contravene his rights under the European Convention on Human Rights, specifically Article 8.

26. The composite rights protected by Article 8 – private and family life - are qualified rights with which interference may be justified on the basis of various legitimate aims which include the prevention of disorder or crime. The way in which the question of justification should be approached where a court or tribunal is required to determine whether a decision made under the Immigration Acts breaches Article 8 is governed by Part 5A (sections 117A-117D) of the Nationality, Immigration and Asylum Act 2002 (as amended by s19 of the Immigration Act 2014).

27. Section 117B, which applies to all Article 8 cases, provides:

> **117B Article 8: public interest considerations applicable in all cases**
>
> (1) The maintenance of effective immigration controls is in the public interest.
>
> (2) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are able to speak English, because persons who can speak English—
>
> (a) are less of a burden on taxpayers, and
> (b) are better able to integrate into society.
>
> (3) It is in the public interest, and in particular in the interests of the economic well-being of the United Kingdom, that persons who seek to enter or remain in the United Kingdom are financially independent, because such persons—
>
> (a) are not a burden on taxpayers, and
> (b) are better able to integrate into society.
>
> (4) Little weight should be given to—
>
> (a) a private life, or
> (b) a relationship formed with a qualifying partner,
>
> that is established by a person at a time when the person is in the United

Kingdom unlawfully.

(5) Little weight should be given to a private life established by a person at a time when the person's immigration status is precarious.

(6) In the case of a person who is not liable to deportation, the public interest does not require the person's removal where—

(a) the person has a genuine and subsisting parental relationship with a qualifying child, and
(b) it would not be reasonable to expect the child to leave the United Kingdom.

28. Section 117C sets out the additional considerations to be made in deportation cases:

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.

(7) The considerations in subsections (1) to (6) are to be taken into account where a court or tribunal is considering a decision to deport a foreign criminal only to the

extent that the reason for the decision was the offence or offences for which the criminal has been convicted.

Private Life

29. To defeat deportation action on private life grounds claimants must satisfy the three-limb test at s117C (4). The meaning of each of these requirements has been recently considered by the Court of Appeal in CI (Nigeria) v Secretary of State for the Home Department [2019] EWCA Civ 2027.

30. Where there is any ambiguity about whether residence was 'lawful' (as in for instance Akinyemi v Secretary of State for the Home Department [2017] EWCA Civ 236) the focus for enquiry should be whether the individual was removable at the given time, recalling that the point of the provision is to remind the decision maker that little weight should be attached to a private life developed when the individual concerned was well aware that he had no right to be here [see §40].

31. In assessing whether a "foreign criminal" is "socially and culturally integrated in the UK", it is important to keep in mind that the rationale behind the test is to determine whether the person concerned has established a private life in the UK which has a substantial claim to protection under Article 8 [at §57]. Approving the ratio of Uner v The Netherlands (2006) 45 EHRR 14 the Court held:

> "58. Relevant social ties obviously include relationships with friends and relatives, as well as ties formed through employment or other paid or unpaid work or through participation in communal activities. However, a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging. The importance of upbringing and education in the formation of a person's social identity is well recognised, and its importance in the context of cases involving the Article 8 rights of persons facing expulsion because of criminal offending has been recognised by the European Court. Thus, in the *Uner* case at para 58, the court considered it "self-evident" that, in assessing the strength of a foreign national's ties with the "host" country in which they are living, regard is to be had to "the special situation of aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there."

59. The European Court returned to this theme in *Maslov* , stating (at para 73) that:

> "… when assessing the length of the applicant's stay in the country from which he or she is to be expelled and the solidity of the social, cultural and family ties with the host country, it evidently makes a difference whether the person concerned had already come to the country during his or her childhood or youth, or was even born there, or whether he or she only came as an adult."

32. As to whether criminality itself is capable of breaking such links, the Court held that it self-evidently is, but it depends on the facts:

> 62. Clearly, however, the impact of offending and imprisonment upon a person's integration in this country will depend not only on the nature and frequency of the offending, the length of time over which it takes place and the length of time spent in prison, but also on whether and how deeply the individual was socially and culturally integrated in the UK to begin with. In that regard, a person who has lived all or almost all his life in the UK, has been educated here, speaks no language other than (British) English and has no familiarity with any other society or culture will start with much deeper roots in this country than someone who has moved here at a later age. It is hard to see how criminal offending and imprisonment could ordinarily, by themselves and unless associated with the breakdown of relationships, destroy the social and cultural integration of someone whose entire social identity has been formed in the UK. No doubt it is for this reason that the current guidance ("Criminality: Article 8 ECHR cases") that Home Office staff are required to use in deciding whether the deportation of a foreign criminal would breach Article 8 advises that:
>
> *"If the person has been resident in the UK from a very early age it is unlikely that offending alone would mean a person is not socially and culturally integrated."*

33. In respect of the final limb, the ability to integrate abroad, the Court approved the dicta in Kamara v Secretary of State for the Home Department [2016] EWCA Civ 813 to the effect that it is the individual's capacity to re-establish a private life in that country which is at the heart of the test:

> "The idea of 'integration' calls for a broad evaluative judgment to be made as to whether the individual will be enough of an insider in terms of understanding how life in the society in that other country

> is carried on and a capacity to participate in it, so as to have a reasonable opportunity to be accepted there, to be able to operate on a day-to-day basis in that society and to build up within a reasonable time a variety of human relationships to give substance to the individual's private or family life".

34. The Court further cautioned that it cannot be assumed that someone will fit into the country to which he is to be deported because he is "from" there. The inference that the individual will have an understanding of, for instance, 'cultural norms' will only be open to decision-makers if there is some actual evidence that this is the case.

Family Life

35. Section 117C(5) of the Nationality, Immigration and Asylum Act 2002 stipulates that foreign criminals may resist automatic deportation on grounds of their family life where they can demonstrate that it would be 'unduly harsh' on either their children, or qualifying partner, should the deportation proceed. In determining the threshold of harm that must be found before that test is met I remind myself that it is not the highest of the three proportionality benchmarks found in the statutory scheme. In the case of non-deportees seeking leave to remain the focus must be on whether it is 'reasonable' to expect a child to leave the United Kingdom; for 'serious offenders' (ie those who get at least four years in prison) the very highest hurdle of 'very compelling circumstances' must be surmounted; 'medium offenders' such as the Appellant are found somewhere in the middle, and are required to prove 'undue harshness'.

36. That the test is found midway in the spectrum should not obscure the fact that it is a high test. The higher courts have repeatedly emphasised that the 'commonplace' distress that will be caused to children if a parent is removed is not sufficient: otherwise any parent facing deportation would be able to succeed. Dicta to this effect can be found in the Court of Appeal decisions in Secretary of State for the Home Department v PG (Jamaica) [2019] EWCA Civ 1213, BL (Jamaica) v Secretary of State for the Home Department [2016] EWCA Civ 357, Secretary of State for the Home Department v AJ (Zimbabwe) and VH (Vietnam) [2016] EWCA Civ 1012 and NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662. It was further underlined in KO (Nigeria) v Secretary of State for the Home Department [2018] UKSC 53 where [at §27] the Supreme Court endorsed the dicta of the Upper Tribunal in MK (Sierra Leone) v Secretary of State for the Home Department [2015] UKUT 223 (IAC) as to what kind of suffering the statute is here concerned with:

> "By way of self-direction, we are mindful that 'unduly harsh' does not equate with uncomfortable, inconvenient, undesirable or merely difficult. Rather, it poses a considerably more elevated threshold. 'Harsh' in this context, denotes something severe, or bleak. It is the antithesis of pleasant or comfortable. Furthermore, the addition of the adverb 'unduly' raises an already elevated standard still higher."

37. The Supreme Court further held that in undertaking the assessment of whether deportation would have unduly harsh consequences for the deportees children the decision-maker must be concerned solely with the impact upon the child. Neither the Appellant's criminality nor any other adverse matters of character should be weighed in the balance.

Very Compelling Circumstances

38. As I note above, s117C(6) of the Nationality, Immigration and Asylum Act 2002 stipulates that those foreign criminals who have committed the most serious of crimes – those for which they are sentenced to four years of more – can only rely on Article 8 to defeat a proposed deportation where they are able to show that there are "very compelling circumstances over and above" the existing exceptions. The Court of Appeal considered this problematic formulation in NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662 and drew three important conclusions. First, the Court found there to be an obvious drafting error in the section, since given its natural reading the clause would only avail the most serious of offenders, whilst excluding those on medium sentences. The Court accordingly held that s.117C(3) is to be construed as containing such a fall-back provision for medium, as well as serious, offenders. Second, the Court held that the terminology "over and above" could only sensibly be construed to relate to an *equivalence* of harm to the matters outlined in the exceptions. Thus the deportee wishing to rely on this provision must show that there are very compelling circumstances in his case which attract a *greater* weight that would be attached to, for instance, the removal being 'unduly harsh' for a child. Finally, the words "over and above" do not prevent a person facing deportation from relying on matters falling within the scope of the 'exceptions' in this second stage of the analysis.

39. Unlike 'undue harshness' decision makers must here give appropriate, and generally substantial, weight to the public interest in the removal of foreign criminals, and any compelling features of the evidence must be weighed against that public interest: MS (s.117C(6): "very compelling circumstances") Philippines [2019] UKUT 00122 (IAC). This being the highest of the three proportionality benchmarks set out in the statute the circumstances in which that public interest will be outweighed are going to be extremely rare, or 'exceptional'. The test invites a holistic evaluation, taking all relevant factors – ie not just those referred to in Part 5A – into account.

40. Recent examples of 'very compelling circumstances' identified in the higher courts include Secretary of State for the Home Department v Garzon [2018] EWCA Civ 1225 where the proposed deportee had a significant number of convictions including serious offences of GBH and supply of Class A drugs. Although Garzon had failed to establish that his deportation would be unduly harsh for his daughter (whom he rarely saw), or that there were very significant obstacles to his integration in his native Colombia, the Court upheld the finding of the First-tier Tribunal that there were nevertheless very compelling circumstances in his case. These were that he had lived in the United Kingdom for 40 years, having arrived as an eleven-year old, and was deeply integrated into the United Kingdom. He had a very strong relationship with his partner and had shown good evidence of his rehabilitation. The Court noted that unlike the appellant in Mwesezi v Secretary of State for the Home Department [2018] EWCA Civ 1104 Garzon was a medium offender. Although Mwesezi could also rely on very long residence, in the end the nature of his offending was such that the public interest prevailed (he had received a sentence of 6 years for unlawful possession of a firearm and live ammunition).

41. Another recent case in which the Court of Appeal considered factors that might contribute to 'very compelling circumstances' is CI (Nigeria) (*supra*): there very long residence, the fact that much of the period of unlawful leave occurred in childhood, mental illness and a tragic family history were all held to be potentially relevant.

Discussion and Findings

Liability to Deportation

42. I am satisfied that the Appellant is a foreign criminal and that he is therefore liable to deportation.

Exception 1

43. I must now consider whether the Appellant can show his deportation to be disproportionate on 'private life' grounds.

44. I find as fact that the Appellant has lived in the United Kingdom since 1991. When he arrived he was 6 years old. I am satisfied that the Appellant has lived continuously in the United Kingdom since then. He is today 35 years old.

Accordingly I am satisfied that the Appellant has spent most of his life in this country.

45. In his submissions Mr Sobowale pointed out that at page 7 of the refusal letter the Respondent expressly concedes that the Appellant has lived in this country lawfully for most of his life. Mr Sobowale then quite properly conceded that whoever wrote that letter appears to have miscalculated. The Appellant is now 36 years old. Although he has spent approaching thirty years in this country only ten of those years was with leave: when the Appellant arrived he had a valid visit visa, that expired sometime towards the end of 1991 and he was not granted any form of leave until the 10th December 2008. From that point he held leave until the 10th January 2018 when the Deportation Order was signed. I am not therefore satisfied that this residence has been 'lawful' for most of the Appellant's life. Of his approximate 30-year residence, only ten years was 'lawful'. I return to issues arising below, but I am satisfied that the Appellant cannot technically meet the requirements of 'exception 1'.

46. Mr Sobowale nevertheless asked me to make findings on whether the Appellant was socially and culturally integrated into life in the United Kingdom, and whether there would be very significant obstacles to his integration in Bangladesh.

47. I accept without hesitation, as did Mr Bates, that the Appellant is socially and culturally integrated in the United Kingdom. I have no doubt that to the external observer he would appear to all intents and purposes British. The Secretary of State did not submit that the Appellant's criminality has severed or even interfered with the Appellant's long-standing and significant ties to this country.

48. As to the situation in Bangladesh I accept that the Appellant has very little memory or understanding of how that country works. He would, I have no doubt, be trying to establish himself there without his wife and children, since the familial ties of C1-C3 make it impossible for them to leave. There is no evidence before me to indicate that the knowledge of Bengali culture that he may have gleaned from the diasporic community in the United Kingdom over the past 30 years would be of much practical assistance to him in, for instance, obtaining work. I have no doubt that the Appellant would find his deportation to be a significant challenge. On arrival he would be lonely and bewildered. I cannot however find that the obstacles he would face are such that he would not be able to found a private life for himself in that country. He speaks some Bengali, and as was clear from his oral evidence, the Appellant is a personable and intelligent man. He is fit and well. He has extensive experience in the restaurant trade and has some qualifications. As all of the supporting witnesses attest, he is a kind and helpful man who would be an asset to any employer. I have no doubt that he would be able to make friends. I do not underestimate the challenge that deportation will represent for the Appellant, but I am unable

to accept that his private life in Bangladesh would be a nullity, or that he would face *very* significant obstacles.

Exception 2

49. Exception 2 requires the Appellant to show that his deportation would have 'unduly harsh' consequences for his wife or children. I am not satisfied that he has done so.

50. I fully accept that the Appellant has a meaningful, genuine and subsisting parental relationship with these five children – I particularly stress that I am satisfied that this is the case not only in regard his own two daughters, but that this is also the nature of his relationship with his stepdaughters, each of whom has made a heartfelt plea that he be allowed to remain in their home. The fact that those girls have maintained a relationship with their natural father does not prevent them from looking to the Appellant in the way that they do for love, support and guidance.

51. I fully accept that it would be strongly contrary to the best interest of these children should the Appellant be deported. It is striking that the additional witnesses (ie not members of the family) all speak of the warmth and close-knit nature of this family unit, and I do not need expert evidence to accept that it would be very much to the detriment of these children should that be taken away. They will miss the Appellant. His absence will place a considerable strain on the household, with Ms RS and the older children having, inevitably, to perform tasks that have hitherto been undertaken by the Appellant. I accept Ms RS's evidence that she is anxious about her ability to cope. I fully accept that all of that.

52. I cannot however allow an appeal because these children or Ms RS will be unhappy, or distressed. These are the obvious consequences of deportation, and parliament has specifically mandated that it is generally acceptable that the families of foreign criminals are broken up. As Lord Justice Sedley put it in Lee v Secretary of State for the Home Department [2011] EWCA Civ 348 [at §27]: "the tragic consequence is that this family…, will be broken up for ever because of the appellant's bad behaviour. That is what deportation does". The test of 'undue harshness' should not be interpreted in an unrealistically high way, but nor should it be read to reflect *any* adverse consequence. As I note above, the Courts have repeatedly emphasised that sadness, or the 'commonplace' distress that children will experience in losing a parent from the family home is not a matter of sufficient gravity to engage the exception. The high point of the evidence was the testimony of the Appellant and his wife in relation to C4, the Appellant's eldest child who is now aged 5. It is their unchallenged evidence that this child found the Appellant's absence from the family home particularly hard to bear, and that she still gets up at night to check that he has not left; she

is described as "very clingy" and tearful if she thinks that the Appellant is going out. Whilst I do not doubt the descriptions given to me by the witnesses, this evidence, as sad as it is, is not sufficient to meet the high threshold in the test. There is no evidence before me to suggest for instance, that this child will suffer any more significant adverse consequences that any child whose father is deported. I have to set the evidence about C4 in the context of her wider family circumstances – she has a mother, sisters, and extended family who love and support her. The consequence for her of her father's deportation will undoubtedly be harsh but the evidence falls short of establishing that it is unduly so.

53. I appreciate that this will be hard for Ms RS and the children to understand. They did not commit a crime, and yet the legislation asks that it is they who pay the price. I have given that my full consideration, but in the absence of any particular evidence of hardship, of "severe" or "bleak" consequences, I am unable to find the burden of proof discharged on this matter.

Very Compelling Circumstances

54. The Appellant has not succeeded in demonstrating that either of the 'exceptions' in s117C are made out. I am nevertheless asked to assess whether there are very compelling circumstances in his case which would, exceptionally, render his deportation disproportionate. I remind myself that here I must undertake a holistic evaluation, weighing the strong public interest in the Appellant's deportation against all relevant factors. These may include matters not contemplated in the legislation, as well as those which are expressly recognised as relevant by Part 5A.

55. I begin by marking the substantial weight to be attached to the crimes committed by the Appellant. He was convicted on three counts but as he readily acknowledged, there could have been many more, given that he had been engaged in street dealing for some 5 months before he was caught. The seriousness of the offences was properly reflected by the Crown Court in the Appellant's sentencing to 3 years' in prison. Class A drugs use is consistently and rightly described as a scourge. The Appellant described a street level drug deal as having a 'butterfly effect' – causing adverse consequences far and beyond the individual user. Drug use causes misery in all sorts of ways.

56. Having placed that heavy weight on the Secretary of State's side of the scales I remind myself that it will only be a very strong case indeed that is capable of outweighing it. I am satisfied that this is such a case.

57. In explaining my reasons I have adopted the structure used by Lord Justice Leggatt in the lead judgment in CI (Nigeria) [from §93 on]: I do so simply because I have to start somewhere, and I make clear that these reasons are not

ranked in order of importance. I have taken all of them into account, and find that their cumulative weight means that the appeal should be allowed.

58. The Appellant could not meet any of the exceptions, but he came very close to doing so. Whilst it would be impermissible to treat a 'near miss', or simply a collection thereof, as creating "very compelling circumstances", these factors remain relevant to the overall balancing exercise: see Jackson LJ in NA (Pakistan) [at §32]:

> "… if all he could advance in support of his article 8 claim was a 'near miss' case in which he fell short of bringing himself within either Exception 1 or Exception 2, it would not be possible to say that he had shown that there were 'very compelling circumstances, over and above those described in Exceptions 1 and 2'. He would need to have a far stronger case than that by reference to the interests protected by article 8 to bring himself within that fall back protection. But again, in principle there may be cases in which such an offender can say that features of his case of a kind described in Exceptions 1 and 2 have such great force for article 8 purposes that they do constitute such very compelling circumstances, whether taken by themselves or in conjunction with other factors relevant to article 8 but not falling within the factors described in Exceptions 1 and 2. The decision maker, be it the Secretary of State or a tribunal, must look at all the matters relied upon collectively, in order to determine whether they are sufficiently compelling to outweigh the high public interest in deportation."

59. The first consideration is the Appellant's private life. The Appellant has unquestionably lived in this country for most – approximately 80% - of his life. Of the thirty years he has spent here only ten have been with valid leave. That is why he failed to meet the requirements of the first limb of exception 1. I must however weigh in the balance that for the first 12 years that he was here the Appellant was a child who cannot sensibly be held responsible for his lack of immigration status, or more importantly have been expected to desist from forming a private life in case he was removed: see CI Nigeria [§100] and Miah (section 117B NIAA 2002 – children) [2016] UKUT 00131(IAC). I would also observe that it appears entirely likely that the Appellant would have been granted British nationality had he applied for it between at least 2012 (when he had accrued five years' residence with indefinite leave) and 2016 (the date of his first offence), although since I heard no argument on the point I attach no additional weight to that matter.

60. The Appellant met the requirements in the second limb of exception 2 by showing that he was "socially and culturally integrated" into British life. That scant statement does not really do justice to the life that the Appellant has here. The Appellant has, I accept, only the haziest of memories of Bangladesh. His

entire primary and secondary education was completed in this country. All of his friends are British, or resident here. He has worked here and built good relationships within the restaurant trade. He has a large extended family, many of whom live very close by in Chester, and it is these people that he now regards as his family, his emotional bonds to his own parents having been abruptly severed in 1991 when they "abandoned" him here, the term strikingly used by other members of the family as well as the Appellant himself. He has played sports and gone out in the United Kingdom as a young man. Now that he has a family of his own their idea of a good night in is, as JN attests, having a roast dinner in front of '*I'm a Celebrity'*. That is a family unit to which the Appellant is deeply committed.

61. In CI (Nigeria) Lord Justice Leggatt states that "a person's social identity is not defined solely by such particular relationships but is constituted at a deep level by familiarity with and participation in the shared customs, traditions, practices, beliefs, values, linguistic idioms and other local knowledge which situate a person in a society or social group and generate a sense of belonging": applying those considerations I find the Appellant's social identity to be deeply rooted in this country. It is a factor of great significance in this case, and I recognise the dicta in Uner and Maslov v Austria [2009] INLR 47 regarding the "the special situation" of settled aliens who have spent most, if not all, of their childhood in the host country, were brought up there and received their education there. Whilst the Appellant committed his offences as an adult (cf Maslov) his very long residence remains a potent factor in his favour [at §75 Maslov]:

> "In short, the court considers that for a settled migrant who has lawfully spent all or the major part of his or her childhood and youth in the host country, very serious reasons are required to justify expulsion."

62. I was not satisfied that the Appellant is able to demonstrate that there are *very* significant obstacles to his integration in Bangladesh. Ironically for him, that finding largely rests on his own positive character traits: his willingness to work hard, his intelligence and resourcefulness and his friendly nature. He would find the adjustment to life in Bangladesh hard, really hard, but he would in time be able to establish a private life for himself. That is not to say that the suffering to be experienced by the Appellant by his deportation is irrelevant to my decision. I find it inconceivable that his wife and children will go with him. As I have said, wholesale relocation is simply not an option open to this family because C1-C3's father continues to play an active role in their lives. Ms RS was born and brought up in this country and there is no part of her that wants to go and live in Bangladesh. I accept that the separation of the Appellant from his family will be devastating for him, an emotional impact compounded by the fact that he will know how difficult they are finding his absence to be. This is not a factor that has attracted very much weight in my reckoning, since it is of

course the case that the Appellant must be expected to pay the price for his criminality. Deportation will, by its nature, result in suffering for the individual concerned. I simply make the points I have in order to underline that this is not a case where the proposed deportee will be returning to a country with which he has some recent familiarity, or where he has a family or friends who can assist him.

63. This brings me to the Appellant's family. I have explained above why the distress caused by deportation in this case, even to C4, would not to my mind be sufficient to demonstrate 'undue harshness'. As I hope I have made clear, I do not seek by that finding to diminish the hurt and panic that this household feels when they contemplate life without the Appellant. I am mindful of my finding that it would be strongly contrary to the best interests of these children if he were to be removed, and that this has contributed some weight to my overall evaluation.

64. The final, very significant, factor that has weighed in the Appellant's favour is this. I have rarely, if ever, come across a case where I was more convinced of the Appellant's contrition, regret, and deep understanding of the harm that he has caused to himself, his family and wider society by his offending. All of the evidence before me – from the Appellant, from those who know him best and from the probation service – pointed one way. The likelihood of the Appellant committing any further offences is extremely slim. This is a young man who got involved in something he shouldn't, fell in way too deep and ended up committing an extremely serious criminal offence. I am entirely satisfied that it is not a mistake that he is going to make again.

65. For all of those reasons I am satisfied that the very substantial weight to be attached to the public interest in removing foreign criminals is, exceptionally, outweighed on the particular facts of this case.

Anonymity Order

66. The Appellant is a foreign criminal and as such he would not ordinarily have the benefit of an order for anonymity. This decision is however concerned with a number of children. I am concerned that identification of the Respondent could lead to identification of those children. As such I am satisfied, having had regard to the guidance in the *Presidential Guidance Note No 1 of 2013: Anonymity Orders*, that it would be appropriate to make an order in accordance with Rule 14 of the *Tribunal Procedure (Upper Tribunal) Rules 2008* in the following terms:

> "Unless and until a tribunal or court directs otherwise, the Appellant is granted anonymity. No report of these proceedings shall directly

or indirectly identify him, any of his witnesses or any member of his family. This direction applies to, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

Decisions

67. The decision of the First-tier Tribunal is set aside.

68. There is an order for anonymity.

69. I re-make the decision in the appeal as follows: the appeal is allowed on human rights grounds.

Upper Tribunal Judge Bruce
18th February 2020