Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: HU/06301/2020 (V)

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 5 January 2022	**On 26 January 2022**

Before

UPPER TRIBUNAL JUDGE McWILLIAM

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

MR MD JUBADUR RAHMAN
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant/SSHD: Mr P Duffy, Home Office Presenting Officer
For the Respondent: Mr P Georget, Counsel, instructed by Stirling Ackroyd Legal Solicitors

DECISION AND REASONS

1. I shall refer to the Respondent as the Appellant as he was before the First-tier Tribunal.

2. The Appellant is a citizen of Bangladesh. His date of birth is 1 January 1978.

3. The Secretary of State was granted permission to appeal against the decision of the First-tier Tribunal (a panel comprising First-tier Tribunal Judge R E Barrowclough and First-tier Tribunal Judge Feeney) to allow the

Appellant's appeal against the decision of the Secretary of State on 26 June 2020 to refuse to revoke a deportation. Judge of the First-tier Tribunal Woodcraft granted permission to the Secretary of State on 8 July 2021, having found that,

> "it is arguably difficult to see how the panel arrived at their arguably tentative conclusion as to future risk, given that the Appellant still does not accept his guilt for his offending. It is arguable that the panel have given no or insufficient reasons for their conclusions".

4. The matter came before me to determine whether the First-tier Tribunal erred in law.

5. The Appellant married a British citizen on 15 March 2002. He entered the UK on 13 March 2003, having been granted entry clearance as a spouse. He was granted ILR on 11 August 2004. On 16 March 2009 he was convicted at Swansea Crown Court of two counts of sexual assault on a female. On 30 March 2009 he was sentenced to 30 months' imprisonment and twelve months' imprisonment to run consecutively. He was disqualified from working with children and ordered to sign the Sex Offenders Register indefinitely. The Appellant appealed against the Secretary of State's decision to deport him from the United Kingdom (the deportation order having been made on 11 February 2011). The Appellant's appeal was dismissed. He was deported to Bangladesh on 27 June 2011. The Appellant made an application to revoke the deportation order on 27 January 2020. The application was refused by the Secretary of State on 26 June 2020.

6. The Appellant was found guilty of sexual assault on two different females. The offences occurred seventeen months apart and were identical on their facts. The second attack occurred in the middle of the night when the victim was alone and walking home. The sentencing judge commented:

> "On any basis these were frightening incidents for your victims and doubtless caused some anxiety in the Port Talbot area whilst you remained undetected.
>
> I have concluded that you are a sexual predator who is a threat to young, unaccompanied women, particularly at night [name] had a narrow escape from you a mere three weeks before.
>
> You had no remorse for your conduct let alone insight into your behaviour of this kind. Women are at serious risk of serious psychological harm from you and you qualify for a dangerous offender sentence under the Criminal Justice Act …"

When dismissing the Appellant's appeal (on human rights grounds against the decision to deport him) the First-tier Tribunal stated:-

> "As we have said above where guilt is not accepted remorse cannot be shown and offending behaviour cannot be addressed. The

> Appellant comes before us as a convicted man … We have no alternative other than to find the Appellant a serial sex offender without remorse and as such, as shown in offender's assessment system report to pose a high risk to the public … The continuing danger posed by the Appellant, a danger that Miss Fenney did not seek to challenge, is a such heavy negative weight in the proportionality balance that even were his wife not willing to join him in Bangladesh we would find his removal to be proportionate."

7. At the time of the appeal (against the refusal to revoke the deportation order) the Appellant was living in Portugal where he was working, having been granted a five year residence card. Following the Appellant's deportation his wife visited him in Bangladesh in 2011. She became pregnant with their son (IR), who was born on 1 August 2012.

8. The panel heard evidence from the Appellant's wife. Whilst the Appellant was in attendance from a location in Portugal and able to participate in the CVP hearing, permission had not been obtained from the local High Commission and therefore he was not able to give evidence.

9. In summary, the Appellant's wife's evidence was that it would not be possible for her and their son to move to Portugal. She was born and raised in the UK where her family reside. Neither can speak Portuguese. She receives state benefit as a result of her mental health problems and is currently prescribed medication. Her evidence was that she became depressed following her husband's conviction in 2009 and she tried to commit suicide. She was diagnosed with borderline personality disorder. She is under regular supervision by her GP. She has also been diagnosed with fibromyalgia, Hashimoto and an underactive thyroid. She takes various medications (see [21]). Her evidence was that her husband now accepts that what he did was wrong and that he is sorry (see [23]). She believed that the Appellant was remorseful (see [24]). She did not know whether the Appellant had attended any rehabilitation courses. While he does not admit the offences in a document, he has done so to her.

10. The panel made findings at [26] – [28]. While they accepted that the relationship between the Appellant and his wife and son are genuine and subsisting, the panel did not find that the Appellant's continued exclusion would be unduly harsh pursuant to s.117C(5) of the 2002 Act. However, the panel went on to consider whether there are very compelling circumstances in the context of s.117C(6) and stated as follows:-

> "28. The final issue is whether there are very compelling circumstances, over and above the 'unduly harsh' test, which impact on the Article 8 proportionality balancing exercise that we undertake between the public interest and the interests of the Appellant in determining whether the deportation order made against him should be revoked. In our judgment, it was plainly appropriate for the Respondent to refuse the Appellant's application in June 2020, since the presumption that such an

order remain in force for at least ten years still applied. However, by the time of the appeal hearing before us, that was no longer the case. Whilst we respectfully adopt the cautious approach recommended to Tribunals by the Court of Appeal in HA (Iraq) in relation to the issue of potential rehabilitation, the simple fact is that the Appellant has not reoffended in the twelve years since his conviction before Swansea Crown Court in March 2009, as is established by the certificates in the Appellant's bundle and as is not disputed by the Respondent. That is perhaps the best evidence that the Appellant may now be rehabilitated and no longer represent a threat to young women, whether or not he finally accepts his established guilt, as he apparently told his wife. Secondly, since the ten year period referred to in EYF (Turkey) has now elapsed, and whilst that does not mean that revocation should be presumed or automatic much will depend on the circumstances of the individual case. In this appeal it is easier to argue that the public interest in his continued exclusion has been assuaged by the passage of time. Here there is no doubt, and it is not disputed that the Appellant's marriage and his relationship with his wife has endured since the Appellant's imprisonment, subsequent deportation and the lengthy separation that inevitably entailed, nor that they wish to be reunited and resume cohabitation. Additionally, as we have found, the Appellant has a genuine relationship with his son, who like his mother is a British citizen and who is now 8 years old. In terms of Beoku-Betts we are entitled to take into account the effect the decision has on them. Both Mrs Rahman and [IR] have spent all their lives in the UK, and they have a well-established support network here, including close family and friends, as well as school and medical care. We find that it would clearly be in [IR's] best interests to remain in the UK with both his parents if possible, and that it should be very hard for him and his mother to have to move to Portugal in order to be with the Appellant; whilst their current arrangement of occasional visits coupled with frequent phone and video contacts would not be adequate on an indefinite basis. All those matters, coupled with the Appellant's good character since he was deported in 2011, give rise to the question of when, if ever, it would be appropriate to revoke his deportation order, if is not to be revoked now. It is difficult to see what more can reasonably be required of the Appellant. In our judgment, the public interest in the maintenance of the Appellant's deportation order does not weigh as heavily against him as it formerly did, and the very compelling circumstances of this case do not justify his continued exclusion from the UK. Maintaining the Appellant's deportation order would be a disproportionate breach of his Article 8 rights, which we find outweigh the public interest considerations set out at s.117C(6) of the Nationality, Immigration and Asylum Act 2002. Accordingly, the Appellant's appeal must be allowed."

The Legal Framework

11. This is an appeal against a decision to refuse to revoke a deportation order. The relevant Immigration Rules are as follows:-

> "**Revocation of deportation order**
>
> 390. An application for revocation of a deportation order will be considered in the light of all the circumstances including the following:
>
> (i) the grounds on which the order was made;
>
> (ii) any representations made in support of revocation;
>
> (iii) the interests of the community, including the maintenance of an effective immigration control;
>
> (iv) the interests of the applicant, including any compassionate circumstances.
>
> 390A. Where paragraph 398 applies the Secretary of State will consider whether paragraph 399 or 399A applies and, if it does not, it will only be in exceptional circumstances that the public interest in maintaining the deportation order will be outweighed by other factors.
>
> 391. In the case of a person who has been deported following conviction for a criminal offence, the continuation of a deportation order against that person will be the proper course:
>
> (a) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of less than 4 years, unless 10 years have elapsed since the making of the deportation order when, if an application for revocation is received, consideration will be given on a case by case basis to whether the deportation order should be maintained, or
>
> (b) in the case of a conviction for an offence for which the person was sentenced to a period of imprisonment of at least 4 years, at any time,
>
> Unless, in either case, the continuation would be contrary to the Human Rights Convention or the Convention and Protocol Relating to the Status of Refugees, or there are other exceptional circumstances that mean the continuation is outweighed by compelling factors."

12. Insofar as reference to paragraphs 398, 399 and 339A of the immigration rules are concerned, they are now in statute. Part 5A of the 2002 Act was introduced by the Immigration Act 2014 with effect from 28 July 2014. The issue in this appeal arises under s.117C, which is headed "Article 8: additional considerations in cases involving foreign criminals". It reads as follows:-

> "(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."

Case Law

13. In HA (Iraq) v Secretary of State for the Home Department [2020] EWCA Civ 1176 Underhill LJ considered the effect of s.117C in respect of both medium and serious offenders. The Appellant in this case is a medium offender.

14. The salient parts of the decision are as follows:

"32. First, the discussion is underpinned by the fundamental point of principle which the Court identifies at para. 22 of its judgment, as follows:

> 'Section 117C (1) of the 2002 Act, as inserted by the 2014 Act, re-states that the deportation of foreign criminals is in the public interest. The observations of Laws LJ in *SS (Nigeria)* [[2013] EWCA Civ 550, [2014] 1 WLR 998], concerning the significance of the 2007 Act, as a particularly strong statement of public policy, are equally applicable to the new provisions inserted into the 2002 Act by the 2014 Act. Both the courts and the tribunals are obliged to respect the high level of importance which the legislature attaches to the deportation of foreign criminals.'

It is because of the high level of importance attached by Parliament to the deportation of foreign criminals that, where neither Exception 1 nor Exception 2 applies, the public interest in deportation can only be outweighed by very compelling circumstances.

33. Secondly, the Court's explanation of the effect of the phrase 'over and above those described in Exceptions 1 and 2', at para. 29, reads as follows:

> 'The phrase used in section 117C (6), in para. 398 of [the Immigration Rules] and which we have held is to be read into section 117C (3) does not mean that a foreign criminal facing deportation is altogether disentitled from seeking to rely on matters falling within the scope of the circumstances described in Exceptions 1 and 2 when seeking to contend that 'there are very compelling circumstances, over and above those described in Exceptions 1 and 2'. … [A] foreign criminal is entitled to rely upon such matters, but he would need to be able to point to features of his case of a kind mentioned in Exceptions 1 and 2 (and in paras. 399 or 399A of [the Rules]), or features falling outside the circumstances described in those Exceptions and those paragraphs, which made his claim based on Article 8 especially strong.'

That passage is expressed to cover the case of both serious and medium offenders. At para. 32 the Court specifically addresses the case of medium offenders, as follows:

> '… [I]n the case of a medium offender, if all [the potential deportee] 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.'

Those two passages make clear that, in carrying out the full proportionality assessment which is necessary where the Exceptions do not apply, facts and matters that were relevant to the assessment of whether either Exception applied are not 'exhausted' if the conclusion is that they do not. They remain relevant to the overall assessment, and could be sufficient to outweigh the public interest in deportation either, if specially strong, by themselves[3] or in combination with other factors.

34. Thirdly, at para. 33 the Court says:

> 'Although there is no 'exceptionality' requirement, it inexorably follows from the statutory scheme that the cases in which circumstances are sufficiently compelling to outweigh the high public interest in deportation will be rare. The commonplace incidents of family life, such as ageing parents in poor health or the natural love between parents and children, will not be sufficient.'

This passage makes a point which appears often in the case-law. But it is important to bear in mind that it is directed at the exercise under section 117C (6). The Court was not saying that it would be rare for cases to fall within section 117C (5).

35. Fourthly, at para. 34 the Court addresses the relevance of the best interests of any children affected by the deportation of a foreign criminal. It says:

> 'The best interests of children certainly carry great weight, as identified by Lord Kerr in *H (H) v Deputy Prosecutor of the Italian Republic* [2012] UKSC 25; [2013] 1 AC 338 at [145]. Nevertheless, it is a consequence of criminal conduct that offenders may be separated from their children for many years, contrary to the best interests of those children. The desirability of children being with both parents is a commonplace of family life. That is not usually a sufficiently compelling circumstance to outweigh the high public interest in deporting foreign criminals. …'
>
> Again, this is a point frequently made in the case-law; but, again, it should be borne in mind that, as the reference to a 'sufficiently compelling circumstance' shows, the final sentence relates only to the exercise under section 117C (6).

38. Reference to the previous case-law is important for the purpose of a particular point made by the Appellants in these appeals. It will be seen that in para. 32 of its judgment in *NA (Pakistan)* this Court expresses the test under section 117C (6) as being whether the circumstances relied on by the potential deportee 'are sufficiently compelling to outweigh the high public interest in deportation'; and it uses the same formulation in paras. 33 and 34 (see paras. 36-37 above). The Appellants contend that that is the only correct formulation, and that it is dangerous to refer simply to 'very compelling circumstances'. It would, to say the least, be surprising if it were wrong to use the very language of the statute; but in any event the position becomes clear when the development of the case-law is understood. This Court in *NA (Pakistan)* took the language of 'sufficiently compelling' from the decision in *MF (Nigeria)*. Paragraph 398 of the pre-2014 Rules had used the phrase 'exceptional circumstances'. At para. 42 of its judgment in *MF* the Court said that that did not mean that a test of exceptionality was to be applied (a point repeated in *NA (Pakistan)* – see para. 36 above) and continued:

> 'Rather …, in approaching the question of whether removal is a proportionate interference with an individual's Article 8 rights, the scales are heavily weighted in favour of deportation and something *very compelling* (which will be 'exceptional') is required to outweigh the public interest in removal [emphasis supplied].'

At para. 46 it expressed the same point slightly differently, referring to 'circumstances which are *sufficiently compelling* (and therefore exceptional) to outweigh the public interest in deportation [again, emphasis supplied]'. The effect is clear: circumstances will have to be very compelling in order to be sufficiently compelling to outweigh the strong public interest in deportation. That remains the case under section 117C (6).

15. This case concerns the revocation of a deportation order which was made over ten years ago at the date of the hearing before the First-tier Tribunal. In the case of EYF (Turkey) the Court of Appeal considered paragraph 391 of the Immigration Rules and stated as follows at paragraph 28:-

> "Within the ten year period, it will be very difficult for other factors to counterbalance the presumptive effect of the Secretary of State's policy. That is consistent with the decision of this court in *ZP (India)*. Once the ten year period has elapsed it becomes easier to argue that the balance has shifted in favour of revocation on the facts of a particular case because the presumption has fallen away; but that does not mean that revocation thereafter is automatic or presumed. The question of revocation of a deportation order will depend on the circumstances of the individual case."

Submissions

16. I have taken into account the grounds of appeal, the Rule 24 response and Mr Melvin's skeleton argument. I heard oral submissions from the parties. Mr Duffy draw my attention to the finding of the panel at [28] that the Appellant "may" be rehabilitated. In any event, he submitted that rehabilitation is only one facet of the public interest. I understood this as a reference to OH (Serbia) [2008] EWCA Civ 694, where the Court of Appeal identified three facets of the public interest in deportation: (1) the risk of reoffending; (2) the need to deter foreign criminals from committing serious crimes; and (3) as an expression of society's revulsion that serious crime and building public confidence in the treatment of foreign criminals who have committed such crimes. Mr Duffy submitted that there was not enough in favour of the Appellant to tip the balance in his favour. He stated that the grounds were essentially a rationality challenge.

17. The Secretary of State's grounds of appeal as drafted are a reasons challenge. It is asserted that the panel gave inadequate reasons for finding that there are very compelling circumstances in the context of s.117C(6). Mr Melvin has expanded on this in his skeleton argument. It is asserted that there is no expert evidence about the Appellant's rehabilitation and he still remains disqualified from working with children and remains on the Sex Offenders Register. It is asserted that the panel have taken the ten year anniversary of the deportation order as determinative; however, this is contrary to what is said at paragraph 28 of EYF. It is submitted that it is for the Appellant to identify the changed circumstances. It is submitted that it is not clear from the decision whether the panel accepted the Appellant's wife's evidence or not. However, there is nothing in the Appellant's witness statement to indicate that he accepts his guilt or that he is remorseful or that he has undertaken rehabilitation. The panel has failed to identify why the decision breaches the Appellant's human rights or the compelling circumstances.

18. Mr Duffy did not expressly rely on Mr Melvin's skeleton argument. His oral submissions were framed as a rationality challenge. Mr Georget relied on his Rule 24 response.

Conclusions

19. I communicated to the parties at the hearing that the First-tier Tribunal did not err in law. I gave brief reasons at the hearing to be followed by a written decision.

20. I remind myself that it is not for the Upper Tribunal to find a misdirection because the Tribunal may have reached a different conclusion to that of the First-tier Tribunal. I remind myself what Baroness Hale stated in AH (Sudan) & Secretary of State for the Home Department [2007] UKHL 49 at [30]:-

> "Appellate Courts should not rush to find such misdirections simply because they might have reached a different conclusion on the facts or expressed themselves differently."

21. I have taken into account what was said by the Court of Appeal in UT (Sri Lanka) v Secretary of State for the Home Department [2019] EWCA Civ 1095. So far as the duty to give reasons is concerned, a judge need do no more than "identify and record those matters which were critical to his decision" (English v Emery Reimbold & Strick Ltd. [2002] 1 WLR 2409 at [19] per Lord Phillips MR, cited with approval by Brooke LJ in R (Iran) v Secretary of State for the Home Department [2005] EWCA Civ 982). The principles were summarised by the Upper Tribunal in Shizad (sufficiency of reasons: set aside) [2013] UKUT 85 where it was held that:

> "Although there is a legal duty to give a brief explanation of the conclusions on the central issue on which an appeal is determined, those reasons need not be extensive if the decision as a whole makes sense, having regard to the material accepted by the judge."

22. The Upper Tribunal in Green (Article 8 - new rules) [2013] UKUT 254 stated that "giving weight to a factor one way or another is for the fact-finding Tribunal and the assignment of weight will rarely give rise to an error of law". The threshold to challenge factual conclusions is a very high one, i.e. perversity, Wednesbury unreasonableness or rationality (see Mukarkar v Secretary of State for the Home Department [2006] EWCA Civ 1045 at [40], cited with approval in R (MM (Lebanon)) v Secretary of State for the Home Department [2017] UKSC 10 at [107]).

23. I am satisfied that the grounds of appeal are an attempt to re-argue the case. The panel properly directed itself on the law. There is no misdirection of law identified in the grounds in any event. There are no conflicting findings within the decision. There is no unresolved issue or a logical contradiction which might amount to an error. Despite the wording of the grounds of appeal it is clearly not a legal error to have found that s.117C(5) is not met whilst s.117C(6) is. The panel's reasons are clearly identified throughout the decision, particularly at paragraph 28. I have set the paragraph out above and it is not necessary for me to repeat the reasons given by the Upper Tribunal.

24. The panel took into account what was said by Underhill LJ in HA (Iraq) and properly adopted a cautious approach to rehabilitation. While the Appellant had not pleaded guilty to the offences and the First-tier Tribunal had made findings that he lacked remorse, that was in 2011. The panel were wholly entitled to take into account that the Appellant had not reoffended. Moreover, the assertion that the panel erred because it treated the ten year period as determinative misrepresents the decision of the Tribunal.

25. The issues raised in Mr Melvin's skeleton argument are an attempt to re-argue the case. The panel were aware there was no expert evidence concerning the Appellant's rehabilitation and there is no legal requirement

for such evidence. The fact remains that the Appellant had not committed further offences for a considerable period of time. What weight to attach to this was a matter for the Tribunal.

26. In respect of Mr Duffy's oral submissions, the panel were entitled to conclude that the Appellant was no longer a threat to women because of the lapse of time since offending. Rehabilitation is not dependant on the acceptance of guilt. I accept that the latter can support the former, particularly in an appeal against deportation where there has not been a significant period since the commission of offences. The Tribunal were entitled to take a different view in 2021 than the earlier Tribunal because the period of time since the offence without re-offending supported rehabilitation. In a case where a person has not offended for a considerable period of time, this can be indicative of a reduced risk of re-offending whether or not a person accepts guilt for the trigger offence/s. Moreover, a proper reading of the decision discloses that the panel did not consider the period of time since the commission of the offences (and risk of re-offending) as determinative of the public interest question. The panel said that the passage of time assuaged the public interest in exclusion (this reflects para 391 (a) of the Immigration Rules). I am satisfied that the panel's consideration of the public interest in this context was not with reference solely to risk of re-offending, but the public interest more generally. It was not necessary for the panel to engage in any detail with OH (Serbia) on the facts in this case. Furthermore, the use of the word "may" does not give rise to a material error. A proper reading of the decision discloses that the panel was of the view that it was more likely than not that the Appellant does not present a threat to young women and they were entitled to conclude this was the case on the evidence before them. The decision is rational.

27. The panel gave their reasons in sufficient detail to show the principles on which it acted and the reasons that led it to the decision. I remind myself of what Carnwath LJ stated in Mukarkar at [40],

> "it is of the nature of such judgments that different Tribunals, without illegality or irrationality, may reach different conclusions on the same case... The mere fact that one Tribunal has reached what may seem an unusually generous view of the facts of a particular case does not mean that it has made an error of law."

28. The grounds do not identify an error of law in the decision of the First-tier Tribunal.

29. The decision to allow the Appellant's appeal is maintained.

Notice of Decision

The appeal is dismissed. The decision of the First-tier Tribunal to allow the Appellant's appeal is maintained.

No anonymity direction is made.

Signed Joanna McWilliam Date 11 January 2022

Upper Tribunal Judge McWilliam