Upper Tribunal
(Immigration and Asylum Chamber) **Appeal Number: UI-2022-006223**
HU/54291/2021
IA/10933/2021

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 25 May 2023

Before

UPPER TRIBUNAL JUDGE PITT

Between

MR ZAKIR HOSSAIN
(ANONYMITY DIRECTION NOT MADE)

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:
For the Appellant: Ms Daykin, Counsel instructed by Makka Solicitors
For the Respondent: Mr E Tufan, Senior Home Office Presenting Officer

Heard at Field House on 3 April 2023

DECISION AND REASONS

1. This is an appeal against the decision issued on 27 October 2022 of First-tier Tribunal Seelhoff which refused the appellant's Article 8 ECHR appeal brought in the context of a deportation order made on 21 July 2021.

Background

2. The appellant is a citizen of Bangladesh and was born on 4 March 1977.

3. The appellant came to the UK illegally in June 2006 with his wife and oldest child, Ismail who was born on 4 September 2005. The appellant and his wife had a second child, Mohammed Ishak, on 12 March 2008 and a

third child, Mohammad Musa, on 16 February 2015. A number of applications for leave under Article 3 and 8 ECHR were unsuccessful until the First-tier Tribunal allowed an Article 8 ECHR appeal on 27 June 2016. The respondent did not challenge that decision and the family was granted leave to remain outside the Immigration Rules until 16 June 2019.

4. On 13 July 2018 the appellant was convicted of conspiring or handling stolen goods and received a sentence of imprisonment of 8 years and 6 months.

5. On 27 August 2019 Mohammad Ishak was naturalised as a British citizen. On 25 October 2019 the appellant's wife, Ismail and Mohammed Musa were granted leave to remain until 24 April 2022.

6. On 21 July 2021 the respondent signed a deportation order against the appellant under Section 32(5) of the UK Borders Act 2007. In a decision of the same date, the respondent refused leave on human rights grounds. The appellant appealed against the refusal of his human rights claim to the First-tier Tribunal.

7. The First-tier Tribunal set out the correct legal matrix to be applied to the evidence in paragraphs 18 to 22. She set out in paragraph 19 that the provisions of s.117C of the Nationality and Immigration Act 2002 were relevant. She highlighted in paragraph 20 that s.117C(6) was the core assessment that had to be conducted, also identifying that this assessment would include consideration of whether the unduly harsh provisions of s.117C(5) were met. She reminded herself in paragraph 22 that Strasbourg case law had to be taken into account in the very compelling circumstances assessment and set out principles to be applied which included:

> "• the nature and seriousness of the offence committed by the applicant;
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> • the length of the applicant's stay in the country from which he or she is to be expelled;
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> • the time elapsed since the offence was committed and the applicant's conduct during that period;
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> • the nationalities of the various persons concerned;
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> • the applicant's family situation, such as the length of the marriage, and other factors expressing the effectiveness of a couple's family life;
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> • whether the spouse knew about the offence at the time when he or she entered into a family relationship;
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> • whether there are children of the marriage, and if so, their age; and
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> • the seriousness of the difficulties which the spouse is likely to encounter in the country to which the applicant is to be expelled …

> • the best interests and well-being of the children, in particular the seriousness of the difficulties which any children of the applicant are likely to encounter in the country to which the applicant is to be expelled; and
>
> • the solidity of social, cultural and family ties with the host country and with the country of destination."

8. The judge's findings are set out in paragraphs 43 to 80 of the decision. The judge explained in paragraphs 44 to 51 why she considered that the appellant's evidence was "vastly different from what the sentencing remarks set out" and that the appellant was not being open about the true facts of his offending.

9. When reaching this conclusion the judge referred to the OASys report in paragraph 49 of the decision:

> "The OASys probation reports in respect of the Appellant are largely positive but the report highlights the gap between what the Appellant is admitting to have done and what he was found to have done.
>
> > 'Mr Hossain is ashamed to be in prison but denies he knew he was working on stolen phones. Without accepting that he committed these offences he cannot accept responsibility.'"

10. The judge set out in paragraph 51 that she was concerned that the appellant "has clearly not told his wife what he has done." The judge accepted in paragraph 51 that "the OASys report does characterise the Appellant as being low risk of reoffending" but also indicated that "I have to proceed on the basis that he is not being honest [with] the tribunal or to his family about the nature of what he has done in the past."

11. In paragraphs 62 to 72 Judge Seelhoff assessed whether it would be unduly harsh for the appellant's children if he were to be deported and they remained in the UK. After considering the evidence on the family circumstances, Judge Seelhoff concluded that it would be unduly harsh for the children to remain in the UK without the appellant. This assessment took into account the challenges faced by Mohammed Ishak who is profoundly deaf. The judge considered that the family had "struggled" whilst the appellant was detained but that "they coped without him for the four years he was in prison." The judge concluded in paragraph 72:

> "Were this to be a case in which the Appellant had received a custodial sentence of four years or less, I would have found it to be unduly harsh for the children to be expected to remain in the UK without their father. The question is whether or not the decision remains unduly harsh considering the length of sentence that has actually been received and in particular the lack of real acceptance of the offence."

12. The judge went on to conduct the very compelling circumstances assessment in paragraphs 73 to 80, concluding that it was not disproportionate to deport the appellant. She set out in paragraphs 79 and 80:

> "79. I have considered all factors in the case and even where I have not specifically referred to items of documentation I have carefully reviewed the materials that have been provided and particularly those relating to Ishak. I accept that it will be exceedingly hard for the children and Ishak in particular to maintain an effective family life with the Appellant if he is removed to Bangladesh. I accept that it will place a considerable burden on the Appellant's wife.
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> 80. However the Appellant's offending in this case is very serious. The Appellant continues to deny real responsibility for the offence despite having apparently accepted more responsibility at times when he was in prison. The Appellant has not apparently admitted to his family exactly what he has done. Assessing all the factors in the case I find the Appellant's deportation from the UK is not disproportionate and that it is reasonable to expect the family to continue living in the UK without him even though it will be very challenging for them to do."

13. The grounds of appeal made two challenges to the decision of the First-tier Tribunal. Firstly, the appellant maintained that the judge erred in paragraph 72 which set out an incorrect legal approach to the very compelling circumstances assessment.

14. I did not find that this ground had merit. Any shortcoming in the wording in paragraph 72 is one of form and not substance. As shown in the passages set out above, the judge made clear and correct self-directions regarding the test provided in s.117(6). The judge followed those self-directions in substance in the decision, making findings on the s.117C(5) Exception before proceeding to the very compelling circumstance assessment. The discussion after paragraph 72 is clearly considering the very compelling circumstances test, applying, paragraph by paragraph, the factors identified as relevant in HA (Iraq) v Secretary of State for the Home Department [2022] UKSC 22 which had been set out earlier in paragraph 8 of the First-tier Tribunal decision; see the extract cited in paragraph 7 above.

15. It is also clear from paragraphs 79 and 80 that the judge weighed the undue harshness for the children appropriately in the s.117C(6) assessment and nothing in the substantive consideration suggests that she sought to minimise the finding of undue harshness in the proportionality assessment. On the contrary, she specifically took into account that it would be "exceedingly hard for the children" to maintain a family life with the appellant. It is not arguable, however, that the facts as found by the judge on undue harshness were so strong as to allow for only one outcome in the very compelling circumstances assessment here, thereby supporting the allegation of an incorrect legal approach. The judge did not indicate anywhere in the decision that the degree of undue harshness was so strong that it could outweigh the factors on the other side of the balance, in particular the very significant prison sentence of 8 years and 6 months which had to add a great deal of weight to the public interest.

16. The second ground argued that the First-tier Tribunal erred in the approach taken to the appellant's attitude to his offence. This ground maintained that the First-tier Tribunal placed "great weight" on the appellant's lack of responsibility for his offending. This was an incorrect approach where the conclusion in the OASys report of a low risk of reoffending already took into account that the appellant did not take responsibility for his offending; see paragraph 49 of the First-tier Tribunal decision. Placing weight on the appellant's failure to take responsibility for his offending was, in effect, going behind the OASys report as this was a factor already taken into account when finding the appellant to be a low risk of reoffending.

17. I did not find that this ground had merit. The First-tier Tribunal judge indicated that she accepted the finding in the OASys report that the appellant was a low risk of reoffending; see paragraph 10. the finding had to be interpreted as questioning the low risk of reoffending identified in the OASys report. Nothing in the decision, including the concerns set out about the appellant's attitude to his offending, suggest that the judge considered that the risk of reoffending was anything other than low. Having accepted that the risk of reoffending was low, it remained open to the First-tier Tribunal to place adverse weight on the separate issue of the appellant's continued attitude to his offence, including his failure to be open about it to the Tribunal in this appeal and his family.

18. The grounds maintain that this part of the assessment attracted "great weight" and that this was an error. Weight was a matter for the judge and, even accepting the characterisation in the grounds, it is not my view that apportioning "great weight" amounted to an error of law. The grounds sought support from paragraph 58 of HA (Iraq). That paragraph is concerned with how to weigh rehabilitation, however, and, in any event, confirms that:

> "the weight to be given to any relevant factor in the proportionality assessment will be a matter for the fact finding tribunal, no definitive statement can be made as to what amount of weight should or should not be given to any particular factor. It will necessarily depend on the facts and circumstances of the case."

19. For these reasons, I did not find that the grounds showed an error in the decision of the First-tier Tribunal.

Notice of Decision

20. The decision of the First-tier Tribunal does not disclose an error on a point of law and shall stand.

Signed: S Pitt Date: 6 April 2023
Upper Tribunal Judge Pitt