



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

Appeal Number: DA/00585/2014

THE IMMIGRATION ACTS

**Heard at Glasgow
on 31 March and 15 June 2015**

**Determination issued
on 23 June 2015**

Before

UPPER TRIBUNAL JUDGE MACLEMAN

Between

JOYNED MIAH

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation

For the Appellant: Mr J Bryce, Advocate, instructed by Maguire, Solicitors
For the Respondent: Mrs M O'Brien, Senior Home Office Presenting Officer

DETERMINATION AND REASONS

1. The appellant is a citizen of Bangladesh, born on 2 March 1962. He appeals against a determination by First-tier Tribunal Judge Mr P A Grant-Hutchison, promulgated on 4 December 2014, dismissing his appeal against the respondent's decision to make an "automatic deportation order."
2. The appellant's grounds of appeal to the Upper Tribunal run at paragraphs 3 and 4 as follows:

In terms of section 117C(4) and (6) of the Nationality, Immigration & Asylum Act 2002 the First-tier Tribunal had to resolve 3 questions of fact and one question of mixed fact and law, viz:

- (a) Has the appellant resided lawfully in the UK for most of his life;
- (b) Is he socially and culturally integrated here;
- (c) Are there very significant obstacles to his integration in the country of his nationality; and
- (d) (Standing that his conviction is for more than 4 years) are there additional and very compelling circumstances.

The First-tier Tribunal Judge has resolved none of these questions.

3. Those grounds are accurately framed. Those questions were live in the First-tier Tribunal, and are not resolved in the determination.
4. At the hearing on 31 March 2015, Mrs O'Brien said that the appellant had not brought evidence by which the relevant questions could be resolved in his favour, particularly (c) and (d). She was prepared to accept my observation that it might be difficult on the evidence to resist a positive finding for the appellant on issue (a). On (b), the appellant has lived here for most of his life but the Secretary of State's position was that his serious criminality went against accepting his social and cultural integration. Mrs O'Brien pointed out that the appellant needed to succeed on all the listed points. She submitted that even if the determination was not particularly well expressed, any errors were immaterial, because the outcome was inevitable. The determination should therefore stand.
5. Mr Bryce observed that in addition to the deficiencies identified in the grounds, paragraph 20 of the determination says that no decision was to be reached regarding the Refugee Convention or humanitarian protection "as the appellant's appeal had been dismissed by an Adjudicator on 24 September 1992. The case had also been certified." This bore no relation to the appellant's circumstances. He has had no previous appeal.
6. Mr Bryce contended that the appellant was likely to succeed at a rehearing on questions (a) and (b), and that on (c) and (d) he at least had a case which required examination and resolution. The obstacle to his integration in Bangladesh is a family and land dispute at his original home. The very compelling circumstances argued are as set out in the note of argument in the First-tier Tribunal. The first is that due to the family history he has a longstanding degree of connection with the UK "going far beyond even that of many actual British citizens." The second is the significance of the Council of Europe Committee of Ministers Recommendation to Member States adopted on 13 September 2000, REC [2000] 15, concerning security of residence of long term migrants (referred to in *Uner v the Netherlands* [2007] 45 EHRR.14).
7. I indicated my view that there were shortcomings in the determination such that it could not safely stand, and that the submission that only one outcome was possible went too far.
8. Mrs O'Brien sought time to prepare further submissions on remaking the decision. Mr Bryce did not oppose that. There was in any event a shortage of time on the day, as a number of other hearings were listed.

9. Parties agreed that the further hearing was not likely to involve oral evidence, or indeed any significant dispute of primary fact. The live issues were identified at points (c) and (d). 15 June 2015 was agreed as a suitable date, when the hearing resumed.
10. Sentencing the appellant in the High Court of Judiciary on 8 May 2012, Lord Doherty said:-

Mr Miah, at the time of the offence of which you have been convicted, the complainer was a prostitute. She had attended at your home to provide you with sexual services for payment, as she had done on numerous occasions previously. Like any woman, she had the right to withhold her consent to any sexual activity she did not wish to engage in. On the occasion in respect of which you have been convicted, you raped her twice.

In approaching sentence I have had regard to all that has been said on your behalf. You have four previous convictions on indictment, in relation to two of which you served custodial sentences. However, all those convictions were many years ago and they were not for analogous offences. Since they were committed, you have avoided further offending. It appears that you have worked hard in the restaurant industry and have contributed positively in several ways to the lives of others. I take all this into account.

However, the fact remains that the crime you have been convicted of is a very serious one. The public interest requires that I impose a significant custodial sentence.

11. There had been a delay between charge and trial of two years, four and a half months. The judge found that to have been inordinate. Had it not been for that breach of the appellant's right to have the charge determined within a reasonable time, the sentence imposed would have been one of five years imprisonment. In light of the breach, the sentence imposed was four years and nine months.
12. Although the crucial questions are accurately identified by Mr Bryce in his grounds of appeal and written argument, it is I think worth setting out the bulk of Part 5A of the 2002 Act and working through its provisions in turn:-

ARTICLE 8 OF THE ECHR: PUBLIC INTEREST CONSIDERATIONS

117A Application of this Part

(1) This Part applies where a court or tribunal is required to determine whether a decision made under the Immigration Acts—

(a) breaches a person's right to respect for private and family life under Article 8, and

(b) as a result would be unlawful under section 6 of the Human Rights Act 1998.

(2) In considering the public interest question, the court or tribunal must (in particular) have regard—

(a) in all cases, to the considerations listed in section 117B, and

(b) in cases concerning the deportation of foreign criminals, to the considerations listed in section 117C.

(3) In subsection (2), “the public interest question” means the question of whether an interference with a person’s right to respect for private and family life is justified under Article 8(2).

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.

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.

117D Interpretation of this Part

(1) In this Part—

“Article 8” means Article 8 of the European Convention on Human Rights;

“qualifying child” means a person who is under the age of 18 and who—

(a) is a British citizen, or

(b) has lived in the United Kingdom for a continuous period of seven years or more;

“qualifying partner” means a partner who—

(a) is a British citizen, or

(b) who is settled in the United Kingdom (within the meaning of the Immigration Act 1971 — see section 33(2A) of that Act).

(2) In this Part, “foreign criminal” means a person—

(a) who is not a British citizen,

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

(c) who—

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

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

(iii) is a persistent offender.

(3) For the purposes of subsection (2)(b), a person subject to an order under—

(a) section 5 of the Criminal Procedure (Insanity) Act 1964 (insanity etc),

(b) section 57 of the Criminal Procedure (Scotland) Act 1995 (insanity etc), or

(c) Article 50A of the Mental Health (Northern Ireland) Order 1986 (insanity etc),

has not been convicted of an offence.

...

13. Section 117A: The appellant is divorced. He has two adult daughters, several siblings and numerous other relatives in the UK. I accept that he has lived here without returning to Bangladesh since about 1982, when he was aged around 16. He is now aged 55. He does not have a family life with a spouse or minor children which is the usual protective limit of that part of Article 8. I was not asked to make a finding that he has family life in the narrower Article 8 sense. The matter makes no practical difference as all the circumstances remain relevant and his private life is to a large extent based on his relatives. Plainly his deportation would interfere with private and family life as he has carried it on throughout adulthood. There is a public interest question to be answered.
14. Section 117B: The maintenance of effective immigration controls is in the public interest. The appellant can speak English, appears to have been mostly financially independent throughout his life when at liberty, and his residence in the United Kingdom has been neither unlawful nor precarious. Sub-sections (2), (3), (4) and (5) do not count against him. He is liable to deportation and there is no child in the case so (6) does not apply.
15. Section 117C: The appellant is a foreign criminal. His deportation is in the public interest. His crime was very serious, as described by the sentencing judge, so the public interest in his deportation is that much the greater.
16. In terms of Section 117C(4) exception 1(a), the appellant has been lawfully resident in the UK for most of his life.
17. In terms of Section 117C(4) exception 1(b), the respondent argued that the appellant should not be considered as integrated due to the nature of his offence. I do not find that a meaningful or workable distinction. Having conducted all his adult life in the UK, in spite of the conviction leading to his deportation (and some distant but also quite serious offences) I do not think the appellant could sensibly be found to be other than socially and culturally integrated here.
18. The first seriously disputed issue is whether in terms of Section 117C(4), exception 1(c), there would be very significant obstacles to the appellant's integration into Bangladesh.
19. I accept that there is a family land dispute in the appellant's locality of origin in Sylhet, likely to lead to his being met with hostility by relatives if he were to return there. The argument for the appellant was that deportation would result in his having to make a new life in what in substance is a foreign country, and that would be tantamount to exile. I think that goes much too far. Although integrated in the UK the appellant has spent his life here within a close-knit community of Bengali origin, speaks the language as a native, and it is only reasonable to conclude that he remains familiar with a culture from which he has never disengaged. While the ideal situation on removal would be to be welcomed within his original community, there is no reason to think he would find it particularly difficult to live in Bangladesh away from that locality. He has made his

living as a restaurant worker moving around within the UK. It was acknowledged on his behalf that he would not be destitute. Support (if and when necessary) would be forthcoming from a relative who is in a good position to provide it. Such health problems as he suffers have no significant impact on the issue. The test of very significant difficulties sets the bar high. I do not think the case discloses difficulties close to that level.

20. There is no spouse, other partner or minor child in the case, so exception 2 does not apply.
21. In terms of Section 117(C)(6), the appellant having been sentenced to a period of imprisonment of over four years, the public interest requires deportation unless he shows very compelling circumstances over and above exceptions 1 and 2.
22. Mr Bryce pointed out that the sub-section does not require the very compelling circumstances to be of a compassionate nature. He argued two points for a finding in the appellant's favour.
23. The first was based on the appellant's immigration history. The appellant's connection to the UK went back to his father's arrival as a Commonwealth immigrant in 1962. If the appellant had been brought to the UK at an earlier age, he would have been immune from deportation. It appeared there had been some attempt to bring him to the UK in 1972. He had a degree of protected status until 1 August 1988. Being "in the small and diminishing cohort of persons who arrived in the UK as dependants of Commonwealth immigrants who were free to settle in the UK, and having held that status for the first 28 years of his life, his connection with the UK might be traced not just to the age of 16 but to the age of two when his father came here - a degree of connection going far beyond even that of many actual British citizens".
24. In my opinion, the case has to be judged as statute now provides. If Parliament had intended exceptions from deportation for persons with a particular immigration history, that would have been enacted. In the context of Part 5A of the Act the history of the appellant's immigration status does not constitute a very compelling circumstance. The strength of what is required can be gauged by the high tests which have gone before. There must be something even greater than that.
25. The argument perhaps more strongly pressed by Mr Bryce was that it was legally compelling that the appellant's circumstances fell within the terms of the Council of Europe Committee of Ministers Recommendation. This provides at paragraph 1(a)(2) that each member state should recognise as a long term immigrant an alien authorised to reside in its territory permanently or for a period of at least five years. Paragraph 4 recommends that after 20 years of residence, a long term immigrant should no longer be expellable. There is a qualification at 4(d), an option to provide in the internal law of member states "that a long term immigrant may be expelled if he or she constitutes a serious threat to national security or public safety". Paragraph 5(b) recommends that before deciding on expulsion of a long term immigrant the competent

authorities should consider alternative measures (for example, by replacing the permanent residence permit with a non permanent one). Mr Bryce submitted that the respondent's policy provides such an alternative measure (mentioned further below).

26. Mr Bryce acknowledged that the recommendation also recites as follows:-

Concerning the possibility of an expulsion after 20 years of residence (paragraph 4.b.-second sentence), the United Kingdom reserves the right to apply national law.

27. The bundle of authorities produced by Mr Bryce includes a paper from the European Centre for law and justice on the status of recommendations of the Committee of Ministers. Although non-binding, these are said to be legal instruments with legal significance, upon which the European Court of Human Rights might rely "to justify a new development of the Convention". In *Uner v The Netherlands* the recommendation was taken into account (paragraph 58). Mr Bryce said that the threshold suggested by the recommendation was effectively the same as the EEA threshold for expulsion of persons with a permanent right of residence, "serious grounds of public policy or public security". The appellant was not such a threat and presented no serious risk.

28. In course of submissions and in light of the developing debate, the appellant's representatives (very properly) produced a copy of a home background report produced by the Social Work Department of Dundee City Council, dated 18 February 2014. This includes the following:-

Analysis of offending and attitude to the victim

Mr Miah has four previous convictions for abduction (of his wife); forgery and counterfeiting; fraud; theft of a motor vehicle and bail offences. His first two offences were in 1985 and the other two in 1990. Three of those offences resulted in him receiving a custodial sentence and one was dealt with by the High Court. The fact that he received custodial sentences in the absence of numerous convictions would suggest that those offences were of a serious nature.

Mr Miah has always maintained that he and his victim were in a consensual relationship spanning two years, and he denied the offence of rape. He proceeded to appeal his conviction, but abandoned his appeal on 5 November 2012.

Risk Assessment

... Mr Miah is assessed as a low risk to the general community and has low social needs. This risk is heightened to moderate when looking at his sexual offending ... the main areas of concern would be in relation to his sexual preoccupation and use of prostitutes. I cannot discount his previous offence of abduction against his wife, which is indicative of force being used. Therefore his attitude towards women needs to be addressed further in order to reduce his risk.

Whilst Mr Miah is a low category prisoner and he is engaged in working in further education, he has been referred in prison for the Good Lives and Constructs programmes. Despite his denial of his offence he is willing to participate in them. Once those programmes are completed this should equip Mr Miah with the necessary skills to manage any future risk of further reoffending.

...

Summary & Conclusion

... Mr Miah ... has yet to address his offending behaviour through completing programme work prior to his release in the community.

Taking all of the above into account Mr Miah is not currently assessed as suitable for parole.

29. Mr Bryce submitted that the evidence as a whole showed that the appellant was of low risk to the general public, a moderate risk to a particular category of persons, and no present or serious threat to anyone. In light of my view of the status of the recommendation, I do not find this to be a decisive issue, but I am unable to agree with that analysis of risk. The Presenting Officer pointed out that although the appellant abandoned his appeal against conviction, all the evidence is that he continues to refuse to accept any guilt. I prefer the assessment proposed by the Presenting Officer that while there is not a risk to the public in general there is a real risk of harm to a very particular section of the population. The level of that risk is moderate, if not higher, it is present, and the level of the possible harm is serious.
30. I prefer the submission for the respondent that the scheme in place for deportation is a complete code, enacted in knowledge of the recommendation and of the UK's reservation from it. The recommendation is no more than that. It is not of the nature of a treaty obligation with legal effect. It might be a powerful aid to applying Article 8 if national law were silent or ambiguous. Where the legislature has framed the national law to different effect and after a conscious decision to make a reservation from the recommendation, it cannot constitute a very compelling circumstance.
31. The alternative measure mentioned by Mr Bryce derives from the respondent's Immigration Directorate Instructions (IDI's) chapter 13 which prescribes that initial leave under article 8 be limited leave for a period of 30 months. Mr Bryce suggested that this would be significantly lesser than the appellant's previous status, depriving him of his previous security, and so would be in keeping with the proportionality principle of interfering only to the minimum extent necessary. However, that outcome could only arise once the appellant had shown that he falls into an exception provided within the statutory scheme, which he has failed to do.
32. The determination of the First-tier Tribunal is **set aside**. The decision is remade by answering the public interest question in favour of the respondent. Interference with the appellant's right to respect for private and family life is justified under Article 8(2). Questions (a) and (b) are answered in favour of the appellant but questions (c) and (d) (either of which is decisive) are answered against him. His appeal, as originally brought to the First-tier Tribunal, is **dismissed**.
33. No anonymity direction has been requested or made.

Hugh Macleman

19 June 2015
Upper Tribunal Judge Macleman