



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

Appeal Number: HU/13234/2017

THE IMMIGRATION ACTS

**Heard at Field House
On 21st June 2019**

**Decision & Reasons Promulgated
On 12th July 2019**

Before

DEPUTY UPPER TRIBUNAL JUDGE MCGINTY

Between

**MR ZAHID HAFEEZ
(ANONYMITY DIRECTION NOT MADE)**

Appellant

and

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Z Jafferji, Counsel

For the Respondent: Mr Bramble, Senior Home Office Presenting Officer

DECISION AND REASONS

1. This is the Appellant's appeal against the decision of First-tier Tribunal Judge Talbot dated 23rd April 2019 in which he dismissed the Appellant's human rights appeal. Before the Upper Tribunal today the Appellant has been represented by Mr Jafferji of Counsel and the Secretary of State has been represented by Mr Bramble a Senior Home Office Presenting Officer. Permission to appeal in this case has been granted by First-tier Tribunal Judge Buchanan on 28th May 2019 having considered the Grounds of Appeal.

2. Within the Grounds of Appeal, it is argued at Ground 1 that there is a failure to take account or make findings of fact on a material matter. It is argued that the judge failed to consider or determine whether and if so, to what extent the Appellant's circumstances triggered any of the exceptions under paragraph 399A or B of the Immigration Rules and Section 117(5) of the Nationality, Immigration and Asylum Act 2002 and whether or not his deportation would be unduly harsh on any or all of his six British citizen children and his British citizen wife. It is argued that such an assessment was material to determining whether there were very compelling circumstances for the purposes of paragraph 398 of the Rules and 117C(6) of the Nationality, Immigration and Asylum Act 2002 which outweighed the public interest in deportation following the Court of Appeal case of **NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662**. It is further argued there were other matters which were not taken account of and given weight in the exercise. In ground 2 it is said there was a material misdirection given the lack of an assessment of undue harshness and that the judge erred in determining that the question of very compelling circumstances could only be met by a determination of the children's best interests.
3. At the appeal hearing before me today, Mr Bramble on behalf of the Secretary of State concedes that having considered the Grounds of Appeal and the grant of permission and the First-tier Tribunal decision that there is a material error of law in this case.
4. Both parties accept that the judge has given at first glance an exceedingly thorough and detailed analysis of the circumstances of the Appellant, his wife and his children. But Mr Bramble on behalf of the Secretary of State conceded that when approaching the question as to whether or not there are very compelling circumstances over and above the exceptions whether under the Immigration Rules or under Section 117C that the court has to actually take a structured approach, first considering the exceptions themselves and then determining whether or not the circumstances of the individual Appellant and his family go distinctly beyond that, such that the circumstances are very compelling over and above the exceptions themselves. In this regard I have been referred to two authorities on that issue both from the Court of Appeal. The first in time was relied upon by the Appellant in the Grounds of Appeal being the case of **NA (Pakistan) v Secretary of State for the Home Department [2016] EWCA Civ 662** where at paragraphs 28 to 30, Lord Justice Jackson giving the judgment of the court stated:

"28. The next question which arises concerns the meaning of 'very compelling circumstances over and above those described in Exceptions 1 and 2'. The new paragraph 398 uses the same language as Section 117(6). It refers to 'very compelling circumstances, over and above those described in paragraphs 399 and 399A'. Paragraphs 399 and 399A of the 2014 Rules refer to the same subject matter as

Exceptions 1 and 2 in Section 117C, but they do so in greater detail.

29. *In our view, the reasoning of the Court of Appeal in **JZ (Zambia)** applies to those provisions. The phrase used in Section 117C(6), in paragraph 398 of the 2014 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 upon 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’. As we have indicated above, a foreign criminal is entitled to rely upon such matters, which he will need to be able to point to features of his case of the kind mentioned in Exceptions 1 and 2 (and in paragraphs 399 or 399A of the 2014 Rules) or features falling outside the circumstances described in those exceptions and those paragraphs which make his claim based on Article 8 especially strong.*
30. *In the case of a serious offender who could point to circumstances in his own case which could be said to correspond with circumstances described in Exceptions 1 and 2 but where he could only just succeed in such an argument, it would not be possible to describe his situation as involving very compelling circumstances, over and above those described in Exceptions 1 and 2. One might describe that as a bare case of the kind described in Exceptions 1 or 2. On the other hand if he could point to factors identified in the descriptions of Exceptions 1 and 2 of an especially compelling kind in support of an Article 8 claim going well beyond what would be necessary to make out a bare case of the kind described in Exceptions 1 and 2, they could in principle constitute very compelling circumstances over and above those described in Exceptions 1 and 2, whether taken by themselves or in conjunction with other factors relevant to application of Article 8.”*

5. Subsequently in the Court of Appeal case of the **Secretary of State for the Home Department v OP (Jamaica) [2018] EWCA Civ 316** at paragraph 19 of the decision the Senior President has stated,

“A Tribunal that is considering the circumstances of a serious offender should first of all consider whether any of those circumstances are of the kind described in the exceptions. It should then consider whether any of the factors identified of such force whether by themselves or taken in conjunction with any other relevant factors not covered by the exceptions to satisfy the ‘very compelling’ test.”

6. Sadly here, as Mr Bramble concedes the learned First-tier Tribunal Judge has not adopted that structured approach when making findings in this case. He has not looked at it first in terms of the exceptions and as to whether or not the circumstances would be unduly harsh before going on to say whether or not there are very compelling circumstances beyond that. In addition, the learned judge has not actually made findings as to whether or not the circumstances would be unduly harsh or there are very compelling circumstances. He mentions a test on a number of occasions and has not made actual findings on those issues before then determining whether there is a breach of Article 8 in paragraph 44 of the judgment. On that basis the judge not having adopted the correct approach to the consideration of the human rights appeal and that being conceded by the Secretary of State in this case, I do find that the decision does contain a material error of law such that the decision is set aside and as both parties agree the case should be remitted back to the First-tier Tribunal for re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Talbot with no preserved findings for a hearing de-novo.

Notice of Decision

The decision of First-tier Tribunal Judge Talbot does contain a material error of law and is set aside. The matter is remitted back to the First-tier Tribunal for a de-novo re-hearing before any First-tier Tribunal Judge other than First-tier Tribunal Judge Talbot.

No application for an anonymity order was made before me and no such order was made before the First-tier Tribunal and therefore I make no anonymity order in this case.

Signed

Date 3rd July 2019

DJ McGinty

District Judge McGinty sitting as a

Deputy Upper Tribunal Judge