



Upper Tribunal  
(Immigration and Asylum Chamber)

Appeal Number: HU/08773/2016

**THE IMMIGRATION ACTS**

Heard at Field House  
On 16 August 2017

Decision & Reasons Promulgated  
On 29 September 2017

Before

THE HONOURABLE LORD BURNS  
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)  
UPPER TRIBUNAL JUDGE LATTER

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

AJ  
(ANONYMITY DIRECTION MADE)

Respondent

**Representation:**

For the Appellant: Mr Jarvis, Home Office Presenting Officer  
For the Respondent: Mr Eaton, Hatton Wyatt Solicitors

**DECISION AND REASONS**

1. Unless until a Tribunal or court directs otherwise the appellant is granted anonymity. No report of these proceedings shall directly or indirectly identify him or any member of his family. This direction applies to both the appellant and to the respondent. Failure to comply with this direction could lead to contempt of court proceedings.

2. The respondent AJ (who we shall refer to as “the claimant”) was born in India on 1 May 1958. He has lived in the UK since 1985 and was granted indefinite leave to remain in July 2007.
3. On 4 August 2011 at the Crown Court at Reading he was convicted of five counts of keeping controlled non-special waste in or around land without a licence and one count of permitting the deposition of controlled non-special waste in or around land without a licence contrary to section 33(1)(b) and 33(6) of the Environmental Protection Act 1990. He received a two year community order. He was also ordered to undertake mental health treatment and supervision for twelve months post sentence. Subsequently, confiscation proceedings were taken against him and a confiscation order was made in the amount of £881,512. Failure to make payment rendered him liable to five years imprisonment.
4. On 17 May 2013 the claimant was issued with a warrant for failure to pay £585,292.97. As a result of that he was ordered to serve 3 years, 3 months and 23 days imprisonment.
5. He was issued with a notice of his liability for deportation on 17 June 2013 and a notice decision followed dated 29 February 2015. A further notice followed on 19 January 2016. It was accepted that he was not liable to automatic deportation under Section 32 of the UK Borders Act 2007 (the 2007 Act).
6. He advanced humanitarian protection and human rights claims in February and March 2016. These were refused by letter dated 30 March 2016 (the decision letter).
7. In relation to the protection claim, the claimant stated that he would be destitute on return to India because of his circumstances. That was rejected on the basis that he was a resourceful individual. Despite mental health difficulties which had been diagnosed during 2009 he had continued to be active in business. It was thought that his education, skills and experience would assist his reintegration into society in India. His claim for asylum was also refused on the basis that he had not shown substantial grounds for believing he faced a real risk of suffering serious harm. Although there was medical and psychiatric evidence as to his mental health problems, these consisted at the time of memory loss and depression. It was considered that he could obtain appropriate medical treatment in India.
8. In relation to his Article 8 claim under the ECHR, it was considered that his deportation was conducive to the public good and in the public interest in the light of the conviction which had “caused serious harm”. He was a repeat offender having already been convicted in May 2004 of three counts of depositing waste without an environmental permit and three counts of disposing of controlled non-waste without a licence. These offences had the potential for a negative impact on the environment and human beings. Consideration was given to his family life with his children who were all adult. It was considered that he did not fulfil the terms of Rule 399(a). In relation to family life with his wife, it was not accepted that it would

be unduly harsh for her to remain in the UK if the claimant was deported. His marriage had been dissolved in July 2012 but had resumed in April 2015 and they were re-married in July of that year. It had not been shown that he was required to remain in the UK while appropriate care and treatment for his wife's medical problems was given. It would not be unduly harsh for her to live in India if she chose to do so.

9. The claimant appealed to the First-tier Tribunal who heard the case on 17 March 2017. The First-tier Tribunal Judge considered whether or not the claimant fell within the definition of a foreign criminal in terms of Section 117D of the Nationality, Immigration and Asylum Act 2002 (the 2002 Act). However, Tribunal decided that, since the sentencing judge described the harm which had been demonstrated by the commission of the offences of which he was convicted in 2011, it could not be said that his offence had "caused serious harm" in terms of sub-Section (2)(c)(ii) of Section 117D of the 2002 Act. Nor could it be said that he was a persistent offender. Reference was made to the case of Chege [2016] UKUT 00187 (IAC).
10. The First-tier Tribunal judge therefore approached the case upon the basis that paragraph 389 of the Immigration Rules and Section 117D of the 2002 Act did not apply. He went on to consider the appellant's private and family life. In the necessary balancing exercise that he was required to perform, he recognised at paragraph 49 that the claimant had committed "a number of particularly serious offences". However, he accepted the assessment conducted in the OASys Report that the claimant was at low risk of reoffending and reconviction, had expressed remorse and understanding of his behaviour. He took account of the sentencing judge's remarks at paragraph 52 that the claimant had deliberately breached the law repeatedly in a "pretty large scale operation". He had been financially motivated and had lied to inspectors from the environmental agencies. He noted that the sentencing judge accepted that the claimant suffered from serious mental health issues and had imposed a mental health treatment order as part of the community penalty imposed. He recognised expressly at paragraph 55 that there was a public interest in the need to protect society against crime and the wider impact of the offending conduct on the community at large.
11. On the other side of the balance he then examined the claimant's private and family life at paragraphs 56 and following. It was accepted that he had a genuine and subsisting relationship with his wife who currently had a spinal injury and required assistance. She had no immediate family in India who could assist her or her husband. Her husband was unable to cope on his own. That matter was not the subject of challenge before the First-tier Tribunal. The claimant was at the time of the hearing diagnosed as suffering from a mixed dementia (Alzheimer's and vascular type) to a severe degree. There were also symptoms of psychosis, periodic low mood with an alternative diagnosis of psychotic depression having been considered. He needed a considerable degree of supervision in all activities of daily living by his family. He was in an extremely and vulnerable state if without constant support and supervision. A psychiatrist in a report dated 17 January 2007 had expressed the

opinion that he would be “very concerned if (the claimant) were to be deported to a country where there was not a high level of family support since he would become extremely disorientated and confused”. He also expressed the view that the claimant did not have the ability to live independently should he be returned to India. In the circumstances the Tribunal found that deportation would be a disproportionate interference with the claimant’s private and family life. For good measure, and in case he was wrong about his conclusion that the Rules and Section 117A to D under the 2002 Act did not apply to him, he also conducted an exercise under those Rules.

12. At paragraph 101 the judge found that it would be unduly harsh to require the claimant’s partner to go to India and for her to remain in the UK without the claimant. Accordingly, he found that the claimant met the requirements of paragraph 399(b). He did not stop there. He went on to consider, in the alternative, whether there were very compelling reasons over and above those in paragraphs 399 and 399A.
13. In conducting that exercise the judge had regard to the fact that the claimant had lived in the United Kingdom for 32 years, had been granted indefinite leave to remain in 2007, all his immediate family lived in the United Kingdom and the appellant was almost 60 years of age. He found there would be substantial interference with his private and family life if deported. His imprisonment had resulted not as a result of the offence itself, but a failure to pay the confiscation order. He had a very serious mental health condition and was very vulnerable, so that there would be very significant obstacles in his reintegration into life in India. He found that this was an exceptional case in which the public interest in his deportation was outweighed by the circumstances he found established and those represented very compelling reasons why the public interest was outweighed.
14. The First-tier Tribunal judge then proceeded to conduct a separate and independent Article 8 exercise and he came to the same conclusions essentially for the same reasons. He therefore allowed the claimant’s appeal under the Immigration Rules “in the application of Article 8” on human rights grounds.
15. The Secretary of State has appealed against that decision and was given permission to proceed on a number of grounds. In presenting the appeal to us Mr Jarvis sought to add grounds of appeal to the effect that the First-tier Tribunal Judge had misdirected himself in respect of the application of Section 117D of the 2002 Act, firstly in respect of the conclusion that there was no serious harm caused by the offending in terms of sub-Section (2)(c)(ii) and as to whether the claimant was a persistent offender in terms of sub-Section (2)(c)(iii). Mr Eaton, for the claimant opposed that on the basis that this was a very late attempt to add wholly new grounds of appeal. We agreed that it was not in the interests of justice to allow these grounds to be added at this stage. The Secretary of State had due notice of the reasoning of the First-tier Tribunal Judge on the matters now sought to be raised. The First-tier Tribunal Judge had gone into considerable detail to explain why it was that he did not think that the claimant fell within the definition of a foreign criminal

under Section 117D of the Act. Ample opportunity was given for the Secretary of State to appeal against that part of the judgment and she failed to do so.

16. Mr Jarvis then went on to argue that the First-tier Tribunal erred in failing to have proper regard to the nature of the relationship between the claimant and his wife. In particular there was a failure to acknowledge and give due weight to the fact that they had separated and divorced before subsequently remarrying. Further, the claimant's wife had lived in India until she was 28 years of age and no proper reasons were given as to why she could not relocate to India in order to support and assist her husband.
17. Furthermore, no sufficient reasons were given as to why it would be disproportionate to expect the claimant to relocate to India. It was not challenged that he had managed to continue to manage his financial affairs since 2009 when he was first diagnosed with mental difficulties. Reference was made to paragraph 15 of the decision letter of 31 March 2016. Further, there was no proper basis upon which it was held that the claimant would be unable to obtain proper medical treatment and thus manage his mental condition if deported. Accordingly, the First-tier Tribunal had failed to engage with the reasons given by the Secretary of State in the letter of 31 March 2016 and no clear findings justifying a rejection thereof had been set out.
18. Mr Eaton submitted that there was ample reasoning given for the conclusions of the Tribunal. This was in essence an Article 8 case and the Tribunal had set out its reasons clearly from paragraph 56 onwards. All the factors taken account of were relevant and he had not considered any irrelevant matter.
19. We have come to the view that the First-tier Tribunal Judge cannot be said to have made any material error on law in the approach taken in this case. This appeal does not proceed on the basis that the judge erred in finding that the claimant did not fall within the definition of a foreign criminal. Accordingly, the case was essentially one which centred upon the contention that the claimant's rights under Article 8 would be breached by his deportation. Nevertheless, the judge went into great detail in relation to the application of the Rules on the basis that he might be wrong in his conclusion that the claimant was not a foreign criminal. Such an exercise provided a cross-check for his conclusion on Article 8. The judge conducted a careful balancing exercise of the relevant factors involved in that claim. He took full account of the weight in respect of the public interest in what he described as very serious offences. Those offences were tempered somewhat by the fact that they had been dealt with by a non-custodial sentence. Also relevant was the fact that he had not been sentenced to imprisonment for the offence itself, but for failure to pay the confiscation order. It cannot be said that he left any relevant consideration out of account when examining the public interest element in this case.
20. Whether expressed as very compelling circumstances or exceptional circumstances, it is clear that he bore very much in mind that it was necessary for the claimant to

demonstrate, in the whole circumstances of his situation, very weighty considerations before the public interest in the claimant's deportation could be outweighed.

21. Among those identified was the mental illness suffered by the claimant in the form of mixed dementia to a severe degree which rendered him highly vulnerable. It was not unreasonable to conclude that, in those circumstances, relocation alone to India would be quite impracticable without substantial family support which was not available. The First-tier Tribunal judge had regard to the depth of the integration into society in the United Kingdom that had been demonstrated both by the claimant and his wife. The nature of the current relationship between them was assessed and, while no mention is made of their divorce and subsequent re-marriage, we do not regard that as a material omission. In paragraph 57 it is noted that the appellant accepted in the Reasons for Refusal that the claimant was in a genuine and subsisting relationship with his wife. It was the current nature of their relationship that was of significance and the support the claimant required from her.
22. The level of support which the claimant would require if deported, the absence of such support in India, the degree of support currently derived from his wife and children in the UK and the medical condition of his wife were all legitimate factors to which the First-Tier Tribunal had regard. There was powerful medical evidence about the claimant's condition and his inability to look after himself at the time of the hearing. The evidence that he had continued to manage his financial affairs after the diagnosis in 2009 came from a letter from his General Practitioner dated 8 June 2015 (see paragraph 15 of the Reasons for Refusal) which pre-dated the psychiatrist's report on which the First-tier Tribunal relied. That detailed and up to date assessment and prognosis of his current condition warranted the finding that he could not look after himself if deported. In the combination of circumstances to which the First-Tier Tribunal make reference, we are unable to conclude that it was precluded from the conclusion that a very compelling case had been made out in the claimant's favour and that in all the circumstances it would be disproportionate to deport him.

### Decision

23. In the circumstances this appeal by the respondent is dismissed.

Signed                      D Burns

Date: 28 September 2017

Lord Burns  
Sitting as a Judge of the Upper Tribunal