



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

Appeal Number: UI-2022-00545
IA/04311/2021

THE IMMIGRATION ACTS

**Heard at Field House
On 21st June 2022**

**Decision & Reasons Promulgated
On 15th August 2022**

Before

**THE HON. MRS JUSTICE THORNTON
(SITTING AS A JUDGE OF THE UPPER TRIBUNAL)
UPPER TRIBUNAL JUDGE KEITH**

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

**EDISON KULLOLLI
(ANONYMITY DIRECTION NOT MADE)**

Respondent

Representation:

For the appellant: Mr D Clarke, Senior Home Office Presenting Officer

For the respondent: *Mr J Gajjar*, instructed by SMA Solicitors

DECISION AND REASONS

Introduction

1. These are the approved record of the decision and reasons which were given orally at the end of the hearing on 21st June 2022.

2. In order to avoid confusion, we refer to the appellant as the Secretary of State and the respondent as the Claimant for the remainder of these reasons.
3. This is an appeal by the Secretary of State against the decision of First-tier Tribunal Judge Louveaux (the 'FtT'), promulgated on 28th February 2022, by which he allowed the Claimant's human rights appeal on the basis that it would be in breach of the Claimant's right to respect for his family life with his British citizen children, pursuant to article 8 ECHR.
4. In essence, the key issues were whether, for the purposes of section 117D(2)(c)(ii) of the Nationality, Immigration and Asylum Act 2002, the offences for which the Claimant had been convicted were offences that had caused serious harm. In addition, if they were not, the next issue was whether the refusal of the Claimant's human rights claim interfered disproportionately with his acknowledged family life with his children. In answering the first question, the FtT referred back to an earlier Tribunal decision of Judge A M Black. Judge Black had not considered the question of serious harm because he had considered, erroneously, the Claimant to be a "foreign criminal" (as defined by the 2002 Act) by reference to a different criterion, the length of his prison sentence. Nevertheless, Judge Black had considered and made findings in relation to the same offences.

The FtT's decision

5. The FtT reminded himself of the authorities of Devaseelan (second appeals, ECHR, extra-territorial effect) [2002] UKIAT 000702, and Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 00350 (IAC). Wilson confirms that "potential harm" is not enough. The harm may be to society in general, not limited to individual harm. See: R (Mahmood) v UTIAC & Ors [2020] EWCA Civ 717 at §19.
6. The FtT noted the Claimant's three offences, which resulted in concurrent sentences of between one and nine months. At §22, the FtT referred to passages of Judge Black's judgment (§71 §§73, 77, 87 and 102). Citing the authorities of Wilson and Mahmood, at §22, the FtT concluded that the offences of dangerous driving and using threatening, abusive or insulting words or behaviour had not caused serious harm. At §23, the FtT concluded that the offence of possession of cocaine, as distinct from possession with intent to supply, was also not such an offence.
7. In that context, at §24, the FtT concluded that sub-sections 117C and D of the 2002 Act (which relate to additional human rights considerations for "foreign criminals") did not apply. He then went on to carry out a proportionality analysis, for the purposes of evaluating the Claimant's human rights claim, at §§34 to 42. He considered the so-called "go" scenario, where the Claimant's children would return with him to Albania, his country of origin; and the alternative "stay" scenario, where they would remain in the UK without him. The FtT concluded that both

scenarios would be a disproportionate interference with the Claimant's right to respect for his family life.

The grounds of appeal and grant of permission

8. The Secretary of State appealed against the FtT's decision on the basis that the FtT had misdirected himself and/or failed to explain why the Claimant's offences had not caused serious harm. It was trite law that "serious harm" could extend to psychological or economic harm, including the supply of drugs.
9. On a second ground, the FtT had failed to apply the test under section 117C(5) of whether the effect of the Claimant's deportation on his children would be unduly harsh.
10. First-tier Tribunal Judge Burnett granted permission on 25th March 2022. In doing so, he noted that the offences described included a person either being struck by a car or having to jump out of the way of a car driven by the Claimant as well as a fight in a public house which clearly involved violence. Judge Burnett regarded it as arguable that the FtT's decision failed to explain why these offences did not cause serious harm. Judge Burnett did not limit his grant of permission.

The hearing before us

The Secretary of State's submissions

11. Mr Clarke relied on his skeleton argument. He accepted that the drugs offence had not caused serious harm. He also accepted that the two grounds of appeal stood or fell with one another. If the Claimant was not a "foreign criminal" as defined by section 117D, it followed that section 117C did not apply. Conversely, if the FtT was wrong about whether the Claimant was a foreign criminal, then he had failed to carry out an assessment under section 117C. The core challenge was therefore to the FtT's analysis of whether the first two of the Claimant's offences had caused serious harm.
12. Mr Clarke also accepted that this was not a challenge that the FtT's conclusions were perverse, but that they had been inadequately explained.
13. The FtT had failed to explain his analysis of the emotional and physical harm likely to have been caused by the Claimant driving his car at someone. The sentencing judge had referred to someone needing to jump out of the way or possibly even being hit. The sentencing judge had not made a positive finding that someone had been hit, but he had applied the criminal standard of proof. It was open to the FtT to assess the facts on a lower standard. The FtT had also failed to explain his analysis in relation to the fight in a public house, in which the Claimant was involved.

14. The FtT had erred by referring to Judge Black's findings, without further analysis. Judge Black had not decided the issue of whether the Claimant's offences had caused serious harm and had not explored fully the distinction between actual and potential serious harm. Instead, the FtT ought to have focussed on, and explained his analysis of the sentencing judge's remarks. The FtT had failed to explain his evaluation of the evidence as required by Mahmood.
15. We asked Mr Clarke whether there was an absence of particular evidence of actual harm (whether physical, psychological or more widely), either in the sentencing remarks or other evidence. The Secretary of State's decision to refuse the Claimant's human rights claim did not appear to have referred to psychological harm. Mr Clarke replied that he was unable to confirm the Presenting Officer's submissions to the FtT, but he submitted that the evidence of the actual harm, particularly psychological, ought to have been apparent by the nature of the Claimant's offences.

The Claimant's submissions

16. Mr Gajjar submitted that the FtT had not erred in law. The FtT had properly directed himself on the relevant law. The burden was on the Secretary of State to prove that the Claimant's offences had caused serious actual harm. The FtT had concluded that she had not done so. The Secretary of State's decision, at §15, page [185] of the FtT Bundle, had focussed on the harm caused by illicit drugs. It provided no evidence or description of psychological harm of the Claimant's offences, on which Mr Clarke was now placing particular emphasis. While Mr Gajjar said that any generalisations needed to be treated with caution, there could be some offences, where purely by their nature, it was reasonable to infer psychological harm. An example might be sexual offences. There was no evidence from which the FtT could infer that driving the car at a person or people had caused them serious psychological harm. The same applied to the fight in the public house. The grounds challenging the FtT's judgment essentially amounted to an argument that the FtT should have drawn speculative inferences of actual serious harm, in the absence of evidence. By way of one practical example, the sentencing judge had not felt able to conclude that someone had actually been hit by the car driven by the Claimant. It was now suggested that the FtT ought to have carried out his own analysis of whether someone had been hit, to a lower evidential standard, but without any additional evidence. The FtT was being asked to speculate.
17. The FtT had not ignored the sentencing judge's remarks. He had expressly referred to them, cross-referring to Judge Black's citation of them at §71 of his decision. It was unnecessary for the FtT to recite every aspect of the evidence. The FtT had considered Judge Black's findings to the extent that they were relevant to the issue of serious harm and had then formed his own view on that issue. The FtT was not satisfied that the Secretary of State had proved actual, as distinct from potential, serious harm. It was

no accident that the passages from Judge Black's judgment specifically related to the potential for serious harm.

Discussion and conclusions

18. It is worth reciting parts of the FtT's and Judge Black's judgments, which we have considered in full. The FtT regarded it as appropriate to depart from Judge Black's findings in certain regards. One of the FtT's reasons for doing so was that Judge Black had erroneously concluded that a potential to cause serious harm was sufficient to meet the test under section 117D. However, the Court of Appeal and Upper Tribunal have since clarified that potential harm is not relevant, see: Wilson and Mahmood. The FtT then went on to state:

"22. I have considered whether, nevertheless, section 117D(2)(c)(ii) applies (i.e., whether the appellant is a foreign criminal by virtue of having been convicted of an offence that has caused serious harm). However, as discussed above, his two convictions – the first for dangerous driving, the second for using threatening, abusive or insulting words or behaviour with intent to cause fear and/or provoke violence – did not cause actual harm. That much is clear from Judge Black's determination, see the previously mentioned §§73, 77, 87 and 102 and the sentencing remarks at [71]. In line with Wilson and Mahmood, the appellant is not a foreign criminal in consequence of these two convictions."

19. The FtT concluded at §23 that the offence of possession of cocaine had not caused serious harm. We say no more on that point, as that conclusion is no longer challenged.

20. We set out below the relevant passages from Judge Black's judgment.

"71. Salient extracts from the Judge's sentencing remarks are as follows:

'The first two offences are old because you drove off on the occasion in January 2016 and the police did not find you until February this year.

You pleaded not guilty at the Pre Trial Preparation hearing. You have pleaded guilty today on notice, the trial that was listed for 26th June.

On the night in question in January 2016 you were in a pub in Aldershot with others when your group was approached by another group. The police suspect that it was drug-related but they had no evidence as to that. However, there was clearly violence in the public house. I have seen the CCTV of it. I can see bottles being thrown. I can see a chair being used as a weapon. It clearly included a Mr [...] who was in the opposing group. I am told that he has been convicted also of a section 4 offence and the possession of an offensive weapon, a knuckle

duster. He was given a two year suspended sentence but he had already spent by that stage eight months in custody.

The fight spread out onto the street. The CCTV of the street shows the opposing group, clearly in angry mood, walking around. There comes a stage, though, when they walk down to a roundabout when you appear driving a car, and you drive that car quite clearly at the group. It would appear too that you hit one of them, either that or he jumps out of the way and ends up on the ground, but quite clearly after that you drove off round the roundabout going back the other side the wrong way, narrowly avoiding a van going along the road in the right direction, you go right the way round the junction again, and as you drive off down the street overtaking another vehicle a further pedestrian has to jump out of the way, so quite clearly there were other people who were nothing whatsoever to do with this gang warfare, as it would seem, that were highly inconvenienced, and the man who jumped out of the way narrowly avoiding injury.

You were not arrested, as I have said, until February of this year when you were arrested as a passenger in a car and you were in possession of cocaine.

The Crown had initially proposed charging you with possession with intent to supply but they have accepted your plea of guilty to the possession and that has been committed for sentence by the Magistrates to be dealt with here.

I am told that you are not in this country legally, you are an Albanian national and the Home Office in due course will decide whether or not to deport you.

So far as your record in this county [sic] is concerned, I know you are aged 30, nearly 31, you have no previous convictions in this country, however, although the request has been made in Albania to know whether you have any convictions there we have no information.

You have been remanded in custody since 15th February.

Your counsel very properly points out that the fight was not started by your group but your counsel accepts that the response that you gave, especially using a car as a weapon, was wholly unacceptable. I accept too that it is clear from the CCTV that your brother was the subject of being set upon but that, however, is little mitigation from what I have seen, you driving a car into a group of young men and one of them clearly having either to jump out of the way or indeed being struck.

You have pleaded guilty. It was after the Plea Trial Preparation Hearing therefore that credit that I will give you I am limited to credit of 25%.

So far as the dangerous driving is concerned I think the right starting point for the offence using the car as a weapon is one of

12 months' imprisonment. That I will therefore reduce to nine months for your plea of guilty.

The public order offence, the right starting point here is a sentence of four months: I will reduce that to three months as a result of your plea of guilty but those two sentences will be consecutive to each other making a total sentence of 12 months.

For the possession of cocaine I impose a sentence of one month concurrent.

You will have to take an extended test. I have to impose, at least I am going to impose disqualification upon you. The period of disqualification will be one of two years, plus I am going to extend that period by six months in order to reflect the time that you are in custody. ...'

73. *The sentencing remarks make it clear that these were serious offences which had the potential to cause serious personal injury, if such injury was not actually caused. That is not known. This case falls squarely within paragraph 398(b) to the effect that 'the deportation of the person from the UK is conducive to the public good and in the public interest because they have been convicted of an offence for which they have been sentenced to a period of imprisonment of less than 4 years but at least 12 months.'*
77. *There is no expression of remorse in the appellant's evidence. He does not refer to the impact on society of his conduct and behaviour. He has expressed no remorse for having driven the vehicle in such a way as to cause potential serious physical harm to others. The main focus of the appellant's evidence is the impact of his deportation on himself and his family. While that is a wholly appropriate focus, it should not be the only one: I would expect the appellant to recognise the impact of his criminal behaviour on the wider public and to have shown some remorse for his criminal behaviour; this is relevant to an assessment of the risk of reoccurrence. The nature of the appellant's convictions suggests that he was unable to keep his temper under control and that he was prepared to use violence to resolve an altercation. Such violent behaviour shows disregard for the laws of this country and the safety of others, including innocent members of the public who happened to be in the vicinity at the time. It is highly relevant that the appellant did not volunteer his involvement in the violent incident to the police but that it was only several months later that he was identified by the police as having been involved in the violence in January 2016 when arrested for another matter. It is further relevant that the appellant did not plead guilty at the first opportunity, only part way through the criminal proceedings albeit I give him credit for so doing prior to trial (as did the sentencing judge). I note the mitigation to which the judge refers in the sentencing remarks and take this into account.*
87. *The appellant's three offences were committed in 2016 and 2017. Two of those offences had the potential to cause very serious personal injury, potentially life-threatening, to innocent victims as well as those*

*already involved in the altercation with the appellant's group. The appellant's use of the car as a weapon was deliberate. There is, however, no current risk of reoffending and no current risk of serious harm to others. However, the public interest serves different purposes: to reflect the public revulsion of serious crime, to protect the public from further offending and to deter others from acting in a similar way (**Taylor v SSHD [2015] EWCA Civ 845**). The first and third limbs are relevant here.*

102. I am satisfied that the respondent's decision to deport the appellant is a proportionate interference with the appellant's and his partner's and the five children's Article 8 rights to a family and private life, when balanced against the public interest in the deportation of this appellant, a foreign criminal who committed serious offences which had the potential to cause very serious harm."

21. Having considered the FtT's judgment as a whole, and his reasoning by reference to the above paragraphs of Judge Black's judgment, we are satisfied that the FtT's reasons were adequately explained. Mr Clarke accepted that the FtT did not need to cite every aspect of the evidence. It does not follow that because the FtT did not refer specifically to psychological harm, that he had failed to consider that aspect of the Claimant's offences. Discussion of particular aspects of evidence will often reflect the parties' focus on them. The Secretary of State's own decision did not refer to psychological harm. Noting the caution against generalisation, we also accept Mr Gajjar's submission that the Claimant's two offences were not, without more evidence, offences from which it was possible to infer actual serious harm. The next question was whether the FtT analysed and explained the evidence, such as there was. The evidence comprised the sentencing judges' remarks. The FtT considered all of the relevant paragraphs, which had been cited by Judge Black. These passages make clear that the offences had the potential to cause harm, even if personal injury had not actually been caused (§73). The implication of these passages, and the FtT's citation of them, was clear, namely that the offences had caused no actual serious harm.
22. We also accept Mr Gajjar's submission that had the FtT attempted to infer actual psychological harm from the above passages, he would have risked justifiable criticism that he was erring down the path of speculation. We do not see how the FtT could otherwise have been expected to assess the likelihood of serious psychological harm to an unnamed person who may or may not have been hit by a car being driven at him, or participants in, or bystanders to, a fight in a public house. We accept Mr Clarke's submission that there is no need for witness statements from victims to infer such harm. Nevertheless, there must be evidence from which inferences of actual serious harm can reliably be drawn. The answer in this case is that the evidence from which it was possible to infer actual serious harm was very limited, and ultimately insufficient. That much was clear from the FtT's reasons. Accordingly, the Secretary of State's challenge discloses no error of law.

Notice of Decision

The decision of the First-tier Tribunal did not involve the making of an error on a point of law.

The decision of the First-tier Tribunal stands.

No anonymity direction is made.

Signed J. Keith

Date: 30th June 2022

Upper Tribunal Judge Keith