Upper Tribunal
(Immigration and Asylum Chamber) Appeal Number: UI-2021-001867
HU/19493/2019

THE IMMIGRATION ACTS

Heard at Field House	**Decision & Reasons Promulgated**
On 23rd December 2022	**On 28th February 2023**

Before

UPPER TRIBUNAL JUDGE FRANCES

Between

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

JAHANARA BEGUM
(ANONYMITY DIRECTION NOT MADE)

Respondent

Representation:
For the Appellant: Mr E Tufan, Senior Home Office Presenting Officer
For the Respondent: Ms A Patyna, TAJ Solicitors

DECISION AND REASONS

1. Although this is an appeal by the Secretary of State for the Home Department ('SSHD'), I shall refer to the parties as in the First-tier Tribunal. The appellant's appeal against deportation was allowed by First-tier Tribunal Judge Malone ('the judge') on 6 July 2022 on human rights grounds.

2. The SSHD appealed on three grounds. Firstly, the judge had misdirected himself on delay and erred in law in finding the respondent should have made a decision to deport the appellant on conducive

grounds under section 3(5) of the Immigration Act 1971 at an earlier date. Secondly, the judge misdirected himself on section 117C(7) of the Nationality Immigration and Asylum Act 2002 ('NIA') in finding the respondent could not rely on offences committed before 2008. Thirdly, the judge's conclusion that previous decision of the First-tier Tribunal in 2010 in which it was found the appellant's "deceit was not intended to achieve a direct financial benefit" should be preferred over the Crown Court findings in 2018 that the "appellant's constant and repeated positive acts of dishonesty, were entirely for gain……", was irrational. There was no reference to benefit fraud in the 2010 decision and the appellant's fraud continued until 2016.

3. Permission was granted by Upper Tribunal Judge Grubb on 11 October 2022 for the following reasons:

> "Having found that neither Exception 1 nor Exception 2 in s.117C(4) and (5) of the NIA Act 2002 applied, it is arguable that in applying s.117C(6) the judge erred in law in his approach to the issue of "delay" by the respondent and in not taking properly into account the appellant's extensive cumulative offending over time (Grounds 1 and 2). Ground 3 may also be argued."

Submissions

4. Mr Tufan relied on the grounds of appeal and submitted the judge found the appellant could not satisfy the unduly harsh exception under section 117C(5) and there was no cross appeal or rule 24 response. There were no very compelling circumstances in this case capable of meeting the high threshold in section 117C(6).

5. The appellant was sentenced in 2018 and delay was not an issue. Any delay on the part of the respondent would not attract sufficient weight to outweigh the public interest in this case. Mr Tufan relied on RLP (BAH revisited – expeditious justice) Jamaica [2017] UKUT 00330 (IAC) in which the Upper Tribunal held:

> "In cases where the public interest favouring deportation of an immigrant is potent and pressing, even egregious and unjustified delay on the part of the Secretary of State in the underlying decision making process is unlikely to tip the balance in the immigrant's favour in the proportionality exercise under Article 8(2) ECHR."

6. Ms Patyna relied on her written submissions dated 22 December 2022 and submitted the judge considered the statutory framework and took into account all relevant factors. She accepted that in most cases delay was unlikely to be a factor tipping the balance in favour of the appellant. However, there was no exclusionary rule and the judge was entitled to consider delay.

7. Ms Patyna submitted the findings of fact set out at [5] of her written submissions were not challenged and were relevant to very compelling circumstances. The judge did not find there were very compelling circumstances because of the delay. He looked at all the facts cumulatively. The appellant is a medium offender and the judge considered her offending from 1993 to 2016. He properly carried out the balancing exercise.

8. Ms Patyna submitted the respondent was aware of the appellant's offending in her previous decisions and she failed to take deportation action. The appellant strengthened her family and private life and the judge was entitled to consider this factor having recognised the seriousness of the appellant's offending. This approach was consistent with EB Kosovo [2008] UKHL 41. Delay was a relevant factor.

9. In relation to ground 2, Ms Patyna submitted it was apparent from the decision the judge considered the totality of the appellant's offending. He did not confine his assessment to post 2008 conduct. The judge was permitted to look at circumstances in addition to sentence. The judge adopted the correct approach following HA (Iraq) [2022] UKSC 22.

10. Ms Patyna submitted, in respect of ground 3, that the judge was not bound by the sentencing judge's remarks. He recognised the seriousness of the offence and took into account the further evidence of motivation. The respondent was aware of the appellant's offending and decided not to take action. The judge found the respondent's inaction arose from a dysfunctional system.

11. In terms of disposal, both parties agreed that if the judge erred in law in his assessment of very compelling circumstances it would be appropriate to also revisit whether the appellant's deportation would be unduly harsh at the date of any future hearing.

Conclusions and reasons

12. The appellant's immigration history is complex and is set out in detail in the decision of the First-tier Tribunal. In summary, the appellant is a citizen of Bangladesh born on 30 July 1970. She entered the UK with her husband in 1993 using a false British passport. She renewed the passport in the UK and used it to claim benefits to which she was not entitled.

13. In 2008, after 14 years' illegal residence in the UK, the appellant and her husband applied for indefinite leave to remain. The appellant disclosed her deception and fraud to the respondent notwithstanding she continued to claim benefits to which she was not entitled. In March 2010, the appellant's application was rejected as invalid because she held a British passport and her husband's application was refused on grounds of deception in February 2010.

14. The appellant's husband appealed and his appeal was allowed in August 2010 by First-tier Tribunal Judge Bailey. The appellant was not a party the appeal but Judge Bailey considered the appellant's and her husband's deception and fraudulent conduct. The appellant's husband was granted indefinite leave to remain on 5 October 2010 and British citizenship on 12 December 2012.

15. The appellant's false passport was revoked in July 2015 and she submitted further grounds in October 2015 again disclosing the deception and fraudulent conduct. The appellant and her six children were granted limited leave to remain in November 2015 valid until May 2018.

16. In 2017, the appellant travelled to Bangladesh and was arrested on her return to the UK. On 18 August 2018, the appellant pleaded guilty to 18 offences of deception and dishonesty from 1993 to 2016 and she was sentenced to 42 months' imprisonment. On 15 November 2019, the respondent signed a deportation order and refused the appellant's human rights claim.

17. The appellant's appeal was heard by the First-tier Tribunal in June 2021 and allowed in July 2021. The judge considered the appellant's immigration history in detail and he heard oral evidence from the appellant and her husband. He found them both to be credible witnesses. The judge's findings of fact set out in [5] of the appellant's written submissions were not challenged.

Ground 1

18. I am not persuaded by Mr Tufan's argument that there was no delay because the appellant was convicted and sentenced in 2018 and the deportation order was made in 2019. It is not in dispute the respondent first became aware of the appellant's deception and fraudulent conduct in 2008, notwithstanding the appellant had no convictions at this time.

19. The appellant's deception and fraudulent conduct was disclosed to the respondent on three occasions: In 2008 (the application for indefinite leave to remain), in 2010 (her husband's appeal before Judge Bailey) and in October 2015 (when the false passport was revoked). The respondent did not pursue deportation action and granted the appellant limited leave to remain in November 2015.

20. In MN-T (Colombia) v SSHD [2016] EWCA Civ 893, the Court of Appeal held at [35] that the lengthy delay in taking action to deport could amount to an exceptional circumstance and make a critical difference. Although that case can be distinguished on its facts, the Court of Appeal went on to find that on a proper application of EB Kosovo the delay in taking deportation action was a factor in favour of the appellant.

21. I find it was properly open to the judge to consider the delay in taking deportation action following EB Kosovo. The judge properly directed

himself at [154] and his findings at [155] were open to him on the evidence before him.

22. I am also satisfied that the judge considered the delay as only one factor in his assessment of very compelling circumstances. The judge considered the circumstances of the whole family. The appellant has six children and the two youngest children, aged 12 and 15, still live at home. The judge found it was in their best interests for the appellant to remain in the UK. The judge considered the appellant's medical records and her mental health. The appellant was 50 years old and had lived in the UK for 28 years. She had no family support in Bangladesh.

23. Following NA (Pakistan) v SSHD [2016] EWCA Civ 662, the judge properly considered matters relevant to exceptions 1 and 2 in assessing whether there were very compelling circumstances in this case. On reading the decision as a whole, it is apparent the judge considered all the evidence in the round.

24. At [156] the judge concluded:

> "I find, on the particular facts of this case, the matters set out in this determination, when looked at cumulatively, constitute "very compelling circumstances over and above those described in Exceptions 1 and 2" of s.117C. I find they outweigh the very significant public interest in the Appellant's deportation."

Ground 2

25. The appellant accepted that, in considering Rexha [2016] UKUT 335 and OH (Nigeria) v SSHD [2019] EWCA Civ 1763, the judge's reasoning could have been clearer, but argued there was no material error of law at [135] and [136]. I find the judge's conclusions on the respondent's decision do not establish the judge excluded the appellant's offending before 2008. I am satisfied the judge took into account all the appellant's convictions from 1993 to 2016, the seriousness of the offences and the lengthy period of time over which they were committed at [58], [73] [98] to [106] of the decision.

Ground 3

26. The judge was not bound by the findings of Judge Bailey or the sentencing judge's remarks and was entitled to come to his own conclusion having heard and considered all of the evidence. The judge gave adequate reasons for why he attached more weight to the decision of Judge Bailey who had heard evidence from the appellant and her husband rather than the sentencing judge's remarks based on the appellant's guilty plea.

Summary

27. There was no challenge to the judge's credibility findings or his findings of fact. The judge properly directed himself in respect of section 117C(6) and the delay in taking deportation action was a relevant consideration. The judge's finding that, on the particular facts of this case, there were very compelling circumstances which outweighed the public interest in deportation was open to him on the evidence before him.

28. This facts of this case are complex and unusual. The judge properly considered all relevant matters and gave adequate reasons for his conclusions. I find there was no material error of law in the decision of 6 July 2021 and I dismiss the respondent's appeal.

Notice of Decision

The appeal is dismissed.

J Frances

Signed Date: 29 December 2022

Upper Tribunal Judge Frances

NOTIFICATION OF APPEAL RIGHTS

1. A person seeking permission to appeal against this decision must make a written application to the Upper Tribunal. Any such application must be **received** by the Upper Tribunal within the **appropriate period** after this decision was **sent** to the person making the application. The appropriate period varies, as follows, according to the location of the individual and the way in which the Upper Tribunal's decision was sent.

2. Where the person who appealed to the First-tier Tribunal is **in the United Kingdom** at the time that the application for permission to appeal is made, and is not in detention under the Immigration Acts, the appropriate period is **12 working days (10 working days, if the notice of decision is sent electronically).**

3. Where the person making the application is in detention under the Immigration Acts**, the appropriate period is 7 working days (5 working days, if the notice of decision is sent electronically)**.

4. Where the person who appealed to the First-tier Tribunal is **outside the United Kingdom** at the time that the application for permission to appeal is made, the appropriate period is **38 days (10 working days, if the notice of decision is sent electronically).**

5. A "working day" means any day except a Saturday or a Sunday, Christmas Day, Good Friday or a bank holiday.

6. The date when the decision is “sent’ is that appearing on the covering letter or covering email.