IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2022-005490
(PA/53923/2021)
LP/00137/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 19 May 2023

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

Secretary of State for the Home Department

Appellant

and

SCA
(anonymity order made)

Respondent

Representation:

For the Appellant: Mr McVeety, Senior Home Office Presenting Officer
For the Respondent: Ms Hashmi, Counsel instructed by Duncan Lewis Solicitors

Heard at Phoenix House (Bradford) on 24 April 2023

Anonymity:

> "Unless and 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, amongst others, both the Appellant and the Respondent. Failure to comply with this direction could lead to contempt of court proceedings"

DECISION AND REASONS

1. The Respondent is a national of Sri Lanka born on the 13th June 1980. On the 6th October 2022 the First-tier Tribunal (Judge Curtis) allowed, on human rights grounds, his appeal against a decision to deport him. The Secretary of State now has permission to appeal against that decision.

2. The Respondent is a foreign criminal. On the 28th June 2016 he was convicted of causing Grievous Bodily Harm and was sentenced to 3 years and 9 months in prison. The Secretary of State signed a deportation order against him pursuant to s32 (5) of the Borders Act 2007. Before the First-tier Tribunal he sought to resist deportation on various grounds. All of them failed bar one: the Tribunal was satisfied, taking all the relevant factors into account under s117C(6), that the decision would be a disproportionate interference with the Respondent's Article 8 rights.

3. The Secretary of State submits that in reaching its conclusion that there were in this case "very compelling circumstances" the Tribunal failed to identify those circumstances, and impermissibly elevated the 'best interests' assessment in respect of the Respondent's children to a decisive factor. It is further submitted that it erred in law in attaching any weight to the delay in this case, or to the Respondent's role in his local community. In granting permission to this Tribunal, First-tier Tribunal Judge O'Brien considered it arguable that the proportionality balancing exercise was further flawed for double counting matters in the Respondent's favour.

The First-tier Tribunal Decision

4. Before I summarise the reasons that the Tribunal gave for allowing the appeal, it is important to note the reasons it gave for dismissing it.

5. The Respondent had asserted that he had a well-founded fear of persecution in Sri Lanka for reasons of his political opinion. Although it was accepted that he was a Tamil who had fled Sri Lanka having been detained and tortured, the Tribunal concluded, having had regard to the end of hostilities in Sri Lanka and the extant country guidance, that there was no real risk that the Respondent would face serious harm if returned there today. Consequently he could not defeat deportation on grounds that it would be contrary to the United Kingdom's obligations under the Refugee Convention, although it is important to note that the Tribunal had found the presumption in s72 of the Nationality, Immigration and Asylum Act 2002 to be rebutted.

6. The Tribunal accepted that the Respondent continued to suffer the sequalae of his ill-treatment in Sri Lanka. It was accepted that he suffered from Post Traumatic Stress Disorder and depression, but not that there was a real risk that he would suffer from a rapid and serious decline in his mental health if deported such that would violate his Article 3 rights.

7. It was accepted that the Respondent had lived in the UK a very long time. He arrived in this country in 2002 but had spent a long time seeking asylum/appealing the refusal of that claim. Consequently he was unable to show that he met the Article 8 'private life' exception to automatic deportation because he had not lived lawfully in the UK for more than half his life.

8. The Respondent's wife is recognised as a refugee from Sri Lanka. Accordingly she could not be expected to go there. Implicit in that was a finding that it would be 'unduly harsh' for her to go to Sri Lanka, but as she was neither settled nor British she was not "qualifying" as defined in s117D of the Act and so the impact on her was not relevant for the purpose of assessing s117C(5).

9. At the date of the appeal the Respondent was living separately from his wife and children. His eldest child was 'qualifying' but the Tribunal was unable to conclude that the impact upon him would be 'unduly harsh': although he had a genuine and subsisting relationship with his father, with whom he had daily and meaningful contact, the deportation would result in him remaining living with his mother and siblings. As such the status quo would be maintained.

10. The appeal then, failed under all of these separate heads. What is apparent from the decision, however, is that the Judge then weighed certain findings of fact arising under these heads in the Respondent's favour. He was not at risk on return to Sri Lanka but he had been detained and horribly tortured there; it could not be said that he would kill himself if returned, but he was certainly damaged by those experiences; it had taken him a long time to regularise his status but he had still lived in this country for 22 years; his wife was not 'qualifying' but she was a refugee and so this was, as Mr MrVeety put it, a "family split" case; only one of the three children was old enough to be 'qualifying' and it was not unduly harsh for him, but it was contrary to all of their best interests for their dad to be deported.

11. The Tribunal added to these factors the following matters. The Respondent's wife had herself endured atrocious persecution in Sri Lanka and continued to suffer from poor mental health as a result. She and the children relied on him – they were only living separately because the were required to do so as a result of this case, and they would move back into together should the decision go in his favour. There had been a delay in this case between the Secretary of State giving notice of an intention to deport, in 2016, and an order finally being signed in 2021. During that time the Respondent had got on with his life. It is further noted that the Secretary of State failed to take any action to remove the Respondent in the 11 years he spent trying to get status. The offence itself was undoubtedly serious, but had to be seen in the context in which it occurred. The Respondent was a small shopkeeper who was an important part of his local community: numerous witnesses came forward to write letters and statements in his support. His 'open all hours' shop had been targeted by shoplifters on several occasions and on the day of his offence, he snapped. He chased a man who had stolen alcohol from the shop and having caught him, beat him badly with an iron bar. The judge at his criminal trial appeared to accept that this was a case of "excessive self-defence" with the Respondent's own mental health, panic and fear playing a part in the attack. It is his only offence, and he is judged as presently a low risk of ever reoffending. The decision concludes:

> 119. I step back to consider the above factors in the round. I take into account the high threshold that the Appellant needs to overcome to satisfy the test in s.117C(6) of the 2002 Act. However, it is my view that the cumulative effect of the factors in favour of the Appellant and his family's article 8 claim, as set against the factors in favour of the public interest in deporting the Appellant, as a foreign criminal, is to reveal the requisite very compelling circumstances that would mean that the article 8 claim outweighs that public interest. That is to say, the interference with that family/private life brought about by the Appellant's deportation is disproportionate to the legitimate aim pursued and his removal from the UK would, accordingly, be unlawful under s.6 of the Human Rights Act 1988. His appeal will be allowed with reference to article 8 ECHR.

Error of Law: Discussion and Findings

12. I deal first with the points made in the written grounds/grant of permission before addressing Mr McVeety's central submission.

13. I do not accept that the Judge engaged in double counting. Even though this is not a point taken in the grounds, Judge O'Brien thought it arguable that the Tribunal may have weighed in the Respondent's favour matters which the trial judge had already weighed in mitigation to reduce the Respondent's sentence eg the fact that he was a shopkeeper with PTSD seeking to protect his business should not be counted twice. Mr MrVeety expressly distanced himself from this submission, and he was right to do so. That is because the factors identified by the First-tier Tribunal were all issues relevant to matters other than the seriousness of the crime. For instance: the fact that the Respondent is a local shopkeeper went to his degree of social integration, and the fact that he has PTSD was relevant to the impact upon him of his family being split.

14. The grounds cite the case of Reid v Secretary of State for the Home Department [2021] EWCA Civ 1158 59 as authority for the proposition that "delay is not a relevant factor". Mr McVeety also distanced himself from this submission, recognising that on the face of it, the delay in this case was not a matter to which the Tribunal placed any great weight. That is an assessment with which I concur, but I would add that Reid is not authority for the proposition for which it is here cited. As the passage cited in the grounds makes clear, the issue of delay was judged in Reid to be irrelevant to the question of whether it would be *unduly harsh* for the claimant's child:

> "The only truly exceptional feature in the case was the delay in enforcing the 1998 deportation order after Mr. Reid's release from prison. Nothing was done for something like a decade. However, this is not a factor tending to make his deportation now unduly harsh to the qualifying child. It is irrelevant to that question".

As a matter of logic, that must be right. It is difficult to see how delay on the part of the Home
Office could exacerbate the negative impact on a child faced with losing a parent. But in the
context of the global proportionality balancing exercise required by s117C it could, depending
on the facts, be obviously pertinent.

15. The grounds next submit that in having regard to the Respondent's role in his local community, the Judge erred in failing to consider whether keeping his shop open all hours was an act of altruism, or the actions of someone who is running a business for profit. With respect, the author of the grounds has misconstrued the Tribunal's findings. The relevance of the shop's opening hours was not that the Respondent was selflessly giving up his time, it went to the nature of his private life in the UK, his generally hard-working nature, and the undisputed evidence, from numerous witnesses, that he is a well-known and well-liked character in the

area in which he lived. It went not to his altruism, but to the extent of his social and cultural integration in the UK.

16. Finally the grounds say this:

> At [113] the FTTJ finds that the it is in the best interests of the appellant's children that he remain in the UK, however, in light of the fact that the appellant's deportation is found not to result in unduly harsh consequences for the qualifying child that the best interests of the children is not a trump card and does not amount to a very compelling circumstance over and above undue harshness.

17. Insofar as that passage might suggest that there is some contradiction in the 'unduly harsh' test not being made out in respect of the one qualifying child in this family, but the 'best interests' question being resolved in the Respondent's favour in respect of all three of his young children, then the ground is misconceived. It is perfectly possible, indeed it will very often be the case, that deportation will be contrary to a child's best interests but nonetheless not be unduly harsh. Mr McVeety thought it made a different point. He submitted that where the Tribunal erred was in treating that positive assessment as determinative, or at least carrying a very great weight in the balance, when it was as a matter of law no more than a starting point.

18. I am unable to read the Tribunal's decision as the Secretary of State invites me to do. Having taken into account the Respondent's very long residence, the fact that he would be settled were in not for his conviction, the delay, the observations of the trial judge that the Respondent is a "pillar of the community" and "a good family man", that the attack was out of character, that he presents a low risk of reoffending, that he is a low risk of harm to the public, that he has built a "strong" private life in the UK, his wife's mental health issues, and the important role that the Respondent plays in his family only then, at paragraph 113, does the Tribunal say this (emphasis added):

> 113. I *also* consider the best interests of the children as a primary consideration. I am satisfied that it would be in their best interests for the Appellant to remain in the UK so that family unit can be preserved and so that they can continue to receive the love and affection from both of their parents. In fact, any lawful future residence that the Appellant might enjoy in the UK is, in my view, likely to lead to a strengthening of the family unit because he will be able to live with his partner and children. That is plainly in their best interests. *I acknowledge that the children's best interests is not determinative of the appeal but it a primary consideration in the proportionality exercise*.

19. It is quite apparent from this passage, and indeed the detailed findings that precede it, that the Tribunal does not find the s117C(6) test to be met simply with reference to the children's best interests. Indeed that is expressly what he avoids, in impeccable self-direction.

20. Ultimately, Mr McVeety submits, an appeal can only be allowed on these grounds where there are very strong grounds indeed. I am wholly satisfied that the Tribunal below understood that. The decision sets out all of the applicable law, and the Judge repeatedly refers himself appropriately to the weight of the public

interest: I note that no issue is taken with this aspect of his decision. There may not be one 'exceptional' feature of this case, but it is perfectly permissible for a Tribunal to consider that a great number of positive factors attracting some weight can together, cumulatively, amount to a very strong case indeed. That is all that has happened here. The grounds are not made out.

Notice of Decision

21. The appeal is dismissed, and the First-tier Tribunal's decision is upheld.

22. There is an order for anonymity. In making such an order I have considered the importance to be attached to the principle of open justice, and to the fact that the Respondent has already been publicly identified as a criminal. I have however decided to make such an order in this case for two reasons. First to protect the identity of the Respondent's children. Secondly because this decision makes reference to the mental health of both of their parents, both torture survivors, and I do not regard it to be in the public interest that such confidential medical matters be disclosed publicly.

Upper Tribunal Judge Bruce
25th April 2023