



IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case No: UI-2022-002631

FTT No: HU/08270/2017

THE IMMIGRATION ACTS

**Decision & Reasons Issued:
On 28 November 2023**

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

**Emoran Miah
(no anonymity order made)**

Appellant

and

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Brown, Counsel instructed by Knightsbridge Solicitors (remote)

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

Heard at Field House on 13 October 2023

DECISION AND REASONS

1. The Appellant is a national of Bangladesh born on the 10th February 1961. He appeals with permission against the decision of the First-tier Tribunal (Judge Davey) to dismiss his appeal, on human rights and protection grounds, against a decision to deport him from the United Kingdom.
2. The Respondent wants to deport the Appellant because he has been convicted of a criminal offence, and the Respondent considers it to be conducive to the public good that he be removed: section 3(5)(a) Immigration Act 1971. The circumstances of the offence were that on the 25th July 2016 the Appellant boarded a bus in Swansea. He deliberately chose to sit next to a 16 year old girl, when there were other empty seats available. Over the course of approximately 15-20 minutes he assaulted the girl by touching her legs, breasts and the top of her legs. He denied the offence but was found guilty after trial. The judge who

sentenced him told him that he was a “potential menace to all women”. He sent him to prison for 9 months, and imposed a Sexual Harm Prevention Order for 10 years.

Legal Framework

3. The power to deport the Appellant is derived from section 3(5) of the Immigration Act 1971:

(5) A person who is not a British citizen is liable to deportation from the United Kingdom if—

- (a) the Secretary of State deems his deportation to be conducive to the public good; or
- (b) another person to whose family he belongs is or has been ordered to be deported.

4. In an appeal against a decision under s5(a) the Tribunal must begin by assessing whether this is a deportation that falls within the ‘automatic deportation’ provisions set out in s32 of the UK Border Act 2007 which insofar as is relevant are:

32 Automatic deportation

(1) In this section “foreign criminal” means a person—

- (a) who is not a British citizen
- (b) who is convicted in the United Kingdom of an offence, and
- (c) to whom Condition 1 or 2 applies.

(2) Condition 1 is that the person is sentenced to a period of imprisonment of at least 12 months.

(3) Condition 2 is that—

- (a) the offence is specified by order of the Secretary of State under section 72(4)(a) of the Nationality, Immigration and Asylum Act 2002 (c. 41) (serious criminal), and
- (b) the person is sentenced to a period of imprisonment.

(4) For the purpose of section 3(5)(a) of the Immigration Act 1971 (c. 77), the deportation of a foreign criminal is conducive to the public good.

5. If the Appellant is liable to the automatic deportation procedure because either Condition 1 or 2 is met, then the next step is to consider whether any of the 'exceptions' set out in s33 of the 2007 Act are met:

33 Exceptions

....

(2) Exception 1 is where removal of the foreign criminal in pursuance of the deportation order would breach—

(a) a person's Convention rights, or

(b) the United Kingdom's obligations under the Refugee Convention.

6. In the event that such a person relies on rights under Article 8 ECHR, then the Tribunal must have regard to the public interest considerations set out in Part 5A of the Nationality, Immigration and Asylum Act 2002 before reaching a decision on whether Exception 1 (a) is engaged. In a deportation appeal the decision maker must in particular have regard to those considerations set out in s117C:

117C Article 8: additional considerations in cases involving foreign criminals

(1) The deportation of foreign criminals is in the public interest.

(2) The more serious the offence committed by a foreign criminal, the greater is the public interest in deportation of the criminal.

(3) In the case of a foreign criminal ("C") who has not been sentenced to a period of imprisonment of four years or more, the public interest requires C's deportation unless Exception 1 or Exception 2 applies.

(4) Exception 1 applies where—

(a) C has been lawfully resident in the United Kingdom for most of C's life,

(b) C is socially and culturally integrated in the United Kingdom,
and

(c) there would be very significant obstacles to C's integration into
the

country to which C is proposed to be deported.

(5) Exception 2 applies where C has a genuine and subsisting relationship with a qualifying partner, or a genuine and subsisting parental relationship with a qualifying child, and the effect of C's deportation on the partner or child would be unduly harsh.

(6) In the case of a foreign criminal who has been sentenced to a period of imprisonment of at least four years, the public interest requires

deportation unless there are very compelling circumstances, over and above those described in Exceptions 1 and 2.

7. If neither of the Conditions in s32 is met, the appeal should proceed on the basis of the procedure set out in Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196(IAC):
- i) *Consider whether the person is liable to be deported on the grounds set out by the Secretary of State. This will normally involve the judge examining:-*
 - a. *Whether the material facts alleged by the Secretary of State are accepted and if not whether they are made out to the civil standard flexibly applied;*
 - b. *Whether on the facts established viewed as a whole the conduct character or associations reach such a level of seriousness as to justify a decision to deport;*
 - c. *In considering b) the judge will take account of any lawful policy of the Secretary of State relevant to the exercise of the discretion to deport and whether the discretion has been exercised in accordance with that policy;*
 - ii) *If the person is liable to deportation, then the next question to consider is whether a human rights or protection claim precludes deportation. In cases of private or family life, this will require an assessment of the proportionality of the measures against the family or private life in question, and a weighing of all relevant factors.*
 - iii) *If the two previous steps are decided against the appellant, then the question whether the discretion to deport has been exercised in accordance with the Immigration Rules applicable is the third step in the process. The present wording of the rules assumes that a person who is liable to deportation and whose deportation would not be contrary to the law and in breach of human rights should normally be deported absent exceptional circumstances to be assessed in the light of all relevant information placed before the Tribunal.*
8. The Respondent's current policy is set out in a document entitled *Conducive Deportation* (version 2.0 published on the 8th June 2023).

Threshold for deportation

Deportation on the ground it is conducive to the public good (conducive grounds) gives the Secretary of State discretion to act in a way that reflects the public interest. Government policy is to pursue deportation on grounds of criminality where the person:

- has received a custodial sentence of 12 months or more for a single conviction for a single offence in the UK or overseas (this can be made up of aggregate or consecutive sentences)
- has received combined sentences totalling 12 months or more in the UK or overseas

- has been convicted in the UK or overseas of an offence which has caused serious harm
- is a persistent offender

unless the person is exempt from deportation under the 1971 Act. If any of the exceptions set out in section 33 of the 2007 Act apply, the Secretary of State will consider whether deportation remains appropriate.

Deportation may also be pursued for reasons including but not limited to:

- national security
- where a court has recommended deportation
- involvement in gun crime or serious drug offending regardless of the length of sentence received
- where there is compelling circumstantial evidence that the person's conduct or presence in the UK has or will cause serious harm, but the person has not yet been convicted of a criminal offence
- a relevant person's involvement in a sham marriage

This is not an exhaustive list and deportation may be pursued in any case where the Secretary of State considers that deportation is conducive to the public good.

Definitions: Serious harm

It is at the discretion of the Secretary of State whether an offence is considered to have caused serious harm. An offence that has caused 'serious harm' means an offence that has caused serious physical, psychological, emotional or economic harm to a victim, victims or to society in general. A person does not have to have been convicted in relation to any serious harm which followed from their offence. For example, they may fit within this provision if they are convicted of a lesser offence because it cannot be proved beyond reasonable doubt that they were guilty of a separate offence in relation to the serious harm which resulted from their actions. Recent court cases have shown that minor offending that more broadly contributes to societal harm does not necessarily meet the definition of serious harm. In the case of Mahmood, R (on the application of) v Upper Tribunal (Immigration and Asylum Chamber) & Ors [2020] EWCA Civ 717 (05 June 2020), which dealt with the joint appeals of three persons subject to a deportation decision (Mahmood, Kadir and Estnerie) the Court of Appeal stated that the prevalence of (even minor) offending may cause serious harm to society, but that does not mean that an individual offence considered in isolation has done so ('Shoplifting, for example, may be a significant social problem, causing serious economic harm and distress to the owner of a modest corner shop; and a thief who steals a single item of low value may contribute to that harm, but it cannot realistically be said that such a thief caused serious harm himself, either to the owner or to society in general').

This was reaffirmed in the case of Wilson (NIAA Part 5A; deportation decisions) [2020] UKUT 350 (IAC) (25 November 2020), in which it was concluded that 'the contribution of an offence to a serious or widespread problem is not sufficient; there needs to be some evidence that the offence has caused serious harm'. The fact that the offending is not characterised as having caused "serious harm" for sentencing purposes will not always be determinative of whether serious harm has been caused. An evaluative judgement should be made in light of the facts

and circumstances of the offending. Where a person has been convicted of one or more violent, drugs or sex offences, they will usually be considered to have been convicted of an offence that has caused serious harm.

The First-tier Tribunal Decision

9. The Tribunal noted that although the Appellant has been in the UK since 2002 he has not held valid leave to remain for much of that period. It records the various health complaints he suffers from, including heart disease and diabetes, and his assertion that medication would be expensive in Bangladesh. The Appellant's relationship with his wife has broken down and he no longer sees her or their daughter. The 'family circumstances report' prepared by Ms Safina Khan was based entirely on what the Appellant had said. The decision refers in general terms to paragraphs 398-399A of the rules. In respect of the Appellant's private life the Tribunal finds no evidence of integration, and notes that he had not been in this country lawfully for most of his life. The decision records the view expressed by the Probation Officer who prepared the pre-sentence report, who found the Appellant to pose a high risk of reoffending, particularly sexual offending, and marks that there is no evidence before the court of the lack of reoffending. At its paragraph 7 the Tribunal records the nature of the offence and states that the Appellant was sentenced to 12 months' imprisonment.

The Challenge

10. The grounds are that the First-tier Tribunal erred in law in the following material respects:
- i) There has been an unreasonable delay in the promulgation of the decision, leading to unfairness. The appeal was heard on the 15th June 2021 and the decision was not promulgated until the 15th March 2022. The Appellant's health declined in that period (he has been diagnosed with cancer) and this was a factor potentially relevant to the Article 8 assessment;
 - ii) The Tribunal has failed to identify whether the Appellant is in fact a 'foreign criminal' as defined in s117D of the Nationality, Immigration and Asylum Act 2002;
 - iii) The decision contains an important error of fact: the Appellant was not sentenced to 12 months' imprisonment, he was sentenced to 9 months';
 - iv) The Tribunal had failed to recognise that the Appellant had not committed any further offences, and given the length of time since the offence was committed this was a factor of material significance.
11. In his oral submissions Mr Brown accepted that the delay in the decision being issued does appear to be an administrative issue rather than a delay on the part of Judge Davey: he had recorded that he had heard the appeal on the 15th June 2021, and written it on the 16th June 2021. Nevertheless, he contended, this delay had given rise to a material unfairness because matters had developed in the Appellant's private life in the 9 months it took for the decision to be made. The

cancer diagnosis was a factor capable of attracting significant weight in the s117C(6) balancing exercise. Mr Brown relied on the decision in E & R v SSHD [2004] EWCA Civ 49 to submit that the Tribunal remained seized of the appeal until the date of promulgation, and yet Appellant was denied an opportunity to submit up to date evidence. This, and taken with the failure to have regard to the Appellant's lack of further offending, could have been material.

12. As to the structure of the decision, Mr Brown submitted that the Tribunal entirely failed to follow the proper legal framework. It obviously made a serious error of fact in stating that the Appellant had been sentenced to 12 months in prison. This meant it failed to appreciate that before doing anything else it had to consider whether the Appellant was in fact liable to for deportation, that is to say whether his offence was of sufficient seriousness as to justify the decision. Although he accepted that that question would likely have been answered in the affirmative had it been asked, he nevertheless submitted that the Appellant was entitled to have his appeal considered on the proper legal footing.

The Reply

13. Whilst Mr Terrell agreed that there plainly had been a delay, he submitted that the Appellant's complaints about that were misconceived. The delay was not on the part of the judge, so there can be no concerns about, for instance, his recollection of the evidence. The fact that he had been diagnosed with cancer in the hiatus between hearing and promulgation of the decision was not a fault that could be laid at the door of the Tribunal. Had he wished those facts to be considered, he should have written in. Mr Terrell further agreed that the First-tier Tribunal appeared to misapprehend the legal framework to be applied here, but again argued that it could not be material. Mr Brown conceded that the offending here had caused serious harm, and so the threshold for deportation was met. Even if the Tribunal had conducted a Hesham Ali balancing exercise of all the matters for and against the Appellant, on the facts it could not possibly have concluded that deportation was disproportionate. In short, submits Mr Terrell, Judge Davey took the wrong path but ended up at the right place.

My Findings

14. I begin with the delay. It is unacceptable that the parties waited so long for a decision to be forthcoming from the First-tier Tribunal, but I am wholly satisfied that this was not a delay of Judge Davey's making, since the decision itself states that it was drafted the day after the hearing. There was clearly some administrative error, which is a matter to be regretted. I am not however satisfied that this delay had any material impact on the fairness of the decision. Mr Brown points out that the Appellant has developed a serious illness in that time, one that could have caused the decision to be otherwise, but for the reasons I explain below I do not accept that this was the case.
15. I find that the First-tier Tribunal did misunderstand the legal framework to be applied in this appeal. The first mention of the law comes at paragraph 6 of the decision, which refers to paragraphs 398-399A; at paragraph 7 comes the possible explanation for that error, since the Tribunal there records that the Appellant was sentenced to 12 months' imprisonment. As the parties now agree,

that was not the correct starting point. The Appellant was not sentenced to 12 months' imprisonment, he was sentenced to 9, and so fell outwith the 'automatic deportation' scheme. This was a 'conducive' deport, and so the first question was to determine whether the threshold for deportation had been reached. As per the published guidance and caselaw this involved consideration of whether the Appellant's offending had caused serious harm. If that question was answered in the affirmative the next question was to consider whether the Appellant's human rights claim precluded deportation. It is here that the materiality of the errors I have found becomes an issue.

16. Whichever way you look at it, and whichever legal framework you apply, this is an appeal that cannot succeed. The Appellant has no family life to speak of, and cannot rely, within the scheme of Part 5A at least, on his private life: Judge Davey rightly found that he had not lived in this country lawfully for more than half his life, and further that he had failed to demonstrate that he was socially and culturally integrated here. Whether one looks at what remains of his human rights claim either 'outside of the rules' or within the scope of s117C(6) Nationality, Immigration and Asylum Act 2002, it becomes clear that the Respondent can discharge the burden in showing that the decision is wholly proportionate.
17. The Appellant has lived in the UK a long time. He claims to have arrived in 2002. He has a number of serious illnesses, for which he receives treatment. Judge Davey listed these as diabetes, ischaemic heart disease, hypertension, urinary problems, lower back and knee pains and of course after the hearing the Appellant was further treated for lung cancer, now thankfully in remission. It is also important to note that notwithstanding the pessimism expressed by the probation service at the time of his trial, the Appellant has not re-offended. These are the factors in the Appellant's favour.
18. Against him is the significant public interest in removing someone who has caused serious harm by his offending. As I note above the only evidence from the probation service expressed serious concerns about his insight into his offending. It "concluded that the Appellant posed a high risk of serious harm to the public particularly through sexual offending" [FTT §7]. It is true that he has not reoffended, but that is a matter that in the context of this appeal, attracts only a little weight. See HA (Iraq) [2022] UKSC 22 [at 59]: "In a case where the only evidence of rehabilitation is the fact that no further offences have been committed then in general, that is likely to be of little to no material weight in the proportionality balancing exercise". Furthermore there is also a public interest in removing someone who has no leave to remain under the rules: the Appellant is an overstayer, and as far as this Tribunal is aware, has no basis under which he could hope to remain in the UK under the present rules. He has no family life, and no subsisting relationship with his daughter. Although it may be assumed that he has some kind of private life in the UK, no evidence was advanced about the quality or nature of that private life, and the vast majority of that time was spent without leave, so whatever private life there is can only attract a little weight. He has not shown himself to be culturally or socially integrated; nor did the Tribunal accept that the Appellant would have any difficulty in re-establishing a private life for himself in Bangladesh.
19. That leaves the Appellant's illnesses, for which he understandably wishes to continue receiving treatment on the NHS. The weight to be attached to the importance of that treatment, and reassurance for him, is offset by the fact that

he has no leave to remain, and so no entitlement to it. More significantly however, it falls away as a factor of any significance in light of Judge Davey's finding that there was no satisfactory evidence before him that the Appellant would have any difficulty in accessing the required medication or treatment in Bangladesh. Mr Brown did not seek to persuade me that there was evidence capable of demonstrating that there were substantial grounds for believing that there would be a breach of Article 3 should the Appellant return to Bangladesh: indeed he could not, for the cancer has been treated. Whilst the Appellant's appeal was brought on the grounds of Article 8, rather than Article 3, but it seems to me that where the Appellant's illnesses are the only matter capable of attracting more than a little weight on his side of the scales, the medical evidence would have to demonstrate some very severe detriment to the Appellant to be able to displace the public interest here. It follows that the appeal must be dismissed.

Decisions

20. The appeal is dismissed.
21. There is no order for anonymity.

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
24th November 2023