



**Upper Tribunal
(Immigration and Asylum Chamber)**
UI-2023-002328

Appeal Number:
HU/23383/2018

THE IMMIGRATION ACTS

**Heard at Field House
On 23 August 2023**

**Decision & Reasons
Promulgated
On 24 December 2023**

Before

**UPPER TRIBUNAL JUDGE PITT
DEPUTY UT JUDGE FARRELLY**

Between

**MSI
(ANONYMITY DIRECTION MADE)**

and

Appellant

THE SECRETARY OF STATE FOR THE HOME DEPARTMENT

Respondent

Representation:

For the Appellant: Mr Jafferji, Counsel instructed by ASR Advantage Solicitors Ltd
For the Respondent: Ms Cunha, Senior Home Office Presenting Officer

DECISION AND REASONS

Introduction

1. The appellant is a national of Pakistan, born in December 1974. He came to the United Kingdom on a spousal Visa in March 1998, aged 23 years. He subsequently was granted indefinite leave to remain. In July 2015 he pleaded guilty to sexual assault. The offence occurred in July 2014. In April 2016 he was sentenced to 8 months imprisonment and placed on the sex offenders register. After serving half his sentence he was detained under immigration powers. He was granted immigration bail in late 2016 and has been living with his brother since.
2. Prior to the offence of July 2014 he had been convicted on six occasions of having committed nine offences which included offences against the person, sexual offences, and single offences of theft, public disorder, drug offending and possession of an offensive weapon. These occurred between 22 December 2000 and 20 July 2015.
3. On 13th July 2016 the respondent made a conducive deportation order. The appellant then made a human rights claim. He had mental health problems and was diagnosed with a traumatic brain injury associated with a road traffic collision in Pakistan in 1993. He was found to have a low IQ.
4. The respondent withdrew the deportation order and made a further decision on 5 November 2018, dismissing the human rights claim. The respondent referred to the availability of medical treatment for the appellant in Pakistan, the limited information about any family life and a lack of integration into the United Kingdom.
5. MSI appealed that decision.

The First tier Tribunal

6. A case management review before First tier Judge Athwal identified the following issues:
 - (i) Was MSI a foreign criminal?
 - (ii) If not, would his article 8 right to private life be breached and if so was this disproportionate?
 - (iii) If he was a foreign criminal did EX 1 or S 117 C of the rules apply?
 - (iv) If he did not meet EX 1 were there very compelling circumstances under section 117 C of the Nationality, Immigration and Asylum Act 2002.
7. The appeal against the 5 November 2018 decision was heard by First-tier Tribunal Judge Hena on the 13th of March 2023 and was dismissed in a Determination promulgated on 17th April 2023. The appellant was

represented by counsel and there was a Presenting Officer . It was argued on behalf of the appellant that he did not meet the definition of a foreign criminal as he was not a persistent offender.

8. First-tier Tribunal Judge Hena found that the appellant was a persistent offender so was a foreign criminal and that he did not meet EX 1 of s.117C nor were there very compelling circumstances. The judge stated he suffered from an organic personality disorder and had taken no steps to seek treatment.

The Grounds

9. The application for permission to appeal totalled six grounds but was primarily based on three of these which overlap with the other grounds. The first was that the judge materially erred at paragraph 28 in referring to the appellant as a persistent offender “at the time that the respondent made the decision to deport”. The correct assessment was whether at the date of hearing he was a persistent offender. Arguably, the judge used the wrong date and failed to have proper regard to the full passage of time, nine years, since the offence and the appeal hearing and the absence of any reoffending.
10. The second ground was that the judge failed to have regard to the application to have the appellant treated as a vulnerable witness. The judge acknowledged concerns about his mental health but did not make a finding on the point or indicate what impact this had on the assessment of the evidence, particularly the medical evidence.
11. The third ground related to how the judge dealt with the medical evidence. It was suggested the judge had been dismissive, stating it did not engage with apparent inconsistencies elsewhere, such as with the handwritten hospital discharge documents from the car collision in 1993. There were limited GP entries in relation to work related sick notes that had raised the possibility of malingering. However, these long predated the appellant being properly diagnosed. It was argued that the separate psychiatric reports were corroborative of each other. Furthermore, the judge failed to have regard to all the evidence, including his low IQ score. It was also suggested the judge failed to have regard to his medical conditions and their effect upon his ability to integrate again into life in Pakistan.
12. Finally, it was argued there were very compelling circumstances for allowing the appellant to remain which the judge had not considered. He has expressed his remorse and rehabilitation.
13. Permission to appeal was granted by First-tier Tribunal Judge Pickering on the basis the determination did not identify whether the appellant was a vulnerable witness and referred to the decision of AM Afghanistan [2017] EWCA 113. The other grounds advanced were arguable.

14. In a rule 24 response the appeal was opposed. Regarding the first ground the judge had found the appellant to be a persistent offender when the decision was made and it was suggested went on to consider if this was still the case. Regarding ground 2, it was contended that paragraph 15 of the determination demonstrated the judge treated the appellant as a vulnerable witness. In any event, credibility was not a major issue and the judge was aware of the appellant's brain injury. Regarding the medical evidence, the respondent argued this had been properly considered and paragraph 36 of the determination sets out relevant extracts and the weight attached to The Upper Tribunal
15. We heard from both representatives who expanded upon the grounds for which permission was granted. Mr Jafferji dealt firstly with the appellant's vulnerability. He said the original substantive hearing had been changed to a case management review where it was accepted the appellant to be treated as vulnerable. He said First-tier Tribunal Judge Athwal raised issues about the medical evidence and this had been responded to. He referred us to the decision of AM(Afghanistan)-v- SSHD [2017] EWCA 113.
16. He then turned to the question of whether the appellant was a persistent offender and referred to paragraphs 25 to 30 of the determination. He highlighted paragraph 28 of the determination where the judge referred to the date of decision. He submitted the judge failed to carry out an overall assessment as referred to in the decision of Binbuga (Turkey) -v- SSHD EWCA Civ 551 to include the appellant's mental health and the circumstances of the offending. He submitted that the judge erred in the approach taken to the persistent offender issue. At paragraph 29 the judge acknowledged the case law in relation to persisting offender but did not then say why that made the appellant a persistent offender.
17. Mr Jafferji submitted that the Tribunal was required to take a witness's vulnerability into account when assessing their credibility. This should have been a factor when assessing the medical evidence and how the brain injury occurred. At paragraph 41 the judge referred to not having heard from the appellant and cites this as a reason for being unable to find he had reformed. However the judge had earlier been referred to his vulnerability in relation to giving evidence. Notably, at paragraph 16 the judge refers to his solicitors attendance with a witness statement to the effect there were difficulties obtaining instructions from the appellant .At paragraph 45 of the determination the judge acknowledges the appellant has a personality disorder but then faults him on the basis he has not taken steps to seek treatment. He submitted this overlooks his vulnerability and ability to do things. Furthermore, he had sought treatment and there has been no reoffending for nine years and he now has the support of his brother.
18. Mr Jafferji referred us to JL (medical reports-credibility) China [2013] UKUT 00145 (IAC) and submitted the judge failed to have regard to the "Joint Presidential Guidance Note No 2 2010 Child, vulnerable adult and

sensitive appellant” and the need for the judge to consider if any inconsistencies in the appellant’s account could be explained by his vulnerability.

19. Mr Jafferji referred to the extensive medical reports submitted indicating the appellant’s vulnerability and mental health issues. He submitted that the judge disregarded the expert reports and erred in attaching little weight to them. For example, in relation to the report from Dr Kennedy, describing the appellant as having severe brain damage, the judge criticises this conclusion on the basis the doctor has made no assessment but had relied upon the account given by the appellant and his brother to Dr Kennedy. However, at paragraph 37 the judge then accepted the appellant had a brain injury and elsewhere refers to his personality disorder. Mr Jafferji submitted there was no proper engagement with the diagnoses or the prognosis and the availability of treatment in Pakistan.
20. He concluded by making submissions on the final grounds, suggesting that the judge failed to engage properly with the issues concerning very compelling circumstances.
21. In response Ms Cunha addressed us on the question of persistent offending, saying it did not mean the offending had to be recent. As set out in Binbuga, it was necessary to look at the offence and then consider the risk of reoffending. Two of the appellant’s previous offences were of a sexual nature. She said his history indicated a pattern of sexually motivated offences against females. She submitted that the judge had considered the case law properly and had due regard to the OASys report. That report was dated 25 August 2016 and referred to a pattern of sexually motivated offending against females. The appellant was assessed as posing high risk of serious harm to them. She made the point that none of the medical reports said the appellant’s behaviour was caused by his brain injury.
22. Regarding vulnerability, the judge was entitled to place weight on the live evidence. The appellant’s brother had given evidence and the judge referred to this at paragraph 41. Whilst the evidence had to be approached with care because of the vulnerability issue it did not mean the evidence could be discounted. The judge accepted the appellant has a brain injury and referred to this at paragraph 34. However, the judge referred to inconsistencies in the evidence presented. The offences were numerous and similar in nature. Ms Cunha referred to paragraph 36 of the determination which summarised the medical evidence presented and which referred to malingering mentioned in the GP notes to get sick notes for work.
23. In summary, she submitted the judge took into account the medical evidence and was entitled to decide which aspects were accepted. Regarding his vulnerability, the judge clearly took this into account and refers to his capacity to give evidence.

24. Mr Jafferji suggested that if we found an error of law the matter could be referred back to the First-tier Tribunal for remaking. Ms Cunha was in agreement with this and suggested a fuller witness statement be provided.

Consideration

25. We find merit in the first ground advanced. The judge was aware that in order to find the appellant was a foreign criminal within the legislation it had to be determined whether he was a persistent offender. The finding on this issue is crucial to the sustainability of the rest of the decision. The concept of a persistent offender was considered in the case law cited to the judge. Chege (“is a persistent offender”) [2016] UKUT 00187 (IAC) made the point that whether or not someone is a persistent offender it is necessary to consider the position as at the date of hearing. A persistent offender is someone who keeps on breaking the law but it is not a permanent status. The decision of Binbuga [2019] EWCA 555 highlighted that before determining this it is necessary to look at the complete picture.
26. At paragraph 25 to 30 of the determination First-tier Tribunal Judge Hena deals with this issue. It was our conclusion that the judge materially erred here. The judge concludes the appellant was a persistent offender. At paragraph 28 the judge states ‘I find that at the time the respondent made the decision to deport the appellant was indeed a persistent offender.’ Crucially, the judge has referred to the time the respondent made the decision rather than the date of the hearing. The judge has cited the relevant case law but this does not remedy the error as to the relevant date for consideration. Arguably the facts indicate at the relevant time the appellant was not a persistent offender. At the date of hearing nine years had passed from the previous offence.
27. Regarding the second ground, the judge acknowledged at paragraph 15 concerns about the appellant’s mental state. However the judge does not specifically make a finding to the effect the appellant was vulnerable. However, this was accepted on behalf of the respondent as supported by the evidence from the various doctors engaged. His vulnerability affected the assessment not only as to his ability to give evidence but also the assessment of the medical evidence presented.
28. It was our conclusion that the First-tier Tribunal judge did not properly engage with the medical evidence. We also found an error as set out in ground 4 as the judge failed to make any findings on the corroborative evidence provided by the appellant’s brother. We also found an error in the failure to take into account the evidence of the likely deterioration in the appellant’s condition if he were to be deported and that the evidence of his remorse was not addressed adequately in the very compelling circumstances assessment.
29. The judge has conscientiously considered this complex appeal which involved substantial documentation. However, we find the cumulative effect of the challenges render the decision unsafe.

30. For these reasons we found material error and set aside the decision of the First-tier Tribunal. The primary findings of fact must be re-made and where that it is so it was our view that the appropriate disposal was for the appeal to be remade by the First-tier Tribunal notwithstanding the presumption that remaking should take place in the Upper Tribunal.

Decision

The decision of First-tier Tribunal Judge Hena materially errs in law and is set aside. The appeal is remitted to the First-tier Tribunal for a de novo hearing.

Signed: Francis J Farrelly
Deputy Upper Tribunal Judge Farrelly

Date: 19 December 2023