IN THE UPPER TRIBUNAL
IMMIGRATION AND ASYLUM CHAMBER

Case Nos: UI-2024-000748
First-tier Tribunal No:
HU/52546/2022
IA/04087/2022

THE IMMIGRATION ACTS

Decision & Reasons Issued:
On the 30 September 2024

Before

UPPER TRIBUNAL JUDGE BRUCE

Between

SECRETARY OF STATE FOR THE HOME DEPARTMENT

Appellant

and

WRC (USA)
(anonymity order made)

Respondent

Representation:

For the Appellant: Mr Diwnycz, Senior Home Office Presenting Officer
For the Respondent: Mr Bryce, Counsel instructed by Rea Law

Heard in Edinburgh on the 4th September 2024

Order Regarding Anonymity

Pursuant to rule 14 of the Tribunal Procedure (Upper Tribunal) Rules 2008, the Respondent is granted anonymity.

No-one shall publish or reveal any information, including the name or address of the Respondent likely to lead members of the public to identify him. Failure to comply with this order could amount to a contempt of court.

DECISION AND REASONS

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1. The Respondent is a national of the United States of America born in 1990. He is facing deportation on the grounds that it would be conducive to the public good.

2. At a hearing before the First-tier Tribunal (Judge Kempton) the Respondent contested his deportation on human rights grounds. He relied on his family life with his British wife (‘P’) and child (‘C’).

3. In a decision dated the 13th January 2024 the First-tier Tribunal accepted the Respondent’s case and allowed his appeal.

4. The Secretary of State sought permission to appeal against that decision and on the 10th April 2024 permission was granted by Upper Tribunal Judge Gill. The grounds are that the decision of the First-tier Tribunal is flawed for the following errors of law:

   i) A failure to take material matters into account, namely:

      a) the possibility that the Respondent’s family could be assisted by social services or other agencies in his absence;
      b) the fact that his daughter is still a baby;
      c) the Respondent has shown no signs of positive sustained rehabilitation;

   ii) “Given the notable professional evidence and concerns raised regarding the appellant and his family, it cannot be said that the circumstances of this case are sufficiently compelling or exceptional or that maintaining the deportation decision would be unduly harsh on the appellant’s family, given the level of support they are presently given which would continue and likely be strengthened, in the event the appellant is deported”.

Preliminary Issue: ‘Foreign Criminal’

5. The power to deport is derived from s3(5) of the Immigration Act 1971:

   3(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.

6. In reaching her decision dated the 24th March 2022 the Secretary of State expressly refers to this power when refusing the Respondent’s human rights claim. It is against that decision that this appeal is brought under s82(1)(b) Nationality Immigration and Asylum Act 2002 on the grounds that the decision is unlawful under section 6 of the Human Rights Act 1998: see s84(2).

7. In that refusal letter the Secretary of State says this: "The Immigration Rules at paragraph A362 and paragraphs A398 to 399D set out the practice to be followed by officials acting on behalf of the Secretary of State when considering an Article 8 claim made by a foreign criminal….". The refusal is thereafter framed against these rules, and in particular the tests therein that the proposed deportation can only be defeated if it can be shown that there would be an "unduly harsh" impact on the Respondent's partner and/or child, or if there are exceptionally compelling circumstances.

8. In fact, as the parties now agree before me, this is not a case in which the rules cited in the refusal letter, materially replicated in s117C Nationality Immigration and Asylum Act 2002, apply at all. That is because the Respondent is not a "foreign criminal".

9. A 'foreign criminal' is, in this context, a term of art defined at s117D Nationality Immigration and Asylum Act 2002:

> (2) In this Part, "foreign criminal" means a person—
>
> (a) who is not a British citizen,
> (b) who has been convicted in the United Kingdom of an offence, and
> (c) who—
> (i) has been sentenced to a period of imprisonment of at least 12 months,
> (ii) has been convicted of an offence that has caused serious harm, or
> (iii) is a persistent offender.

10. The Respondent is not a British citizen, and he has been convicted in the United Kingdom of an offence. It has not however been shown that any of the alternate requirements at s117D(2)(c) apply to him. It is not the Secretary of State's case that either (ii) or (iii) apply. The Respondent has been sentenced to a period of imprisonment of at least 12 months on at least two occasions, but as Mr Diwnycz accepts, neither of these periods of imprisonment count for the purpose of section 117D(2), since they were both imposed by courts in the United States of America, and in one instance was, in addition, wholly suspended.

11. In Gosturani v Secretary of State for the Home Department [2022] EWCA Civ 779 the Court of Appeal held that although there is plainly a public interest in deporting an individual who is a criminal regardless of where that conviction might have occurred, the structure for the assessment of proportionality set out in s117C does not apply to such a person. Decision makers should instead conduct a holistic proportionality balancing exercise, giving due weight to matters weighing in the public interest including the offences and the factors set out in s117B Nationality Immigration and Asylum Act 2002.

12. As it happens, this is not the approach taken by the First-tier Tribunal who instead adopted that taken, erroneously, by the Secretary of State: the Tribunal allowed the appeal having found that the Respondent's deportation would have an unduly harsh impact on C. Nor is it the approach taken by the Secretary of State in pursuing this appeal to the Upper Tribunal: see ground (ii) set out above.

13. Before me Mr Diwnycz acknowledged that in fact the exercise should have been undertaken, by all concerned, in line with Gosturani, and the Presidential decision in Bah (EO (Turkey) – liability to deport) [2012] UKUT 00196 (IAC). In Bah the Tribunal held that the proper approach in deportations falling outwith the 'automatic deportation' provisions is first to establish whether the Secretary of State has discharged the burden of proof and shown that the person is liable to be deported in accordance with s3(5) Immigration Act 1971. 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. Mr Diwnycz accordingly invited me to proceed on the basis that I could disregard those passages of the grounds which are concerned with the application of the 'undue harshness' test.

Discussion and Findings

14. I begin by addressing a concern expressed by Judge Gill when she granted permission that the First-tier Tribunal had engaged in speculation when it concluded that P would experience a "sharp downturn" in her mental wellbeing if her husband were to be removed, because there was "no evidence" to that effect. It may be that in making this observation Judge Gill had not been provided with all of the documentary evidence that had been before the First-tier Tribunal.

15. In those materials there are approximately 500 pages of medical records relating to P, dating back to 1998. These records show that her childhood was characterized by neglect, rejection and trauma and that from her late teens P was observed by professionals working with her to be engaged in abusive sexual relationships; she attempted suicide on several occasions and abused drugs including heroin, cocaine, cannabis and prescription medications. She has been engaged with various public services throughout her adult life including psychiatry, drug rehabilitation, counselling and the social work and homelessness teams at Edinburgh City Council. Over the years she has been diagnosed with depression, self-harm, poly-drug abuse, generalised anxiety disorder, Hepatitis C, agoraphobia, and migraine. In 2012 she had a baby who was still born, causing her deep distress and insecurity in relation to the subsequent pregnancy and birth of C. It is against this background that P herself averred that she feared that her husband's removal would precipitate a "devastating" deterioration in her mental health. The Respondent himself, in unchallenged evidence, spoke of how during his detention there was a "massive impact" on his wife's mental health and how she went into a "downward spiral" upon hearing that he may be deported. A family friend, again in unchallenged evidence, spoke of how his presence has "definitely helped" P a lot since their relationship was formed. A psychologist who provided evidence reports that the main thought that triggers "bad days" for P is losing her husband. Social worker Blythe Keenan, who has worked with the family since 2022, said this:

> "Without [the Respondent] I do not know how well [P] would cope. I know that this would severely impact her mental health and there would be concerns about her ability to cope without [him]".

This was echoed by her colleague Patricia Bell who thought it would be "catastrophic" for P. Health visitors Emma Chalmers and Lorna Foulis shared this concern, noting that in their view P would "struggle" to parent C without him and underlining that she is a very vulnerable person, to whom he offers a "calming and reassuring presence".

16. Having seen this evidence for himself Mr Diwnycz accepted that it was open to the First-tier Tribunal to have made the finding that it did about P.

17. Moving on to address the actual grounds. The first ground is that the Tribunal has failed to take materials matters into account.

18. The first of these matters is the possibility that P could be assisted by social services or other agencies in the Respondent's absence. It is in my view utterly unarguable that the Tribunal failed to consider that possibility. This was not an ordinary family. As the First-tier Tribunal put it, at its paragraph 49, the Respondent and his wife are both "already very vulnerable ex-habitual drug users who have worked hard to remove themselves from their addictions". The voluminous evidence before the Tribunal referred to P having received support over the past twenty years from a multiplicity of agencies and services including drug workers, psychiatrists, psychologists, several branches of the social services department of Edinburgh City Council, streetworkers, the homelessness team, a drug dependency unit, Narcotics Anonymous, counsellors and her GP. The decision of the First-tier Tribunal refers to this evidence and notes, at paragraph 42, the evidence that P was very dependent upon all of this offered support because of her own vulnerability and mental health issues, in particular the fact that she suffers from agoraphobia. The birth of her daughter precipitated the involvement of yet more social workers and several health visitors. Again, this is all reflected in the Tribunal's decision. Unlike the scenario where a family has no engagement with external agencies, this was not a case in which the Tribunal had to undertake an entirely notional projection of how P might cope if her husband were deported: it understood perfectly well that she would be relying on exactly the same kind of services that she has relied upon for the entirety of her adult life. This was not simply a case about practical support, or childminding, or the help that a family might get in adjusting to change. This was a case where the family are already heavily reliant on public and third-sector services, and it is in this context that the Tribunal undertook its evaluation of how the Respondent's deportation would impact upon his family. Its clear conclusion, as I note above, was that P would find it very difficult to cope without him, and that her mental health and ability to parent their daughter would likely deteriorate. These conclusions were reached in the clear knowledge that she would continue to receive external support.

19. The second point that the Secretary of State contends to have been lost on the Tribunal was the fact that C is only a baby. This too is unarguable. The decision sets out the child's date of birth, and it is clear from the context, and the evidence of the social workers, set out at some length in the decision, that the focus of this decision was on two matters: the ability of P to parent her safely and effectively in the Respondent's absence, and the fact that "the child would be deprived of the society of her father in her years when growing up" [at 61].

20. Finally it is suggested that the Tribunal erred in failing to consider whether the Respondent is rehabilitated. At its paragraph 48 the Tribunal refers to the evidence given by the Respondent's friends and family, including his mother,

sister and P. It states that none of these witnesses "sugarcoat" his past life. The evidence relating to that life, in summary, is that he had a difficult childhood and in his teens suffered from poor mental health which led to drug addiction and criminality. He, like his wife, has struggled with addiction for his entire adult life. The evidence before the Tribunal, which it considers in detail, is that the Respondent had, only a couple of weeks before the hearing, relapsed and taken his wife's prescription medication; she had kept this under lock and key and he had connived to steal it, lying and hiding this fact from her until confronted with it. This had led, two days before Christmas, to him leaving the family home to go into a temporary shelter, and to the social workers in the case updating their written evidence to express their strong professional concerns about his behaviour. This evidence was at the heart of the Tribunal's decision. It unarguably weighed it in the balance. I do not accept that it failed to consider whether he was fully rehabilitated, since he quite plainly was not. The Tribunal properly took that matter into account.

21. As I allude to above, the way in which the Secretary of State has framed her final ground is problematic, since it expressly refers to the tests set out in s117C - 'undue harshness' and 'exceptional compelling circumstances' - when in fact neither of these tests should ever have been applied in this case. For that reason Mr Diwnycz very fairly asked me to disregard this passage of the grounds.

22. For the sake of completeness I record that had I been asked to decide whether this ground was made out, I would have found that it was not. The relevant paragraph reads:

> "Given the notable professional evidence and concerns raised regarding the appellant and his family, it cannot be said that the circumstances of this case are sufficiently compelling or exceptional or that maintaining the deportation decision would be unduly harsh on the appellant's family, given the level of support they are presently given which would continue and likely be strengthened, in the event the appellant is deported".

23. Judge Gill read that as a reasons challenge. I am satisfied that the reasons that the First-tier Tribunal allowed this appeal are quite clear. It was satisfied that the deportation of the Respondent would have a strongly detrimental impact on the mental health of P, which would in turn have a strongly detrimental impact on her ability to parent C. In addition C would be deprived of the benefit of her father growing up, and it was confirmed by the social workers in the case that it would be in her best interests to have a male role model as she grew up, whether or not he was to return to live with her full time. These factors are found to prevail over the public interest. The reasoning is clear.

24. My reading of this final ground is rather that it is a perversity challenge: "it *cannot be said* that the circumstances of this case are sufficiently compelling or exceptional or that maintaining the deportation decision would be unduly harsh". To this end the grounds focus on the fractious situation arising in the three weeks before the appeal was heard:

> "The appellant's relationship with his wife is described as 'unstable' and 'unhealthy' and they are not presently living together, although it is recognised that the appellant plays a supportive role in the care of his daughter. Both the family

practitioner and social worker have advised that they should both live separately given both have vulnerabilities and mental health issues and a background of substance abuse. It has even been stated in the social worker's most recent communication exchange of 03 January 2024, that her view and that of his wife has changed due to the relationship becoming 'significantly strained with increased arguments'. Further, that 'they are not a stable happy family and the appellant's wife wants the appellant out of her home'"

25. If the author of the grounds contends that the situation arising between the 23rd December 2023 and the 10th January 2024 when this appeal was heard meant that it could not on any rational basis be allowed, I reject that contention. The Respondent, his wife and all the professionals involved in supporting them were very clear in their evidence that this couple would like to repair the damage that he did (when he took her prescription medication), and that even if this were not possible, it is the parties' clear intention to co-parent their daughter together. The First-tier Tribunal plainly understood this. The set-back to the Respondent's rehabilitation, and family life, is squarely addressed in its decision. I am satisfied that in its evaluation of that evidence the Tribunal did not err in setting it in the context of the history of this relationship overall, and in the long term best interests of the child at the heart of this family.

26. Finally I have stepped back and considered whether this decision can survive in light of the decisions in Gosturani and Bah, which together set out the framework which should have been applied. It may be that this is otiose, given that what the Tribunal actually did was apply what must be, by parliament's reckoning, a more onerous test. That said, there was no question that the Secretary of State had discharged the burden in showing that the Respondent is liable to be deported. The Respondent has a number of convictions in the United States going back to 2010 and has received three convictions in Scotland, for which he was made subject to a community payback order. In its assessment of whether or not the decision would result in a disproportionate interference with the Respondent's Article 8 family life rights the Tribunal had due regard to his history of criminality as well as the public interest considerations set out in s117B Nationality Immigration and Asylum Act 2002. It gave reasons why in its view, the detrimental impact upon his wife and child was such that the Respondent's individual rights prevailed.

27. For those reasons I dismiss this appeal

Decisions

28. The decision of the First-tier Tribunal is upheld and the Secretary of State's appeal is dismissed.

29. There is an order for anonymity. That is made not to protect the identity of the Respondent, but to protect the identity of his wife, whose personal medical records are a feature of this decision, and that of his child.

Case Nos: UI-2024-000748
First-tier Tribunal No: HU/52546/2022
IA/04087/2022

Upper Tribunal Judge Bruce
Immigration and Asylum Chamber
20th September 2024